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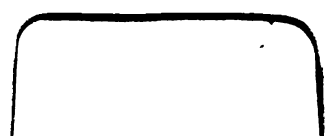
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OF
NISI PRIUS,
EVIDENCE IN CIVIL ACTIONS,
AND ARBITRATION & AWARDS:

WITH
AN APPENDIX
OF
THE NEW RULES,
THE STATUTES OF SET-OFF, INTERPLEADER, & LIMITATION,
AND THE DECISIONS THEREON.

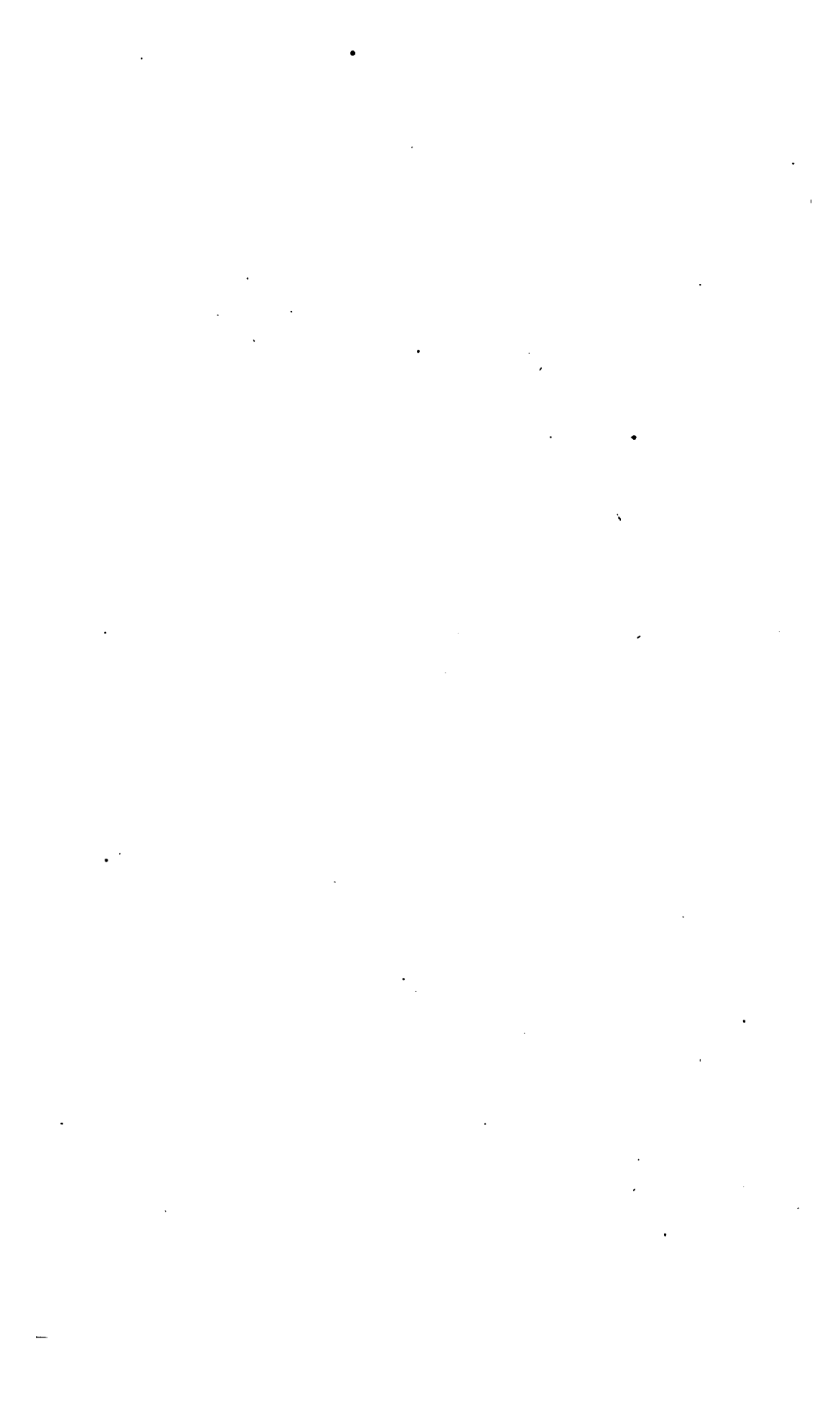
By ARCHIBALD JOHN STEPHENS,
BARRISTER AT LAW.

IN THREE VOLUMES.

VOL. III.

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1. DEFINED.

DEFINED.

False imprisonment is a restraint on the liberty of the person, without lawful cause, either by confinement in prison, stocks, house, &c., or even by forcibly detaining the party in the streets against his will; and an un-

lawful detention is a new caption, and may be declared on as such (1): — but exercising legal authority in a harsh or oppressive manner, is not the subject of an action of trespass. (2)

DEFINED.

In an action for false imprisonment it is essential, that the plaintiff was by the act or orders of the defendant deprived of his personal freedom for some portion of time, however short. Bare words, indeed, without laying hold of the person of the plaintiff, or restraint on submission without force, will not constitute an arrest or imprisonment. (3) Where, upon a magistrate's warrant being shewn to the plaintiff, the latter voluntarily and without compulsion attended the constable, who had the warrant, to the magistrate, it was held, that there was no sufficient imprisonment to support an action. (4) And where a sheriff's officer having a warrant against A. sent a message requesting him to call and give bail, and A. accordingly called and gave bail, it was held to be no arrest. (5) Yet it seems, that in ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting, until actual violence be used. (6)

Essential that the plaintiff was deprived of his personal freedom.

Words, in ordinary practice, sufficient to constitute an imprisonment, if they impose a personal restraint.

2. LEGAL AND ILLEGAL IMPRISONMENT.

I. By Courts.

LEGAL AND ILLEGAL IMPRISONMENT. BY COURTS.

Where a court has jurisdiction of the cause (7), and proceeds *inverso ordine*, or erroneously, an action does not lie against the party who sues, or the officer or minister of the court who executes the precept or process of the court; and an action of trespass cannot be maintained against a judicial officer, as against the steward of a court baron, where his bailiff by mistake takes the goods of A., under a precept against B. (8)

Where a court has jurisdiction, and proceeds *inverso ordine*.

But, if the court have not jurisdiction of the cause, the whole proceeding being *coram non judice*, an action will lie against them, without any regard to the precept or process. (9) Hence, where one of the bail had been arrested by process out of the Marshalsea (10), for the purpose of satisfying a judgment obtained against a principal, in a cause of which the Marshalsea court had no jurisdiction, it was holden, that an action for false imprisonment would lie against the party who sued, the marshal who directed the execution of the process, and the officer who executed the same.

When the court has no jurisdiction.

Trespass for false imprisonment will lie for a detention under a lawful process, if it be executed at an unlawful time, as on a Sunday (11); for by stat. 29 Car. 2. c. 7. s. 6. it is provided, that no person upon the Lord's

Stat. 29 Car. 2. c. 7. s. 6.

(1) *Withers v. Henley*, Cro. Jac. 379.

(2) *Wiles v. Bridger*, 2 B. & A. 286.

(3) *Dalt.* c. 170.

(4) *Arrowsmith v. Mesurier*, 2 N. R. 211.

(5) *Berry v. Adamson*, 6 B. & C. 528.

(6) 3 Stark. Ev. 3d ed. 1113.

(7) *Le Case del Marshalsea*, 10 Co. 76.

(a.) (8) *Holroyd v. Breare*, 2 B. & A. 473.

(9) This principle has been recognised in several cases. *Nichols v. Walker*, Cro. Car. 395. *Hill v. Bateman*, Str. 711. *Shergold*

v. Holloway, *ibid.* 1002. *Perkin v. Proctor*, 2 Wils. 384. *Brown v. Compton*, 8 T. R. 424.

(10) *Le Case del Marshalsea*, 10 Co. 68.

(b.) (11) *Wilson v. Tucker*, 1 Salk. 78. 5 Mod.

95.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

Legal process
improperly
executed.

day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace); but that the service of such writ, &c. shall be void; and the person serving or executing the same, shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without any writ, process, &c.: neither can original process be served upon a Sunday. But where there has been an escape against the will of the bailiff, he may retake on a Sunday: it is however questionable, if the escape be voluntary upon the part of the bailiff, whether he can retake upon a Sunday. (1)

Arresting an-
other, and de-
taining him
until dis-
charged by a
judge's order.

An action on the case lies for maliciously, and without reasonable or probable cause, arresting another, and detaining him until discharged by a judge's order, pending a former suit by the defendant for the same cause of action, in which the plaintiff had been arrested, and discharged out of custody by reason of the defendant's delay in declaring. To such action it is no defence, that the second suit is still pending; and it seems, that the action lies, although the party arresting had a good cause of action. (2)

II. *By Magistrates.*

By MAGIS-
TRATES.

"If a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer." (3)

Doing an act "in pursuance of" a statute is applicable only to cases where the party can be considered as founding his act, upon the power given him by the legislature. (4)

Acts of an un-
qualified
justice.

The acts of a justice who has not duly qualified by taking the oaths, &c. are not absolutely void, so as to make him a trespasser. (5)

Feme covert
refusing to be
bound over to
appear at the
sessions.

A justice of the peace may commit a feme covert, who is a material witness, upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. (6)

Warrant illegal
on its face.

In the case of a warrant, illegal on its face, for an excess of jurisdiction in the magistrates, trespass is maintainable against the committing magistrate, although the conviction has not been quashed (7); but where the justice has competent jurisdiction, his judgment is conclusive until reversed or quashed, and the conviction cannot be controverted in evidence. (8)

When not ne-
cessary to state
an act of va-
grancy on a
conviction.

Where a conviction stated, that the plaintiff, having been brought before a magistrate, on an information charging him, with having unlawfully returned without a certificate to a parish, from whence he had been removed, and that upon that occasion he confessed himself guilty:—It was holden (9), that

(1) *Quare*, Whether a prisoner under sentence should be discharged at midnight or kept till the morning? *Stochdale v. Chapman*, 7 C. & P. 363.

(2) *Quare*, Whether it lies where the defendant obtained a judge's order for the second arrest? *Heywood v. Collinge*, 9 A. & E. 268.

(3) *Per Best C. J. in Henly v. Lyme (Mayor of)*, 5 Bing. 107.

(4) *Per Bayley J. in Edge v. Parker*, 8 B. & C. 700.

(5) *Margate Pier Comp. v. Hannam*, 3 B. & A. 266.

(6) *Bennet v. Watson*, 3 M. & S. 1.

(7) *Groome v. Forrester*, 5 *ibid.* 314.

(8) *Strickland v. Ward*, 7 T. R. 633. *n. Fawcett v. Fowles (Bart.)*, 7 B. & C. 394.

(9) *Mann v. Davers (Clerk)*, 3 B. & A. 103.

this conviction was good upon its face, and that it was not necessary expressly to state any act of vagrancy, it being for the party convicted to shew in his defence, that he did not return in a state of pauperism.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

A magistrate who commits a party in a case, where he has no jurisdiction, is liable to an action of trespass; but where, supposing the facts alleged to be true, the magistrate has jurisdiction, his liability to be sued, or his exemption from such liability on the ground of jurisdiction, cannot be affected by the truth or falsehood of those facts, or by the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them. (1)

Magistrate's liability on the ground of jurisdiction, cannot be affected by the truth or falsehood of the facts.

But an information brought before a magistrate, which charges an offence within his cognisance, is sufficient to give the magistrate jurisdiction, and to protect him in an action for false imprisonment, although the information disclose no legal evidence against the alleged offenders, and purports as being founded upon inadmissible hearsay evidence. (2)

In a case where the period for which a party has been committed for further examination appeared to the court to be too long, yet the jurors having, to the satisfaction of the judge at *Nisi Prius*, found, that the detention was not excessive, a rule *nisi* for a new trial was refused. (3)

Excessive detention.

Knowledge on the part of a committing magistrate, that the prisoner will be subjected to restrictions unnecessarily severe in the gaol to which the commitment is made, does not make the magistrate a trespasser, unless he expressly direct such treatment to be adopted in the particular case. (4)

If a magistrate do not take into account, all the circumstances in his power to investigate a charge before him, such as not examining a witness, he renders himself liable to an action for false imprisonment. (5)

Magistrate must fully investigate a charge.

A magistrate is not justified in detaining a known person amenable to the law, on an intimation, that a charge of misdemeanour is to be made against him, without an information being regularly laid before him. In such a case, a justice of the peace is liable in trespass for false imprisonment. (6)

Not justified in detaining a prisoner on an information, that a charge of misdemeanour is to be made against him.

Two constables who had taken the plaintiff on a charge of disorderly conduct on a Sunday night, were taking the plaintiff before a magistrate on the Monday, when they met the magistrate in the street, who desired them to take the plaintiff back to the lock-up, and bring him up for examination on the Tuesday. He did so, when the magistrate fined him 1*l.*:—It was held, that the magistrate was liable to an action of trespass, for sending the plaintiff back to the lock-up; and that it was the duty of the magistrate, either to have gone into the case on the Monday, or to have desired that the plaintiff should be taken before another magistrate. (7)

A felonious assault having been committed, a magistrate, upon a suspicion arising in his own mind, that a certain person had been concerned in it, gave verbal directions, that that person should be taken by a constable to the house of the person assaulted, for the purpose of identification, and if identified, be taken to gaol. He was identified, and thereupon he was handcuffed, and taken by the constable to gaol. The prisoner was never

(1) *Cave v. Mountain*, 1 M. & G. 257.

(2) *Ibid.*

(3) *Ibid.*

(4) *Ibid.*

(5) *Neal v. Mages*, 1 Irish Circuit Cases, 62.

(6) *Atkinson v. Carty*, 1 Jebb & Symes (Irish), 369.

(7) *Edwards v. Ferris*, 7 C. & P. 542.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

examined, and no information charging him with the offence was sworn to, until after his committal to gaol:—It was held, in an action for false imprisonment against the magistrate, that the judge was right in telling the jury, that the defendant's conduct, although he acted *bond fide*, was illegal. (1)

If a magistrate arrest upon his own suspicion, he must shew, that it was reasonable and necessary to prevent the escape of the suspected party.

When a magistrate must imprison by warrant.

A magistrate who arrests upon his own suspicion, must be able to shew, not only that his suspicion was reasonable, but that what he did under the influence of it, was no more than was necessary to prevent the escape of the suspected person, and render him amenable to the due course of law. (2)

A justice of the peace cannot, for a contempt of himself in his office, commit (3) for punishment, unless by warrant in writing.

And where a statute directs a "warrant to be issued," it must be a written one, unless it be a temporary detainer, while it is being settled. (4)

But if a warrant be issued at the right time, it is not bad, because it bears too early a date. (5)

III. *By Officers in the Army or Navy.*

By OFFICERS
IN THE ARMY
OR NAVY.

Commanding officers in the army or navy have a power of placing their inferior officers under an arrest; but it must be done on good grounds, and not oppressively.

Thus, in *Swinton v. Molloy* (6) the defendant, who was captain of the Trident, man-of-war, put the plaintiff, who was the purser, into confinement, and kept him there for three days, after which he liberated him without any charge or court-martial: the detention was held to be unlawful. (7)

Judgment of
Lord Mansfield
in *Wall v.*
M'Namara.

The principles under which this species of action are governed, will receive illustration from the judgment of Lord Mansfield in *Wall v. M'Namara* (8), and which was as follows:—"In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong; if cruelty, malice, and oppression, appear to have occasioned, or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justifi-

(1) *Annett v. Osborne* (Bart.), 2 Jebb & Symes (Irish), 376.

(2) *Ibid.* The reasonableness of the suspicion is a question for the jury. *Ibid.*

(3) *Mayhew v. Locke*, 2 Marsh. 377. 7 Taunt. 63.

(4) *Hutchinson v. Lowndes*, 4 B. & Ad. 118.

(5) *Newman v. Hardwicke*, 3 N. & P. 368.

(6) 1 T. R. 537. n.

(7) *Vide etiam Wall v. M'Namara*, cit. 1 T. R. 535.

(8) *Ibid.*

ation the most technically regular, from that punishment which it is your province and your duty to inflict, on so scandalous an abuse of public trust."

An action will not lie at common law for false imprisonment (1), where the imprisonment was merely in consequence of taking a ship as *prize*, although the ship has been acquitted; because the court of Admiralty possesses an exclusive jurisdiction, not of prize only, but of every matter dependent on it, and consequently, can give damages for any injury or detention which individuals experience under such circumstances.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

In cases of
prize.

IV. By Sheriffs, and by their Officers.

By stat. 6 Geo. 1. c. 21. s. 53. the sheriff shall not make out the warrant until he have the writ in his actual possession, under a penalty of 10*l.*; nor shall the bailiff arrest the defendant until he have received the warrant (2), otherwise he will be liable to an action for false imprisonment, and the court or a judge will discharge the defendant out of custody, or order the bail bond (if any) to be delivered up to be cancelled. (3)

The sheriff is civilly liable for false imprisonment by his officer, or for the misconduct of his officer in executing a writ, though the act done be contrary to the express terms of the writ, as if he take a person under a *fieri facias* (4); but trespass will not lie against a sheriff for the act of his bailiff, under a judgment obtained in the county court (5); because the sheriff is a constituent part of that court.

An arrest on mesne process (6), which is not returned, is wrongful (7); and false imprisonment will lie against the sheriff. (8) So likewise trespass for false imprisonment may be maintained against the sheriff, for an arrest made by his bailiff, after the return day of the writ (9); and if an officer of an inferior court do not return the process directed to him, he is a trespasser *ab initio*, and false imprisonment lies against him, for he is as sheriff within the jurisdiction.

The sheriff or his officer is not bound to execute mesne process, wherein the defendant is described by the wrong name (10); and a warrant is bad, unless the name be on it, or such a *designatio personæ*, as is not likely to lead to a mistake. (11)

If the defendant be arrested on mesne process by a wrong name, he may

By SHERIFFS,
AND BY THEIR
OFFICERS.

Stat. 6 Geo. 1.
c. 21. s. 53.

Sheriff must
not make out
the warrant
until he have
the writ in his
actual posses-
sion.

Arrest without
a warrant.

Sheriff civilly
responsible for
the conduct of
his officer,
though he act
contrary to the
express terms
of the writ.

Arrest made
after the return
day of the writ.
Sheriff not
bound to ex-
ecute a writ on
mesne process
against a party
improperly
described.

Person arrested
by a wrong
name.

(1) *Le Caux v. Eden*, Doug. 594.

(2) 7 Bac. Abr. Trespass (D.), 661.
Greene v. Jones, 1 Saund. 295. n. 5. *Astley v. Goodier*, 2 Dowl. P. C. 619.

(3) *Ibid.*

(4) *Smart v. Hutton*, 8 A. & E. 568. n.

(5) *Tinsley v. Nassau*, M. & M. 52.

(6) *Vide ante*, 1173. tit. DEBT.

(7) 2 Rol. Abr. Trespass (G.), 563.

(8) *Ibid.*

(9) *Parrot v. Mumford*, 2 Esp. N. P. C. 585.

(10) *Morgans v. Bridges*, 1 B. & A. 647.
Keisar v. Tyrrel, 2 Bulst. 256.

(11) *Rez v. Hood*, Arch. Cr. Pl. by
Jervis, 357. As to the validity of the bail

bond in such a case; — a defendant, whose name was Cocken, was arrested upon a *capias* against him by the name of Cocker; he gave a bail bond to the sheriff in the name of Cocken sued as Cocker; and the bond being afterwards assigned to the plaintiff, he declared thereon against the defendant as Cocken sued by the name of Cocker: — It was held, upon motion in arrest of judgment, that the declaration was bad, because a writ against Cocker, did not authorise an arrest of Cocken, unless he was known as well by one name as the other, and there was no averment of that fact in the declaration. *Finch v. Cocken*, 3 Dowl. P. C. 678.
Cole v. Hindson, 6 T. R. 234.

**LEGAL AND
ILLEGAL IM-
PRISONMENT.**

Writ must be
executed upon
the person
named therein.

maintain an action of false imprisonment against the sheriff or his officers, or any one interfering in the arrest (1); but not so, if the defendant be as commonly known by the name by which he is sued, as his real name, and it be averred (2), or if the name be *idem sonans*; and stat. 3 & 4 Will. 4. c. 42. s. 11., or the rule of H. T. 2 Will. 4. s. 32. makes no alteration of the law in this respect. (3)

A. B. brought an action for false imprisonment against C. (4), who justified, that he had a warrant to arrest J. S., and having asked A. B., the plaintiff, what his name was, he answered J. S., whereupon C. arrested A. B. The plaintiff demurred; but judgment was given for the plaintiff, because C. the defendant ought at his peril to have taken notice of the person named in the writ.

A commission of rebellion was issued against I. G., another person appeared before the commissioners, and affirmed himself to be I. G., whereupon they apprehended him by virtue of their commission; but such arrest was held illegal, the court observing (5), "If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet the commissioners having no warrant to take him by the commission, his affirming himself to be the person, will be no excuse in false imprisonment, as has been held on the execution of a *capias*."

A sheriff's officer (6) having received a warrant to arrest A., whose person he had never seen, went to her house, where he found her and the plaintiff together. Addressing himself to the plaintiff, he said, "I have a writ against you," upon which A. desired the plaintiff to go with the officer. The officer immediately took the plaintiff to a sponging house, where he kept her all night, but the next morning having discovered his mistake, he released her. Lord Kenyon admitted the law to be as stated in the preceding case, but considering this as a trick on the officer, directed the jury to give the plaintiff only nominal damages.

Process issued
in a wrong
name, in conse-
quence of the
false statement
of the arrested.

**PRIVILEGED
PERSONS.**

But if a person whose real name is W. be asked before process issues against him, whether his name is not John, and he says it is, he cannot maintain trespass for imprisonment under process against him by the wrong name. (7)

If a bailable writ were to issue against a member of the royal family, or against a peer, peeress, or member of the House of Commons, the sheriff by executing it, would render himself liable to be committed by the House of Lords or House of Commons respectively for a breach of privilege. If the sheriff were to arrest an ambassador or his servant, not only the sheriff and his officer, but also the plaintiff at whose suit the process issued, and his attorney, would be subjected to fine, imprisonment, and corporal punishment by stat. 7 Anne, c. 12. But in all other cases of permanent privilege the sheriff may execute the writ, without any regard to the

(1) *Shadgett v. Clipson*, 8 East, 328. *Cole v. Hindson*, 6 T. R. 234. *Finch v. Cocken*, 3 Dowl. P. C. 678. 2 C. M. & R. 196. 1 Gale, 130.

(2) *Ibid*.

(3) *Finch v. Cocken*, 3 Dowl. P. C. 678. 2 C. M. & R. 196. *anté*, 2023. s. 11. The court or judge, in discharging the defendant out of custody, &c. for a misnomer, usually restrain him from bringing any action.

(4) *Coote v. Lighthworth*, Sir F. Moore, 457.

(5) *Thurbane and another*, Hardr. 323.

(6) *Ozley v. Flower*, B. R. Middlesex Sitt. Dec. 4. 1800, vide *Morgans v. Bridges*, 1 B. & A. 647. *Brunskill v. Robertson*, 9 A. & E. 840.

(7) *Price v. Harwood*, 3 Camp. 108. *Walker v. Willoughby*, 6 Taunt. 590.

privilege of the defendant (1), and no action for false imprisonment can be maintained against him for so doing. (2)

Although certificated bankrupts, or persons discharged under insolvent acts, are privileged from arrest, yet the sheriff or his officer, is not liable to an action for false imprisonment for arresting them. (3)

So where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A., and asked him to fix a time to call and give bail; and A. accordingly fixed a time, attended, and gave bail:—It was holden (4), that this was neither an actual or constructive arrest; because the sheriff's officer did not take a warrant with him, nor did he tell A. that he came to arrest him, but merely gave notice of the writ, and asked him to fix a time for giving bail.

If a prisoner in execution escape by the voluntary permission of the gaoler, and the gaoler retake him, he is liable to an action for false imprisonment. (5) But an officer, who has arrested a prisoner on mesne process, and voluntarily permitted him to escape, may retake him *before* the return of the writ, without being liable to such action. (6)

LEGAL AND ILLEGAL IM- PRISONMENT.

Certificated bankrupts and insolvent debtors.

Officer giving notice of the writ to the person to be arrested, and requesting him to fix a time for giving bail.

Prisoner in execution escaping by the voluntary permission of his gaoler.

V. By Commissioners of Bankrupts, and of Courts of Request.

By stat. 5 & 6 Will. 4. c. 29. s. 25. courts of review and subdivision courts are declared to have been courts of record from the passing of stat. 1 & 2 Will. 4. c. 56.; but no single judge or commissioner is authorised to impose a fine or commit for a contempt; but every contempt of single judge or commissioner is cognisable by the court of review.

Previously to the foregoing statutes, trespass *vi et armis* would not lie against commissioners of bankrupts (7) for a commitment by them for not fully answering to their satisfaction lawful questions proposed by them to a party whom they had authority to examine, and upon a subject into which they had authority to inquire. But the commissioners had not an authority to commit (8) a person brought before them to be examined for giving an unsatisfactory answer to an immaterial question.

Where commissioners made out their warrant of commitment without shewing any actual restraint in consequence of such warrant, the party being previously and still remaining in custody for another cause, could not support an action of imprisonment against them. (9)

A witness, summoned by commissioners of bankrupts under stat. 6 Geo. 4. c. 16. s. 33., was required by them to read certain entries in a ledger, and on his refusal to do so, was committed by them for refusing to answer a question:—It was holden (10), that the commitment was illegal, inasmuch as the request to read, was neither in form nor in substance a question.

By COMMISSIONERS OF BANKRUPTS, AND OF COURTS OF REQUEST.
Stat. 5 & 6 Will. 4. c. 29. s. 25.

Stat. 6 Geo. 4. c. 16. s. 33.

(1) *Duncombe v. Church*, 1 Salk. 1. Co. Litt. 131. *Tarlton v. Fisher*, Doug. 676. *Crossley v. Shaw*, 2 W. Black. 1085.

(2) *Tarlton v. Fisher*, Doug. 676., et vide *Cameron v. Lightfoot*, 2 W. Black. 1194. *Sherwood v. Benson*, 4 Taunt. 631.

(3) *Tarlton v. Fisher*, Doug. 671. *Sherwood v. Benson*, 4 Taunt. 630.

(4) *Berry v. Adamson*, 6 B. & C. 528.

(5) *Atkinson v. Matteson*, 2 T. R. 172.

(6) *Ante*, 1212—1222. tit. DEBT.

(7) *Doswell v. Impey*, 1 B. & C. 163.

(8) *Ibid.* 176. Exp. *Baxter*, 7 *ibid.* 672.

(9) *Crowley v. Impey*, 2 Stark. 261.

(10) *Isaac v. Impey*, 10 B. & C. 442.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

Stat. 6 Geo. 4.
c. 16. s. 23.
Commissioners
of court of
requests.

In order to justify commissioners in issuing their warrant to apprehend a party summoned to attend before them as a witness under stat. 6 Geo. 4. c. 16. s. 23., there should be a reasonable interval between the service of the summons and the time appointed for his attendance.

Commissioners of a court of requests, having power to commit for a contempt, are not within act 45 Geo. 3. c. lxvii. s. 6. (1)

BY CONSTA-
BLES.

Stat. 24 Geo. 2.
c. 44. s. 6.

Action not to be
brought against
any constable
or other person,
acting in obedi-
ence to a
justice's war-
rant.

VI. *By Constables.*

By stat. 24 Geo. 2. c. 44. s. 6. no action shall be brought against any constable, headborough, or other officer, or against any person acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case, after such demand and compliance therewith, any action be brought against such constable, &c. for any such cause as afore-said, without making the justice of the peace who signed or sealed the said warrant defendant, that on producing and proving such warrant, at the trial of such action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice and such constable, &c., then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction; and if the verdict be given against the justice of the peace, the plaintiff shall recover his costs against him, to be taxed in such manner as to include the costs which the plaintiff is liable to pay to the defendant for whom such verdict is found as afore-said.

What actions
are within stat.
24 Geo. 2. c. 44.
s. 6.

DEMAND OF
WARRANT.

Construction
of stat. 24
Geo. 2. c. 44.
s. 6. by Mr.
Justice Bayley
in *Parton v.*
Williams.

Neither *assumpsit* nor *replevin* (2) are within stat. 24 Geo. 2. c. 44. s. 6.; in fact, no actions are within it except those in tort. (3)

If the constable refuse or neglect for the space of six days to comply with the demand, the constable may be sued as before stat. 24 Geo. 2. c. 44. s. 6. But if he comply with the demand at any time before action brought, though more than six days after the demand, he will be protected by the provisions of that statute. (4)

But a perusal and copy of the warrant need not be demanded, where the officer does not act within his jurisdiction in obedience to the warrant. (5)

In *Parton v. Williams* (6) Mr. Justice Bayley said, "The sixth section [of stat. 24 Geo. 2. c. 44.] is shortly this—if the act done, be in obedience to the warrant, it is identified with that of the justice, and he alone shall be responsible for it. If a copy of the warrant is given, the justice may be made either a sole defendant or a co-defendant; but the party can only recover

(1) *Mackey v. Goodden*, 1 Dowl. P. C. 463.

(2) *Fletcher v. Wilkins*, 6 East, 283.

(3) Bull. N. P. 24. (b.)

(4) *Jones v. Vaughan*, 5 East, 445.

(5) *Gladwell v. Blake*, 1 C. M. & R. 645.

(6) 3 B. & A. 335. recog. in *Smith v. Wiltshire*, 2 B. & B. 619. *Smith v. Shaw*, 10 B. & C. 284.

against the justice. That section must of necessity, therefore, be confined to that description of cases, in which the constable acts strictly within the limits of the authority communicated to him by the magistrate; in which case, if the action is maintainable at all, it is maintainable against the justice. If an officer, therefore, confines himself within the limits of the warrant, he has an effectual protection under the sixth section. There could then be no reason for providing, that an action in which the defendant is not liable at all, should be brought within a limited time." (1)

The foregoing principles were recognised in *West v. Smallwood* (2), in which Lord Abinger said, "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all, is liable as a trespasser in many cases; but this liability does not extend to the constable, who acts under a warrant; and the statute 24 Geo. 2. c. 44. was passed with this very object of protecting such officers."

If a constable act upon any warrant, except that issued by a justice of the peace (3); or if he be authorised by a warrant to seize certain articles suspected to have been stolen, and take away others also not specified, nor likely to furnish evidence as to the identity of others (4); or apprehends a person not described in the warrant (5); or executes the warrant out of the jurisdiction of the magistrate (6); or executes a warrant of distress by entering a house and breaking the windows, &c. (7) — he will not be protected under stat. 24 Geo. 2. c. 24. s. 6.

Where a warrant is directed to a constable in his official character without naming him; as, "To the constable of the parish of W.," the warrant ought to be executed (8) within the limits of the district for which he is constable.

If a warrant be directed to a constable by name, commanding him to execute it, though he is not compellable to go out of his own precinct, yet he may if he will, and shall be justified by the warrant for so doing; but if the warrant be directed to all constables, &c. generally, it must be taken respectively, and no constable can execute the same out of his precinct.

Where a sheriff's officer arrests a person under two writs, and detains him after he has a right to a discharge under one, yet trespass does not lie, if in fact his imprisonment be justifiable under the other. (9)

A constable or peace officer having reasonable ground to suspect, that felony has been committed, is authorised (10) to detain the party suspected, until inquiry can be made by the proper authorities, although it appear afterwards, that a felony has not been committed.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

Officer pro-
tected, if he act
in strict obe-
dience to a
magistrate's
warrant.

Judgment of
Lord Abinger
in *West v.*
Smallwood.

Constable not
pursuing a
magistrate's
warrant.

Execution of
warrant out of
constable's pre-
cincts.

Arrest under
two writs, one
legal the other
illegal.

ARREST WITH-
OUT A WAR-
RANT.

(1) Vide etiam *Price v. Messenger*, 2 B. & P. 158., vide *Shergold v. Holloway*, Str. 1002.

(2) 3 M. & W. 420.

(3) *Gladwell v. Blake*, 1 C. M. & R. 636.

(4) *Crozier v. Cundey*, 6 B. & C. 232.

(5) *Money v. Leach*, 3 Burr. 1742.

(6) *Milton v. Green*, 5 East, 233.

(7) *Bell v. Oakley*, 2 M. & S. 259.

(8) *Rex v. Weir*, 1 B. & C. 288.

(9) *Blessley v. Sloman*, 3 M. & W. 40.

(10) *Samuel v. Payne*, Doug. 359. *Coupey v. Henley*, 2 Esp. N. P. C. 540. *Hobbs v. Branscombe*, 3 Camp. 420. *Beckwith v. Philby*, 6 B. & C. 635. *Nicholson v. Hardwick*, 5 C. & P. 495.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

* Watchmen and beadles have authority at common law to arrest, and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there be no proof of a felony having been committed. (1)

Affrays.

In general, where an affray takes place in the presence of a constable, he may keep the parties in custody, until the affair is over, or he may carry them immediately before a magistrate.

But to justify a constable in apprehending a party without a warrant for an affray, it is essential, that the party should have been engaged in the affray, and that the constable should have had view of the affray (2), while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension.

Stat. 5 & 6
Will. 4. c.59.
s. 19.

Officer should
not take an-
other into
charge, unless
he inquire into
the particulars.

If under stat. 5 & 6 Will. 4. c.59. s. 19. a peace officer be required by another person to take a third into custody for cruelty to a horse not committed in the officer's own view, the officer, before taking the party into custody, should either inquire into all the particulars, or should see the animal, so as to form an opinion, as to what has happened. (3)

By ATTORNEYS.

VII. *By Attorneys.*

Suing out an
illegal *ca. sa.*

Trespass will lie (4) against an attorney or his client, for suing out an illegal *ca. sa.*, and causing a party to be arrested.

Where A. employed B. an attorney to enforce payment of a debt, B. directed his agent to sue out a *justices* in the county court. Before the return of the *justices*, the debtor paid debt and costs to B. B.'s agent not knowing of such payment, afterwards entered up judgment in the county court, although the defendant had not appeared, and sued out execution: —It was holden (5) that A. and B. were liable as trespassers, for A. was answerable for the act of B. his attorney, and B. and his agent were to be considered as one person.

Arrest made
under irregular
process.

In *Codrington v. Lloyd (Gent.)* (6) it was held, that where an arrest was made under process, which is afterwards set aside for irregularity, the attorney in the suit is liable in trespass as well as the plaintiff; and that if in an action of trespass he justifies under the process, it is a good replication, that the process was irregularly sued out, and was afterwards set aside by rule of court for irregularity; Lord Denman observing, "In *Bates v. Pilling* (7) no doubt was entertained, that if the action lay against the principal, it lay also against the attorney. Indeed there is a stronger reason for holding the attorney liable, since the party cannot be expected to know, whether the process is regular in point of law or not."

Judgment of
Lord Denman
in *Codrington*
v. Lloyd.

In *Sowell v. Champion* (8) it was held, that the attorney who places the writ of execution in the hands of an officer is not guilty of trespass, though he may be persuaded, that the officer will execute it in a place, which may turn out on inquiry to be out of his jurisdiction; but if he *direct* it to be executed there, or if the officer tell the attorney of his intention, and the

(1) *Lawrence v. Hedger*, 3 Taunt. 14.

(2) *Cook v. Nethercote*, 6 C. & P. 741.

(3) *Hopkins v. Crowe*, 7 *ibid.* 373.

(4) *Barker v. Braham*, 3 Wils. 368.

(5) *Bates v. Pilling*, 6 B. & C. 38.

(6) 8 A. & E. 449.

(7) 6 B. & C. 38.

(8) 6 A. & E. 407. 417.

attorney, knowing it to be illegal, acquiesce therein, it may make him a trespasser.

LEGAL AND
ILLEGAL IM-
PRISONMENT.

VIII. *By Impressment ; and by Overseers of the Poor.*

If a person cause another to be impressed, he does it at his peril, and is liable in damages, if that person can shew, that he was exempted from the impress service. (1)

Trespass for false imprisonment would lie against overseers of the poor, if they were to imprison a man under a justice's warrant, until he should pay a sum of money for the maintenance of a child, which should be born of a woman then pregnant by him. (2)

By IMPRESS-
MENT; AND BY
OVERSEERS OF
THE POOR.

Improperly
causing a per-
son to be im-
pressed.

By OVERSEERS
OF THE POOR.

Imprisoning a
man under a
justice's war-
rant, for the
payment of a
sum of money
for the main-
tenance of a
child.

By PRIVATE
INDIVIDUALS.
WHEN UN-
LAWFUL.

Mere suspicion.

IX. *By private Individuals.*

If a private person apprehend another on suspicion of felony, he does it at his peril, and unless he can establish the guilt of the arrested, is liable to an action : thus, a private person cannot apprehend another upon a suspicion of felony, for the purpose of taking him to the place where the theft was committed, in order to ascertain whether he was the thief. (3)

Mere suspicion will not bar the action, although it may be given in evidence in mitigation of damages. (4)

Suspicion, that a person has on a former occasion committed a misdemeanour, is not a justification for giving him in charge to a constable without a justice's warrant (5); and there is not any distinction in this respect, between one kind of misdemeanour and another, as a breach of the peace and fraud.

If A. having been robbed, suspect B. to be guilty of the robbery, and take B. and deliver him into the charge of a constable present, B. (if innocent) may maintain trespass for false imprisonment against A. (6)

Proof of annoyance and disturbance by a person present at a meeting, such as crying "Hear, hear!" and putting questions to a speaker, and making observations on his statements, will not justify the chairman of the meeting, in giving such person in charge of the police; but to justify such a course of proceeding it must be shewn, that what was done, amounted to a breach of the peace. (7)

A. telling a policeman to take charge of B., is the same, as telling the policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A. (8)

Chairman of a
meeting no
right to give a
person into cus-
tody, unless he
have com-
mitted a breach
of the peace.

Telling a
policeman to
take charge of
B., is the same
as telling the
policeman to
take B. into
custody.

(1) *Flewster v. Royle*, 1 Camp. 187.

(2) *Wenman v. Fisher*, M. T. 2 G. 2. B. R. M8. cit. in *Rex v. Banghurst*, H. T. 5 G. 2. B. R. 1 Sess. Cas. 149.

(3) *Hall v. Booth*, 3 N. & M. 316.

(4) *Mure v. Kaye*, 4 Taunt. 34. *Hall v. Booth*, 3 N. & M. 316.

(5) *Fox v. Gawnt*, 3 B. & Ad. 798.

(6) *Stonehouse v. Elliott*, 6 T. R. 315.

(7) *Wooding v. Ozley*, 9 C. & P. 1.

(8) But it seems, that in an action for false imprisonment, a plea that the defendant was possessed of a house, and that the plaintiff was there making a great disturbance, and refused to depart when requested, and was in a great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad. *Wheeler v. Whiting*, 9 C. & P. 262.

LEGAL AND
ILLEGAL IM-
PRISONMENT.WHEN NOT UN-
LAWFUL.

What is not an imprisonment.

In trespass for false imprisonment, proof must be given of circumstances, from which the judge and jury may decide, whether there was or was not a restraint or detention of the person; and it is not enough for witnesses to swear, that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to shew, that the defendant, at a police-office, stood before the plaintiff and said, "you cannot go away till the magistrate comes," if it appears, that he relinquished that attitude, and went to another part of the office, before the plaintiff had made any attempt to depart. (1)

Judgment of
Chief Justice
Eyre in *Simp-
son v. Hill*.

In *Simpson v. Hill* (2) the imprisonment complained of, was, that the defendant sent for a constable, to whom he gave the plaintiff in charge; but the constable never touched the plaintiff, or took her into custody, or used any words expressing, that she was a prisoner; for the defendant, on seeing her frightened, said to the constable, that he would not trouble him further at that time, and the constable departed: upon which Chief Justice Eyre observed, "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be, in point of law, an imprisonment; as, for example, if he had tapped her on the shoulder, and said, 'you are my prisoner;' or if she had submitted herself into his custody, such would be an imprisonment; but the merely giving her in charge, without any taking possession of the person, where nothing more passes, than merely the charge, is not, by law, a false imprisonment. And as, in the present instance, the constable did never take her into custody, and the defendant withdrew his charge almost as soon as it was given, such is not, by law, an imprisonment."

Preventing the
perpetration of
a felony.

A private person can perform any act to prevent the perpetration of a felony: thus, the imprisonment of a husband by a private person to prevent him from committing murder on his wife is justifiable. (3) So, likewise, if two persons are fighting, and there is reason to fear, that one of them will be killed by the other, it is lawful to part them and imprison them, until their anger is cooled. (4)

Plaintiff guilty
of an affray.

In *Timothy v. Simpson* (5) it appeared in evidence, that the plaintiff entered the defendant's shop to purchase an article in the shop, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing on request to go out of the shop, the shopman endeavoured to turn him out, and an affray ensued between them; that the defendant came into the shop during the affray, which continued for a short time after he came in; that the defendant then requested the plaintiff to leave the shop quietly, but he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station-house:—It was held, that the defendant was justified, under the circumstances, in giving the plaintiff in charge to a policeman, for the purpose of preventing a renewal of the affray.

What is a direc-
tion to a police
officer to ar-
rest, and what
is not.

If A. having no right to apprehend B., direct a police officer to take B., and he do so, B. may maintain an action of false imprisonment against A.; but if A. merely make a statement to the officer, leaving it to him to act as

(1) *Cant v. Parsons*, 6 C. & P. 504.

(2) 1 Esp. N. P. C. 431.

(3) 22 Edw. 4. 45. (b.)

(4) 2 Bol. Abr. Trespass (E.), 559. 7
Bac. Abr. Trespass (D.), 664.

(5) 1 C. M. & R. 757. 6 C. & P. 499.

he thinks proper, and the officer then take A., B.'s remedy (if any) is against A. by action on the case. (1)

The marshal of the Queen's Bench prison has a right to detain a crown prisoner for chamber rent. (2)

LEGAL AND
ILLEGAL IM-
PRISONMENT.

The marshal
of Queen's
Bench can de-
tain a prisoner
for chamber
rent.

COMMENCE-
MENT OF AC-
TION.

Stat. 21 Jac. 1.
c. 16. s. 3.

STATUTE OF
LIMITATIONS.

3. COMMENCEMENT OF ACTION.

By stat. 21 Jac. 1. c. 16. s. 3. all actions for assault and battery, or false imprisonment, shall be brought within four years after the offence committed, or they shall be barred: and the Statute of Limitations is a good plea in this action.

If the imprisonment be laid for a continued length of time, as in *Coventry v. Apsley* (3), from 32 Car. 2. till April 3. 4 Jac. 2., the defendant may divide the time and plead the Statute of Limitations as to part, and not guilty, or any other plea to the rest; and in such case the plaintiff should not demur, but plead that the duress was continued.

In the case of justices of the peace, or constables acting under their warrants, another limitation is made.

By stat. 24 Geo. 2. c. 44. s. 8. "no action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person, acting as aforesaid, unless commenced within six calendar months after the act committed."

In *Parton v. Williams* (4) Mr. Justice Bayley, in reference to the foregoing clause, observed, "The 8th section was intended to give a protection to the justice, and also to the constable and officers where they or any of them have acted beyond the extent of their duty; and it provides, that all actions shall be brought within six months, in order that the matter shall be tried promptly after the transaction has occurred, and when the circumstances are fresh in the recollection of witnesses. Inasmuch, therefore, as the same words used in the former part of this act of parliament (sect. 1.) have been held to give to a magistrate, who really believed that he was acting in the execution of his duty, but in fact was acting illegally, the protection intended by the legislature, they must have the same meaning in this section. And if the justice be protected, the legislature must have intended to give equal protection to the constable and officers; for it is but just, that where any injury is said to be committed by a person, upon whom the law casts a burdensome office, that he should be called upon to answer for it, within a reasonable time."

Construction
of stat. 24
Geo. 2. c. 44.
s. 8. by Mr.
Justice Bayley
in *Parton v.*
Williams.

Mr. Justice Best likewise observed, "The words 'acting as aforesaid' in the 8th section, refer only to the word 'person' immediately preceding, and are equivalent to the words 'acting in aid or in assistance to the constable,' and not to the words 'for any thing done in obedience to any warrant.'" (5)

"Acting as
aforesaid" de-
fined by Mr.
Justice Best.

(1) *Hopkins v. Crowe*, 7 C. & P. 373.

(2) *Stockdale v. Chapman*, *ibid.* 363.

(3) 2 Salk. 420.

(4) 3 B. & A. 336.

(5) Vide etiam *Smith v. Wiltshire*, 2 B. & B. 619. *Ballinger v. Ferris*, 1 M. & W. 630. In *Parton v. Williams* (3 B. & A. 330.) the authority of *Postlethwaite v. Gibson* (3 Esp.

N. P. C. 226.) was questioned, in which Lord Kenyon ruled, that inasmuch as the defendant had not a warrant, and as he was not acting on his own view, but merely on a charge, he was not acting in his character of a constable, and therefore was not entitled to the protection of the eighth section of the act.

COMMENCEMENT OF ACTION.

Judgment of Lord Kenyon in *Alcock v. Andrews*.

In *Alcock v. Andrews* (1) Lord Kenyon said, "that the defendant acted *colore officii* and not *virtute officii*; and said, that a constable acting *colore officii* was not protected by the statute, where the act committed is of such a nature, that the office gives him no authority to do it; in the doing of that act, he is not to be considered as an officer; but where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. The distinction is, between the extent and the abuse of the authority."

But there can be no question, a constable is not within the statute, when he acts without warrant and without view. (2)

Mode of computation, where an act is required to be done so many days at least before a given event.

If a man be imprisoned by a justice's warrant the first day of January, and kept in prison till the first day of February, and if the action be commenced within six months after the first day of February it will be commenced in time, for the whole imprisonment, is one entire trespass. (3) Where an act is required by statute to be done so many days *at least* before a given event, the time must be reckoned excluding both the day of the act and that of the event (4), Mr. Justice Littledale observing, "It appears to me that a day is a day, whether 'at least' be added or left out." (5)

NOTICE OF ACTION.

Stat. 24 Geo. 2. c. 44. s. 1.

WHEN NOTICE REQUISITE.

No writ to be sued out against any justice, until notice be given to him.

4. NOTICE OF ACTION.

By stat. 24 Geo. 2. c. 44. s. 1. no writ shall be sued out against, nor any copy of any process, at the suit of a subject, shall be served on, any justice of the peace for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode by the attorney or agent for the party, who intends to sue, at least one calendar month before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action, and on the back of which notice shall be indorsed the name of such attorney, with the place of his abode, and who shall be entitled to the fee of 20s. for preparing and serving such notice.'

Where a justice of the peace does an act under colour of his office, though he exceed his jurisdiction, he is entitled to notice before an action can be brought against him (6): thus, where one magistrate who had committed the mother of a bastard to prison for not filiating the child, he was holden to be entitled to the notice of action required by the statute, though by stat. 18 Eliz. c. 3. s. 2. jurisdiction on the subject-matter is given to two magistrates. (7) But where he does not act *colore officii*, a notice is unnecessary. (8)

No notice is necessary to support an action against a person for the

- (1) 2 Esp. N. P. C. 542. n.
- (2) *Ballinger v. Ferris*, 1 M. & W. 630.
- (3) *Pickersgill v. Palmer*, Bull. N. P. 24.
- (4) *Regina v. Shropshire (Justices of)*, 8 A. & E. 173.
- (5) Vide etiam *Zouch v. Empey*, 4 B. & A. 522. *Young v. Higgon*, 6 M. & W. 49. *Mitchell v. Foster*, 4 P. & D. 150.
- (6) *Prestidge v. Woodman*, 1 B. & C. 12.
- Jones v. Williams*, 1 C. & P. 459. *Briggs v. Evelyn (Sir F.)*, 2 Hen. Black. 114.
- (7) *Weller v. Toke*, 9 East, 364. *Sabin v. De Burgh*, 2 Camp. 199. n.
- (8) *Morgan v. Palmer*, 2 B. & C. 729. *Bird v. Gunston*, cit. in *Cook v. Leonard*, 6 B. & C. 354.

penalty given by stat. 18 Geo. 2. c. 20. for acting as a justice without a proper qualification. (1)

Where a statutory protection is given to persons, having acted in pursuance of the statute, a party is not entitled to the protection, merely because he believed *bona fide* that he was so acting — there must be reasonable ground for the belief.

If the party acted under a reasonable, though mistaken, persuasion, from appearances, that the facts were such, as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such, that the statute clearly affords no justification.

Thus, if by the assumed authority of stat. 7 & 8 Geo. 4. c. 30. s. 28., which gives power to arrest persons found committing certain offences, a party arrest another as being so found, under circumstances which afford reason for thinking that he was, at the time, committing such offence, though in reality he was not, and an action be brought for the arrest — the defendant is entitled to notice of action under sect. 41. of that statute (2)

Where A. gave B. into charge at 5 o'clock in the evening, on a charge of pulling down a chimney, and B. was kept in custody all night, and next morning discharged; a summons having been obtained against B. for the alleged offence, returnable at the next magistrate's meeting, it was held, in an action for false imprisonment against A., that A. was entitled to a notice of action under stat. 7 & 8 Geo. 4. c. 30. s. 41. if he acted *bona fide*, and believed that he had a right to give B. into custody. (3)

If a person who has ill-treated a horse be apprehended by one, who is neither the owner of the horse, nor a peace officer, the person so apprehending, is not entitled to notice of action under stat. 5 & 6 Will. 4. c. 59. s. 19. (4)

The notice to a justice of the peace must express the nature of the writ or process intended to be sued out, as well as the cause of action. (5)

In stating the cause of action, it is sufficient to inform the defendant substantially of the ground of complaint (6); and the notice is valid, notwithstanding it be in the form of a declaration, and unnecessarily verbose.

It is not requisite to specify the form of action (7); but if it be stated, it must correspond with the declaration (8); but the cause of action as stated in the notice, must not differ in any respect from that proved; if it do, it will be fatal. (9)

So a notice to a magistrate, under stat. 24 Geo. 2. c. 44., is sufficient to warrant a writ, and proceedings against the magistrate and a constable conjointly; and where such a notice was given to a magistrate, and the plaintiff after a month had expired, sued out a writ against the magistrate

NOTICE OF ACTION.

Where a statutory protection is given, it must appear that the party seeking protection under it, had reasonable grounds for his actions.

When a party entitled to notice of action under stat. 7 & 8 Geo. 4. c. 30. s. 41.

Stat. 5 & 6 Will. 4. c. 59. s. 19.

FORM OF NOTICE.
Cause of action.

Stat. 24 Geo. 2. c. 44.

(1) Tidd, 29.

(2) *Cann v. Clipperton*, 10 A. & E. 582., vide *Norris v. Smith*, ibid. 188., vide etiam *Cook v. Leonard*, 6 B. & C. 351. *Beechey v. Sides*, 9 ibid. 806. *Reed v. Cowmeadow*, 6 A. & E. 661. *Wedge v. Berkeley* (Hon. M.), ibid. 663. When case cannot be maintained against a sheriff, for retaining a prisoner committed for contempt, vide *Smith v. Eggington*, 6 Dowl. P. C. 38. 7 A. & E. 176. post, 2037.

(3) *Reed v. Cowmeadow*, 7 C. & P. 821. *Quere*, Whether on that statute the question

of *bona fides* is a question for the jury or for the judge.

(4) *Hopkins v. Crowe*, ibid. 373.

(5) *Strickland v. Ward*, 7 T. R. 631. 633. n.

(6) *Jones v. Bird*, 5 B. & A. 837. *Robson v. Spearman*, 3 ibid. 493. *Gimbert v. Coyney*, M'Clel. & Y. 469., sed vide *Freeman v. Line*, 2 Chitt. 673.

(7) Tidd, 30. *Sabin v. De Burgh*, 2 Camp. 196.

(8) *Strickland v. Ward*, 7 T. R. 631. 633. n., vide etiam *Aked v. Stocks*, 4 Bing. 511, 512.

(9) *Aked v. Stocks*, 4 Bing. 509.

NOTICE OF ACTION.	alone, and afterwards abandoned that writ, and sued out another against the magistrate and constable jointly, the notice was held sufficient to warrant the second writ. (1)
Indorsement of attorney's name.	It is sufficient in indorsing the attorney's name to put the initial only of his christian name, with his surname and place of abode at full length. (2) Where the notice was signed T. and W. A. Williams, the names of the attorneys for the plaintiff being Thomas Adams Williams and William Adams Williams, it was deemed sufficient. (3)
Place of abode.	The attorney giving the notice may describe himself generally of the town in which he resides, as "of Birmingham" (4), or "Bolton-en-le-Moor. (5) But where an attorney described himself in the notice, "New Inn, London," which in fact was in Westminster, it was holden to be fatal. (6) If the attorney indorse the place where his office is situated, though he do not reside there, it will suffice. (7)
Notice, not indorsed on the back.	Where the notice was not indorsed with the place of abode of the attorney, but concluded thus, "Given under my hand at Durham, this — day of —, &c.," it was deemed sufficient. (8) In <i>Crooke v. Curry</i> (9) Mr. Baron Thomson held, that the attorney's name and place of abode being in the body, instead of on the back of the notice, was sufficient, on the grounds of the intent of the statute being, that the justice might be able to tender amends to the party or his attorney. (10) The attorney signing the notice need not, seemingly, be the one on the record. (11)
Computation of the month.	In <i>Castle v. Burditt</i> (12) it was holden, that the month begins with and includes the day on which the notice was served; but, in <i>Young v. Higgon</i> (13) it was held, that the day of giving the notice, and the day of suing out the writ, are both to be excluded; Mr. Baron Alderson observing, "Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to insure to him <i>the whole</i> of that space of time. Here is a case, in which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice is given, cannot fix the period of the day when it is to be given; but the act of parliament allows him a month, as an intervening period, within which, he may deliberate, whether he will do a certain act, viz, tender amends; and, unless you exclude both the first and the last day, you do not give him a whole month for that purpose." (14)
Judgment of Mr. Baron Alderson in <i>Young v. Higgon</i> .	

- (1) *Jones v. Simpson*, 1 C. & J. 174.
 (2) *Mayhew v. Locke*, 7 Taunt. 63.
 (3) *James v. Swift*, 4 B. & C. 681. 2 C. & P. 237.
 (4) *Osborn v. Gough*, 3 B. & P. 551.
 (5) *Crooke v. Curry*, Durham Sum. Ass. 1789; but Thomson B. there said, "London, Manchester, or other such large town, generally, would not be sufficient;" cit. Tidd, 30. n. (f).
 (6) *Stears v. Smith (Clerk)*, 6 Esp. N. P. C. 138., sed vide *Mills v. Collett*, 6 Bing. 90.
 (7) *Roberts v. Williams*, 2 C. M. & R. 561.
 (8) *Taylor v. Fenwick*, 7 T. R. 635. cit. 3 B. & P. 553. (a.)
 (9) Durham Sum. Ass. 1789, cit. Tidd, 30. n. (c.)
 (10) Vide *Rex v. Bigg*, 3 P. Wms. 419. Str. 18., sed vide *Lovelace v. Curry*, 7 T. R. 634.
 (11) *Roberts v. Williams*, 2 C. M. & R. 561.
 (12) 3 T. R. 623.
 (13) 6 M. & W. 54.
 (14) Vide etiam *Pellaw v. Worsford (Inhab. of)*, 9 B. & C. 134. *Hardy v. Ryle*, ibid. 603. *Webb v. Fairmaner*, 3 M. & W. 473. 6 Dowl. P. C. 549. *Reg. v. Shropshire (Justices of)*, 8 A. & E. 173. *Blunt v. Heslop*, ibid. 577.

5. THE DECLARATION.

THE DECLARATION.

VENUE.

An action for false imprisonment is a transitory action, and it is competent to the plaintiff to lay it in any county of England, although the matter arose beyond the seas. (1)

By stat. 21 Jac. 1. c. 12. s. 5. if any action, bill, plaint, or suit, upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of the peace, mayor, or bailiff of city, or town corporate, headborough, portreeve, constable, tithingman, churchwarden, or overseer of the poor, and their deputies, or any other (who in their aid, or by their commandment, shall do any thing concerning their office), or concerning any matter, cause, or thing by them done by virtue of their office, such action, bill, &c. shall be laid within the county where the trespass was committed.

Stat. 21 Jac. 1. c. 12. s. 5.

The provisions of stat. 21 Jac. 1. c. 12. having been found very salutary, they were by stat. 42 Geo. 3. c. 85. s. 6. extended to all persons holding any public employment, or any office, station, or capacity, civil or military, either in or out of this kingdom, and who, by virtue of such employment, have power to commit persons to safe custody; provided, that where any action shall be brought against such persons in this kingdom, for any thing done out of this kingdom, the plaintiff may lay the act to have been done in Westminster, or in any county where the defendant shall reside.

Stat. 42 Geo. 3. c. 85. s. 6.

Protection to all civil and military officers.

Stat. 7 & 8 Geo. 4. c. 30. s. 41. which directs, that actions brought for any thing done in pursuance of that statute shall be tried in the county, where the fact was committed, applies only to parties exercising particular powers conferred by such statute. (2)

Stat. 7 & 8 Geo. 4. c. 30. s. 41.

In an action against justices for falsely imprisoning the plaintiff on a charge of feloniously beginning to demolish a house, contrary to the act, the court granted a rule to change the venue, on a suggestion, that a fair trial could not be had in the county. (3)

A constable who imprisons a person on suspicion of felony, without any reasonable grounds, and without any warrant or charge, is within stat. 21 Jac. 1. c. 12.; and a private person who acts in aid of the constable, is also within it; but if he act not merely in aid, but as a prime mover and principal, which is a question for the jury, the statute does not apply to him. (4)

Persons within stat. 21 Jac. 1. c. 12.

Where the prosecutor, who had obtained the warrant, pointed out the party to the constables, Lord Ellenborough was of opinion, that he was acting in their aid, within the meaning of the statute. (5)

But where A. sent for B. a constable, and gave the plaintiff in charge for a felony:—It was held, that he was not within the statute, but must plead specially. (6)

Trespass is the remedy for an illegal imprisonment not under colour of

FORM OF ACTION.

(1) *Mostyn v. Fabrigas* (in error), Cowp. 161.

(4) *Staight v. Gee*, 2 Stark. 445. *Bond v. Rust*, 2 C. & P. 342.

(2) *Thomas v. Saunders*, 5 B. & Ad. 462.

(5) *Nathan v. Cohen*, 3 Camp. 257.

(3) *Ibid.*

(6) *M^r Clughan v. Clayton*, Holt's N. P. C. 478.

THE DECLARATION.

Judgment of
Chief Justice
Abbott in *Dos-*
well v. Impey.

process (1); for an imprisonment in the first instance lawful, but the party by an unnecessary degree of violence becoming a trespasser *ab initio* (2); for a wrongful imprisonment after legal process is determined. (3)

In *Doswell v. Impey* (4) Chief Justice Abbott said, "The general rule of law, as to actions of trespass against persons having a limited authority, and commissioners of bankrupts are such persons, is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass; but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action. This rule is mentioned and recognised by the Lord Chief Justice in the case of *Miller v. Seare*." (5)

In *Flewster v. Royle* (6) the defendant went to the place of rendezvous for the impress service, near the Tower, and gave information, that there was a young man (meaning the plaintiff) at a house she described, who was liable to be impressed, and who was a fit person to serve his majesty. In consequence of this the plaintiff was seized by the press-gang, and carried on board the Tender, where he was detained, until it was discovered that he had never been in a ship before except once, when he had been in a like manner wrongfully impressed. An action for trespass and false imprisonment having been brought, it was objected that the form of action should have been an action on the case, and not an action of trespass; but Lord Ellenborough said, "This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant, therefore, was a trespasser in procuring it to be done; nor is any proof of malice necessary."

Judgment of
Mr. Justice
Ashhurst in
Morgan v.
Hughes.

In *Morgan v. Hughes* (7) Mr. Justice Ashhurst stated, "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but where the act of imprisonment by one person, is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other."

Judgment of
Mr. Justice
Bayley in *El-*
see v. Smith.

So likewise in *Elsee v. Smith* (8) Mr. Justice Bayley said, "If a party acts himself in apprehending another, he may be liable in trespass; but if he falsely and maliciously, and without any probable cause, puts the law in motion, that is properly the subject of an action on the case. With that, all the authorities agree." (9)

Where the defendant gave information before a magistrate, upon which the plaintiff was taken up on a warrant, and brought before the magistrate; but after the charge was dismissed for the time, and the plaintiff liberated on his promise to appear at a future day, the defendant stated, that he had another charge of forgery, against the plaintiff, upon which the plaintiff,

(1) *Bourden v. Alloway*, 11 Mod. 180. nor (*Earl of*), 8 East, 113. *Pike v. Carter*,

(2) *Com. Dig. Trespass (C.)*, 2. 7 Bac. 3 Bing. 78.

Abr. Trespass (B.), 648. (6) 1 Camp. 187.

(3) *Withers v. Henley*, Cro. Jac. 379. (7) 2 T. R. 232.

Davis v. Capper, 10 B. & C. 38. (8) 2 Chitt. 308.

(4) 1 B. & C. 169. (9) *Vide etiam Barber v. Rollinson*, 1 C.

(5) 2 W. Black. 1141. *Lowther v. Rad-* & M. 330.

who was retiring, was again put to the bar:—It was held, that trespass was not maintainable. (1)

THE DECLARATION.

In trespass for false imprisonment, the defendant, a sheriff, justified under a writ in Chancery, by which, he as sheriff, was commanded to attach the plaintiff to answer "as well touching a contempt" (not stating in what) as such other matters as, &c. Replication, that the writ was for a contempt in not answering; that the plaintiff was in actual custody of the defendant for thirty days under the writ, and was not brought to the bar of the court in that time; nor was her contempt cleared, the last of the thirty days being in term; that the plaintiff in Chancery did not bring the plaintiff to the bar in the thirty days, though the contempt was not sooner cleared; that it thereupon became the defendant's duty, and he was requested, to discharge the plaintiff, but refused. On demurrer it was held (assuming the defendant to have been bound to discharge the plaintiff without any order of court), 1. that the action should have been in case; 2. that even if the defendant had been a trespasser, he was not a trespasser *ab initio*; and the replication should have new assigned (2), Mr. Justice Littledale observing, "The replication is improper. It does not limit the complaint to the detainer after the expiration of the proper time; it ought to be a new assignment. The general rule is in the *Six Carpenters' case* (3); where there is an authority given by law for doing an act, there an abuse may turn the act into a trespass *ab initio*. But that rule does not apply here. The rule is said to rest upon this—that the subsequent illegality shews the party to have contemplated an illegality all along, so that the whole becomes a trespass. But here the sheriff could not, from the first, have had in view the detention of the plaintiff after the time should have expired. The action therefore being founded on the original detention, should have been in case. Further, the record does not shew, that the sheriff had notice of the nature of the contempt; and there are other contempts besides these mentioned in the fifth rule. (4) There can be no action against the sheriff without such notice. At all events the form should be case."

Judgment of Mr. Justice Littledale in *Smith v. Egginton*.

A subject born in Minorca is as much entitled to appeal to the king's courts, as a subject born in Great Britain; and the objection of its not being stated on the record, that the plaintiff was born since the treaty of Utrecht, does not make any difference. (5)

PARTIES.

Where there has been a misnomer of the defendant, and he has been arrested by a wrong name, and afterwards brings an action of false imprisonment, it is not sufficient to say, that he was the same person against whom the writ was directed, though called by a different name; the plea must go on and state, that he was known by one name as well as by another. (6)

EFFECT OF MISNOMER.

(1) *Barber v. Rollinson*, 1 C. & M. 330.

(5) *Mostyn v. Fabrigas (in error)*, Cowp.

(2) *Smith v. Egginton*, 7 A. & E. 176.

161.

6 Dowl. P. C. 38.

(3) 8 Co. 146. (a.)

(6) 1 Esp. N. P. 356. *Shadgett v. Clipson*, 8 East, 328. *Cole v. Hindson*, 6

(4) *Semble*, that no action lay for want of notice to the defendant of the facts bringing the case within the rule.

T. R. 234., vide etiam *Crawford v. Satchwell*, Str. 1218. *Price v. Harwood*, 3 Camp. 108. ante, 2023. n. (11.)

THE PLEADINGS.

Stat. 7 Jac. 1.
c. 5. and 21
Jac. 1. c. 12.

Reg. Gen.
T. T. 1 Vict.

Matter of justification must be pleaded specially.

Plea of justification must enumerate and cover the declaration.

Plea of justification consisting of two facts.

A release must be pleaded specially.

JUSTIFICATION
FOUNDED ON
PROCESS OUT OF
SUPERIOR
COURTS.

6. THE PLEADINGS.

By stat. 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12., in any action of trespass or case against a justice of the peace, mayor, bailiff, constable, &c. for any thing done by virtue of their offices, or against any other persons acting in their aid, and by their command concerning their offices, the defendant may plead the general issue, and give the special matter in evidence.

A constable can justify under the general issue, although he acted without a warrant, provided a reasonable charge of felony be made, notwithstanding the prisoner be discharged without taking him before a magistrate, and although it should eventually appear, that no felony was committed.

Where a defendant in trespass pleads, that he tendered to the plaintiff a certain sum, being a sufficient amends, the plaintiff should reply, that the defendant did not tender the sum named, or that that sum was insufficient, and not that he did not tender sufficient amends. (1)

By Reg. Gen. T. T. 1 Vict. (2), if the defendant intend to give the special matter in evidence, under the general issue, he must insert in the margin of such plea the words "by statute," otherwise such plea will be taken as not having been pleaded by virtue of any act of parliament. (3)

But matter of justification must be pleaded specially, and proved as pleaded in all cases, except in those cases to which reference has been made; for a private individual is not within stat. 21 Jac. 1. c. 12. unless acting in the aid of a constable. (4)

A plea of justification or excuse must enumerate and cover the whole, or the plaintiff without a special replication or new assignment will be entitled to a verdict for the trespasses proved and not pleaded to (5); for he who imprisons another, except under certain statutes, must justify himself by showing specially to the court, that the act was lawful: thus, a plea justifying an arrest of the plaintiff upon the ground that a felony had been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the specific *reasons* for suspecting the plaintiff. (6)

If a plea of justification consist of two facts (7), each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification, if one of these facts be found by the jury.

The defendant must plead specially a release (8) or other matter in discharge of the cause of action. (9)

Where a party justifies a trespass under an authority given, he must shew that authority. (10)

(1) *Williams (Clerk) v. Price*, 3 B. & Ad. 695.

(2) 4 Bing. N. C. 816. 8 A. & E. 279.

(3) Where a statute enables defendants to plead the general issue and give the special matter of defence in evidence, the plea of "not guilty" so pleaded, is not affected by the new rules of H. T. 4 Will. 4., but operates as before they were framed, putting in issue, not only the defences peculiar to the statute, but all that would have arisen at common law. *Ross v. Clifton*, 11 A. & E. 631.

(4) *Bond v. Rust*, 2 C. & P. 342.

(5) *Bush v. Parker*, 1 Bing. N. C. 72.

(6) 1 Chitt. Pl. 236.

(7) *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(8) Com. Dig. Pleader (M. 12.). 9 Went. 15.

(9) *Bird v. Randall*, 3 Burr. 1353. Tidd, 652.

(10) 1 Inst. 283. (a.) *Matthews v. Cary*, 3 Mod. 137. Carth. 73.

If the justification be under judicial process between the party to the cause, or a mere stranger, and the officer who executes the process of the court, the party to the cause, or mere stranger, must set forth in their plea the judgment (1) as well as the writ; but the officer need only shew the writ (2) under which he acted, for he is bound to execute the legal process of the court.

When the action is brought jointly against the plaintiff in the former action and the officer, they may sever in their defence, for the writ would be a good justification to the officer; but if the officer join the plaintiff in the same plea, he waves the benefit he may have himself; and if the plea be bad as a justification for the other, judgment will also go against him. (3)

And so if they join in the plea, and it be bad for the officer, it will be so likewise for the other party; as where he does not shew the process returned, under which he justified. (4)

Where A. B. being in custody of the marshal of the King's Bench has been charged in execution on an attachment issuing out of the court of Exchequer, at the instance of C. D., there must, it seems, in an action by A. B. against C. D., be a special plea of justification under such writ. (5)

Where the defendant justifies under process of a court of limited jurisdiction, the plea should shew, that the cause was properly subjected to such jurisdiction. (6)

JUSTIFICATION
FOUNDED ON
PROCESS OUT
OF INFERIOR
COURTS.

Where the defendant justifies under process of an inferior court, and a special authority to imprison, the plea should shew, that such authority was strictly pursued.

For where in trespass and false imprisonment the defendant justified under an order of the court of conscience in London, which directed him to arrest the plaintiff, and carry him to the compters, and imprison him till he paid 9s. 6d. *virtute cujus*, he took him and detained him; this plea, on demurrer, was adjudged to be bad; for the order was, to imprison him in the compters, which the plea should have shewn that he had done, as he confessed he took and detained him. (7)

Where the defendant justifies under a process of the inferior court, "it is sufficient for the defendant to allege in his plea, that a plaint was levied, and process prayed in the inferior court, and that *superinde taliter processum fuit*, and a *capias* was awarded, without setting out all the proceedings" of the inferior court at length. (8)

Where an officer or other person justifies under process, which is returnable, he must in his plea, shew that it was returned, or the plea will be bad. (9)

Where a constable is directed to arrest a person, in order, that he might become bound to appear at the next sessions, an arrest long after the ses-

(1) *Britton v. Cole*, Carth. 443.
 (2) *Turner v. Felgate*, 1 Lev. 95. *Cotes* and *Olive's case*, March, 117. *Moravia v. Slopes*, Willes, 37. recog. in *Evans v. Munkley*, 4 Taunt. 50.
 (3) *Michill*, 3 ibid. 20.
 (4) 1 Esp. N. P. 356.
 (5) *Ibid.*
 (6) *Bryant v. Clutton*, 1 M. & W. 408. 5
 (7) *Swinstead v. Lyddal*, 1 Salk. 408.
 (8) *Per Lee* C. J. in *Adams v. Freeman*, Sayer, 81.
 (9) *Middleton v. Price*, 1 Wils. 17. Str. 1184.
 (10) *Johns v. Smith*, Cro. Jac. 314. *Dye*

THE PLEAD-
INGS.JUSTIFICATION
UNDER THE
PROCESS OF A
FOREIGN
COURT.

sions next after the date of the warrant is good, because "next sessions" means the sessions next after the arrest. (1)

In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts; but at any rate, a plea which only states, that the court abroad was governed by foreign laws; that the property seized was within its jurisdiction; that certain legal proceedings were bad, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum, &c.*; that the defendant was ordered by the said court, having competent authority in that behalf, to seize the property — is bad, as being too general, and not giving the plaintiff notice, whether the defendant justified as an officer of the court, or party to the cause; or of what nature the charge was; or by whom instituted; or what the order of seizure was, whether absolute or *quousque, &c.* (2), Mr. Justice Le Blanc observing, "The principal object of putting a justification of this sort on record is, to give the other party notice of what he is to answer."

Defendant must establish all the material allegations in his plea.

Where there are a series of matters complained of in trespass, and the plea amounts to a justification of all, in order to entitle the defendant to a verdict, it is incumbent upon him to make out all the material allegations in his plea; therefore, where the declaration complained of an assault, putting the plaintiff out of a shop, and imprisoning him in custody of a police officer, and the plea was *molliter manus imposuit*, to remove the plaintiff from the defendant's shop, and a justification of the imprisonment, because the plaintiff had assaulted defendant, and the assault on the defendant was not proved:—It was held, that, although without it the first part of the plea was sustainable, yet, being a material allegation to maintain the plea as to the imprisonment, it was necessary to prove it, to entitle the defendant to a verdict. (3)

The causes of suspicion, must in pleading, be shewn with certainty.

A plea justifying an arrest by a private person on suspicion of felony, must shew the circumstances from which the court may judge, whether the suspicion was reasonable. (4)

A private individual who makes the charge, and puts the constable in motion, cannot justify under the general issue; he must plead the special circumstances by way of justification, in order that it may be seen, whether his suspicions were reasonable. (5)

What defence requires a joint plea.

Pleas in false imprisonment, justifying a detention in the King's Bench prison for chamber rent and for fees separately, are not either of them supported by evidence allowing the detention to have been for chamber rent and fees together; and such a defence requires a joint plea. (6)

Where plea no sufficient answer.

Where the declaration charged an assault and battery of the plaintiff, and taking him into custody along certain streets, and imprisoning him on a false charge of an assault with an intent to commit a felony; to which it was pleaded, that the plaintiff having assaulted the defendant, the latter gave the former in charge to a peace officer, who took him before a magistrate:

(1) *Mayhew v. Parker*, 8 T. R. 110.

(2) *Collett v. Keith (Lord)*, 2 East, 260.

(3) *Reece v. Taylor*, 4 N. & M. 470.

(4) *Mure v. Kaye*, 4 Taunt. 34. *Hall v. Booth*, 3 N. & M. 316.

(5) *M'Cloughan v. Clayton*, Holt's N. P. C.

478.

(6) *Stockdale v. Chapman*, 7 C. & P.

363.

(all the allegations in the count being proved), it was held, that the plea was no sufficient answer. (1)

THE PLEAD-
INGS.

Where the justification is under a writ, warrant, or other process of a court of record, the plaintiff cannot reply *de injuriâ* generally, putting the whole of the plea in issue (2); but must, according to the facts of each particular case, either specifically deny the issuing of the writ, or the making of the warrant (3), or protest the writ or warrant, which in effect admits it, and reply *de injuriâ* as to the residue. (4)

REPLICATION.

If the parties have been guilty of any illegal conduct, as undue violence, or an imprisonment before the issuing or after the return of the writ, the plaintiff should reply the facts, or new assign. (5)

And matter which shews, that the defendant, by subsequent misconduct, became a trespasser *ab initio*, should be specially replied. (6)

NEW ASSIGN-
MENT.

The object of a new assignment is to correct an error or affected error in the defendant's plea; and that, where there is no traverse of the plea, it operates as an entire waiver and abandonment of the particular trespass justified by the plea.

Therefore, in a case where the plaintiff brought trespass for false imprisonment, and the defendant justified under process which was in fact irregular, but the plaintiff, instead of traversing the plea as he ought to have done, and relying on the irregularity, new assigned that the trespass complained of was upon another and a different occasion:—It was held, that he was bound to prove a new and substantive trespass wholly unconnected with the process; and as there was only one arrest and imprisonment proved, which would have been authorised by the process had it been regular, it was answered by the plea, and the defendant was therefore entitled to a verdict. (7)

7. EVIDENCE.

EVIDENCE.

With respect to justices, it has been enacted by stat. 21 Jac. 1. c. 12. s. 5., "if upon the trial the plaintiff shall not prove that the trespass was committed within the county wherein the action, &c. is laid, then the jury shall find the defendant, without respect to the plaintiff's evidence, not guilty;" and by stat. 24 Geo. 2. c. 44. s. 5., "no evidence shall be given by the plaintiff, on the trial of any such action, of any cause of action, except such as is contained in the notice of action."

Stat. 21 Jac. 1.
c. 12. s. 5.

Trespass not
committed
within the
county.

Stat. 24 Geo. 2.
c. 44. s. 5.

In *Edwards v. Ferris* (8) it was held, that under a notice of action against a magistrate for imprisoning the plaintiff in the lock-up, the plaintiff might give evidence of the circumstances, under which he was taken into custody on the Sunday, and of what took place before the magistrate on the Tuesday; but that he could not give evidence of a declaration made by one of the constables a month before.

In an action
against a magis-
trate, evidence
is receivable of
the circum-
stances under
which the ar-
rest was made,
but declarations
made a month
previous are
inadmissible.

(1) *Stammers v. Yearsley*, 3 M. & Sc. 410.
10 Bing. 35.

(2) 1 Chitt. Pl. 593. Com. Dig. Pleader
(F.), 19, 20.

(3) *Greene v. Jones*, 1 Saund. 299. (b.)

(4) 1 Chitt. Pl. 594.

(5) *Monprivatt v. Smith*, 2 Camp. 176,
177. *Rex v. Shakespeare*, 10 East, 85.

(6) *Shortland v. Govett*, 5 B. & C. 485.

(7) *Oakley v. Davis*, 16 East, 82.

(8) 7 C. & P. 542.

EVIDENCE.

Evidence of a different imprisonment as inducement.

Memorial of assignment of judgment is admissible in an action for maliciously over-marking an execution.

Where plea substantially established.

Proof of being constable.

Warrant and conviction.

Onus of justification rests on the defendant.

Demand of warrant under stat. 24 Geo. 2. c. 44. s. 6.

DAMAGES.

No principle can be laid down respecting the specific amount of damages.

Malice appears to form no part

In an action for false imprisonment, evidence of a different imprisonment from that, for which the action is brought, is admissible as inducement. (1)

Where in trespass the defendant justifies under a *feri facias*, and the plaintiff replies a detention after a bail bond given, an actual arrest must be proved; proof of the execution of the bail bond, coupled with the admission of the trespass in the special plea, is not sufficient. (2)

In an action against the assignee of a judgment for maliciously over-marking an execution, an examined copy of the memorial of the assignment of the judgment, is evidence to shew, the sum of money mentioned in the assignment, as due upon the judgment. (3)

In an action for false imprisonment, the defendant pleaded, that the plaintiff had stolen feathers from a bed in a ready-furnished bed-room, let to him by the defendant, and that he therefore gave the plaintiff into the custody of a policeman, who, because the plaintiff resisted, beat the plaintiff, and took him to a station house. There was no evidence, either of any resistance by the plaintiff, or of any blow given by the policeman: — It was held, that, on proof of the other allegation, the plea was substantially made out. (4)

The fact of the defendant being a constable or other public officer is sufficiently shewn by proof, that he was acting as such. (5)

Where the warrant and conviction state all the circumstances which are essential to give them validity, and are connected by internal reference, no other evidence appears to be necessary than their production. (6)

In trespass for false imprisonment, the *onus* of justifying rests on the defendant; therefore, in trespass for causing the plaintiff to be apprehended under a justice's warrant, it was held, that the plaintiff might maintain the action, without producing the warrant. (7)

The demand from the constable of a copy of his warrant under stat. 24 Geo. 2. c. 44. s. 6. must be proved by the production of a duplicate original without a notice to produce (8); and it is sufficient, if the demand be signed by the plaintiff's attorney. (9)

Where the declaration does not charge the defendants as officers, the plaintiff need not, in the first instance, prove a demand of a copy of the warrant. If the defendants "mean to justify under the warrant, the proof of that lay on them; when they came to that part of the case, the plaintiff must prove a demand of a copy of the warrant." (10)

No general principle can be laid down respecting the specific amount of damages; but the plaintiff cannot recover, if the acts of the defendant were such, that any reasonable person acting without passion or prejudice would have committed.

In trespass for false imprisonment, malice appears to form no part of the cause of action. However fairly and considerably the defendant may have acted towards the plaintiff, if the imprisonment turn out to be illegal, the

(1) *Neal v. Magee*, 1 Irish Circuit Cases, 62.

(2) *Reece v. Griffiths*, 5 M. & R. 120.

(3) *Maguire v. Armstrong*, 1 Hudson & Brooke (Irish), 313. n.

(4) *Atkinson v. Wurne*, 6 C. & P. 687.

(5) *Ante*, 1560. tit. EVIDENCE.

(6) *Strickland v. Ward*, 7 T. R. 631. 633. n.

(7) *Holroyd v. Doncaster*, 11 Moore, 441. S. C. nom. *Holroyd v. Lancaster*, 3 Bing. 492.

(8) *Jory v. Orchard*, 2 B. & P. 39.

(9) *Ibid.*

(10) *Per* Lord Eldon C. J. in *Price v. Messenger*, 3 Esp. N. P. C. 96.

defendant ought to render compensation to the plaintiff to the full extent of the damage, which the latter has sustained by reason of the illegal act of the former. It would rather seem, that damages reduced below that amount, in favour of the *bona fides* of the defendant, would be inadequate damages; and that any thing exceeding that amount given in respect of the malice of the defendant would be vindictive damages.

EVIDENCE.
of the cause of
action.

And by stat. 24 Geo. 2. c. 44. s. 2. it shall be lawful for such justice of the peace, at any time within one calendar month after such notice given, to tender amends to the party complaining, or to his agent or attorney; and in case the same is not accepted, to plead such tender in bar to any action brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court; and if upon issue joined thereon, the jury find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and in such case, or in case the plaintiff become nonsuit, or discontinue his action, or judgment be given for such defendant upon demurrer, such justice of the peace shall be entitled to the like costs, as if he had pleaded the general issue only; and if the jury find that no amends were tendered, or that the same were not sufficient, and also against the defendant on such other plea, they shall give a verdict for the plaintiff, and such damages as they think proper, which he shall recover, together with his costs.

Stat. 24 Geo. 2
c. 44. s. 2.

Tender of
amends.

Where the defendant pleaded 40s. amends, and the tender was admitted by the replication, and the notice of action was for seizing and carrying away goods to the value of 40s. only, it was held, that the plaintiff could claim no more than 40s., which, being covered by the tender, he was non-suited. (1)

By stat. 24 Geo. 2. c. 44. s. 3. "no such plaintiff shall recover any verdict against such justice of the peace, where the action shall be grounded on any act of the defendant as justice of the peace, unless it is proved upon the trial of such action, that such notice was given as aforesaid; but in default thereof such justice shall recover a verdict and costs."

Stat. 24 Geo. 2.
c. 44. s. 3.
Plaintiff not
to recover
without proof
of notice.

By stat. 43 Geo. 3. c. 141. s. 1. in all actions brought against any justice of the peace on account of any conviction made by virtue of any act of parliament, or by reason of any thing done or commanded to be done by such justice of the peace for the levying of any penalty, apprehending any party, or for or about the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff, in such action (besides the value and amount of the penalty, which may have been levied upon the plaintiff in case any levy thereof shall have been made), shall not be entitled to recover any more or greater damages than the sum of two pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, and which shall be in an action upon the case only, that such acts were done maliciously, and without any reasonable and probable cause.

Stat. 43 Geo. 3.
c. 141. s. 1.

To recover
damages there
must be an
allegation of
malice.

By stat. 43 Geo. 3. c. 141. s. 2. "such plaintiff shall not be entitled to recover against such justice any penalty, which shall have been levied, nor any damages or costs, in case such justice shall prove at the trial, that such plaintiff was guilty of the offence, whereof he had been convicted, or on account

Stat. 43 Geo. 3.
c. 141. s. 2.
Plaintiff not
entitled to
recover, if

EVIDENCE

proved that the offence was committed.

Judgment of Lord Ellenborough in *Massey v. Johnson*.

Judgment of Chief Justice Gibbs in *Burley v. Bethune*.

of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater punishment than was assigned by law to such offence."

In *Massey v. Johnson* (1) Lord Ellenborough said, "It appears to me, that the true construction of the act is, to confine the protection given by it to magistrates to cases, where there has been in fact a conviction;" an informal conviction is not sufficient. (2)

In *Burley v. Bethune* (3) Chief Justice Gibbs said, "There is a wide distinction between an action against the prosecutor for a malicious prosecution, and an action against a magistrate for a malicious conviction. In the former case, proof that there was in reality no ground for imputing the crime to the plaintiff, shews that the prosecution was instituted without probable cause, and malice may be inferred from thence. What passed at the trial is, in this case, immaterial. The prosecutor may have sworn to the truth of the charge, but that will not shew that he had a probable cause for it. In an action against the magistrate for a malicious conviction, the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do, by proving what passed upon the hearing before the magistrate, when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. The conviction must be founded upon that evidence alone, and it is impossible to shew, that there was no probable cause for the conviction, without shewing what that evidence was."

Where A. caused B. to be taken into custody on suspicion of felony, and taken before a magistrate, who remanded B. for two days, and then discharged him: — It seems, that B., on a declaration for false imprisonment (in the usual form), cannot recover for the two days' imprisonment after the remand. (4)

In an action for false imprisonment, the defendant justified on the ground of the plaintiff having been his lodger, and after she had left her apartments, he discovered that some feathers were missing from a bed, which she had occupied, and that he suspecting her to be the person who had stolen them, caused her to be apprehended, &c. It appeared, that the defendant took a policeman at night to the new lodgings of the plaintiff a few days after she had left his house, and had her apprehended and taken to the station-house, and the next day she was examined before the magistrate and discharged: — It was held, that as the defendant had taken the law into his own hands, and not adopted, as a prudent person would under such circumstances, the cautious course of having previous investigation by a magistrate, and obtaining a warrant from him, it was incumbent on him to make out to the entire satisfaction of the jury, not only that a felony had been committed, but that the circumstances of the case were such, that they or any reasonable person acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it. (5)

(1) 12 East, 71.

(2) Ibid.

(3) 5 Taunt. 583, 584.

(4) *Holtum v. Lotun*, 6 C. & P. 726. *Quare*, Whether he could do so, if it were stated as special damage? Ibid.

(5) *Allen v. Wright*, 8 C. & P. 522.

Where defendant bound to prove, not only that a felony had been committed, but that he had reasonable grounds to suspect the plaintiff as the offender.

In an action of trespass and false imprisonment, for causing a person to be taken to a police station-house, if it appear, that the going, proceeded originally from the plaintiff's own will, the defendant will be entitled to a verdict on either "not guilty," or "leave and license," pleaded; but the plaintiff will not be deprived of his right to recover damages, if it appear that, *being acted upon* by the defendant's having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station-house, for the purpose of meeting the charge. (1)

EVIDENCE.

Plaintiff voluntarily going with a policeman to meet a charge preferred against him.

In an action for false imprisonment, by giving the plaintiff in charge to a police officer, the defendant may, in mitigation of damages, go into evidence to shew, that the plaintiff had for several days been in the habit of going after him and annoying him. (2)

Plaintiff guilty of personal annoyance.

In an action for false imprisonment, where a verdict for 200*l.* damages was given for one night's confinement in a prison, and evidence of a trespass by the defendant on the goods of the plaintiff, arising out of the same transaction, committed on the following day, was admitted for the purpose of shewing, that the defendant was actuated by malice:—It was held, to be no ground for granting a new trial. (3)

NEW TRIAL.

The defendant having in mitigation of damages, adduced evidence of the state of accounts between himself and the owners of the fund, which the plaintiff was recovering, under an irregular order, at the time of his being given into custody, and the jury having been told, that the fact shewn, was no mitigation of defendant's conduct, the defendant's witnesses were allowed to be cross-examined as to bill transactions between the defendant and the owners of the fund, for the purpose of negating the state of accounts set up by the defendant, although it was objected, that such an inquiry could not be gone into, unless the bills were produced:—It was held to be no ground for granting a new trial. (4)

To induce the court to grant a new trial on the ground of excessive damages, it must be shewn, that they are very excessive, or that a perverted view of the case has been taken by the jury. (5)

8. PAYMENT OF MONEY INTO COURT — POSTPONEMENT OF TRIAL — COSTS.

PAYMENT OF MONEY INTO COURT — POSTPONEMENT OF TRIAL — COSTS.

By stat 3 & 4 Will. 4. c. 42. s. 21. payment of money into court for false imprisonment is not allowed.

Where an action is brought for false imprisonment, and the defendant afterwards prefers an indictment against the plaintiff for an assault, which was the offence charged to have been committed, when the plaintiff was imprisoned, the court will not compel the plaintiff to try his cause, until the other proceedings are terminated. (6)

POSTPONEMENT OF TRIAL.

By stat. 3 & 4 Vict. c. 24. s. 2. (7), if the damages are less than 40*s.*, the plaintiff is not entitled to recover costs, unless the judge immediately after

COSTS.

Stat. 3 & 4 Vict. c. 24. s. 2.

(1) *Peters v. Stanway*, 6 C. & P. 737.

(2) *Thomas v. Powell*, 7 *ibid* 807.

(3) *Edgell v. Francis*, 1 M. & G. 222.

(4) *Ibid*.

(5) *Ibid*.

(6) *Long v. Hutchins*, 1 Hodges, 56.

(7) *Ante*, 228.

PAYMENT OF
MONEY INTO
COURT —
POSTPONEMENT
OF TRIAL —
COSTS.

Stat. 24 Geo. 2.
c. 44. s. 7.

the trial certify, that the trespass or grievance was wilful and malicious, or that the action was brought to try a right.

By stat. 24 Geo. 2. c. 44. s. 7., "where plaintiff in any such action against any justice of the peace obtains a verdict, he shall be entitled to double costs, if the judge (before whom the cause is tried) in open court will certify on the back of the record that the injury for which such action was brought was wilfully and maliciously committed." This enactment relates only to the costs incurred in the ordinary course of law. (1)

Stat. 21 Jac. 1.
c. 12. s. 5.

Double costs.

By stat. 21 Jac. 1. c. 12. s. 5., if the verdict shall pass with defendant, or plaintiff become nonsuit, or suffer any discontinuance, defendant shall have double costs. (2)

Stat. 43 Geo. 3.
c. 141. s. 2.

Stat. 43 Geo. 3. c. 141 s. 2., which deprives a plaintiff of his costs of suit against a magistrates, if the latter prove at the trial that the plaintiff was guilty of the offence imputed, only applies to cases where the conviction has been quashed. (3)

When, previously to stat. 3 & 4 Vict. c. 24., the judge had no power to certify for costs.

In trespass for assault and false imprisonment, the defendant pleaded, as to the seizing and laying hold of the plaintiff, that it was done to prevent a breach of the peace. The jury found a verdict for the plaintiff with 1*s.* damages, and the judge certified under stat. 43 Eliz. c. 6. s. 2.: — It was held, previously to stat. 3 & 4 Vict. c. 24., that as a battery was admitted on the face of the record, the judge had no power to certify, and therefore that the plaintiff was entitled to his costs. (4)

(1) *Thomas v. Saunders*, 1 A. & E. 553.

(2) The officer or person acting in aid, in order to entitle himself to double costs, must obtain a certificate from the judge, that, at the time of the trespass, he was a mayor, constable, &c. and in the execution of his office, or that he was acting in aid of mayor,

constable, &c. But it is not necessary that this certificate should be granted at the trial. *Anon.* 2 Vent. 45.

(3) *Rogers v. Jones (Clerk)*, 5 D. & R. 268. 3 B. & C. 409. R. & M. 129. *Gray v. Cookson*, 16 East, 13.

(4) *Scruton v. Taylor*, 8 Dowl. P. C. 110.

INFANT.

1. CONTRACTS WHICH CAN BE ENFORCED BY AN INFANT, pp. 2048, 2049.

2. CONTRACTS MADE DURANTE MINORITATE, WHICH CAN BE ENFORCED AGAINST AN INFANT, pp. 2049, 2050.

Friendly Society Act, 10 Geo. 4. c. 56. s. 32. — ACTS OF NECESSITY BIND AN INFANT — *Presentations to benefices* — *Admittances to and grants of copyholds* — *Liability for acts of solicitor* — *Money advanced to liberate an infant from imprisonment* — *Judgment of Lord Alvanley in Clarke v. Lealie* — *Contract of marriage* — *Where an ejectment cannot be brought without giving notice to quit.*

3. PECUNIARY PAYMENTS, AND SECURITIES FOR PECUNIARY PAYMENTS, BY AN INFANT, p. 2051.

Money cannot be recovered when paid by an infant for value — *Judgment of Chief Justice Gibbs in Holmes v. Blogg* — *Judgment of Lord Kenyon in Wilson v. Kearse* — *Bond debts* — *Account stated* — *Bills of exchange.*

4. PECUNIARY PAYMENTS TO AN INFANT, p. 2052.

Money advanced to an infant, although for an apprentice fee, cannot be recovered — *Judgment of Lord Kenyon in Smith v. Gibson* — *Fraudulent concealment of age* — *Equity will relieve, where money is lent to an infant to purchase necessities* — *Payments on account of wages to purchase necessities.*

5. NECESSARIES, pp. 2052—2057.

I. RESPONSIBILITY OF PARENTS, pp. 2052, 2053.

Parents bound to supply their children with necessities — *The father is the person to judge, what is proper for his children* — *A father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a mere stranger* — *Judgment of Lord Abinger in Mortimore v. Wright* — *Parent not bound to educate his children.*

II. WHEN THE INFANT IS LIABLE, pp. 2053, 2054.

If an agreement be for the benefit of an infant at the time, it will bind him — *Judgment of Mr. Justice Buller in Maddon v. White* — *If a father give his son a reasonable allowance for his expenses, the son is solely liable* — *Judgment of Lord Kenyon in Crantz v. Gill.*

III. WHAT ARE NECESSARIES, pp. 2054—2057.

What are necessities or not, is usually a question of fact for the jury — *Judgments of Mr. Baron Alderson in Peters v. Fleming and Burghart v. Angerstein* — *Regimentals* — *Horses* — *Jewellery* — *Lodgings* — *House-rent* — *Wife and children* — *Wife's child by a former husband.*

IV. WHAT ARE NOT NECESSARIES, p. 2057.

6. IRRESPONSIBILITY FOR TRADING CONTRACTS, pp. 2057—2059.

Judgment of Lord Kenyon in Dilk v. Keighley — *Goods sent to a minor but not received by him until after the age of twenty-one* — *Hire of house* — *House repairs* — *Reference to arbitration* — *Recitals in a deed* — *Cognovit* — *Covenant cannot be maintained for refusing to serve under an indenture of apprenticeship* —

Irresponsibility as an innkeeper — Cannot be a bankrupt; nor take the benefit of the Insolvent Act — LIABILITY OF PARTNERS AND CO-CONTRACTORS.

7. PERSONAL INCAPACITIES, p. 2059.

8. RATIFICATION AFTER FULL AGE, pp. 2059—2062.

*Contract of an infant voidable only — Moral obligation to pay, is an adequate consideration — Stat. 9 Geo. 4. c. 14. s. 5. — "Signed by the party chargeable thereby" — Nothing but a written promise will render an adult liable for a voidable debt — Circumstances under which a written promise will be invalid — Judgment of Lord Alvanley in *Martner v. Killing* — Date of promise — Written promise to pay a debt, but without a date, or amount of debt, or creditor's name — Judgment of Mr. Justice Patteson in *Hartley v. Wharton* — Voidable contracts may be confirmed conditionally — CONTINUING CONTRACTS — Disaffirmance of partnership — Confirmation of lease — Employment during minority, and continued when of age — Confirmation of marriage settlement — When bond cannot be confirmed.*

9. LIABILITY FOR TORTS, pp. 2062, 2063.

10. APPEARANCE, pp. 2063, 2064.

An infant must appear by guardian or prochein amy — When the court will appoint a guardian — Parent falsely appearing as guardian, for a minor defendant — Prochein amy can sue without authority from his minor — Admission of guardian — Effect of infant appearing in person or by attorney.

11. DECLARATION — PLEADINGS — AND PAYMENT OF MONEY INTO COURT, p. 2064, 2065.

12. EVIDENCE, pp. 2065, 2066.

Proof of infancy lies upon defendant — If plaintiff reply "necessaries," no proof of infancy need be given — Incumbent on plaintiff to prove the articles were "necessaries" — Ratification after full age — Conditional promise — Prima facie evidence of necessities to charge a father — Joint contracts.

13. COSTS, p. 2067.

Liability of infant defendant — Attachment does not generally lie against the guardian of an infant for costs — When security for costs will be required — Costs of an infant plaintiff when nonsuited — Court will not discharge infant for costs in an action of tort.

1. CONTRACTS WHICH CAN BE ENFORCED BY AN INFANT.

CONTRACTS
WHICH CAN BE
ENFORCED BY
AN INFANT.

Infancy is a personal privilege, of which no one can take advantage but the infant.

The general presumption of law is, that an infant does not know his own rights (1); and although the promise of an infant be not binding at his election (2) except for necessities, yet he may take advantage of any promise made to him, although the consideration be merely the infant's promise, as in an action on mutual promises to marry (3); on a contract for the purchase of potatoes (4); or submission to a reference. (5)

(1) 1 Inst. 246. *King v. Dilliston*, Show. 83.

(2) *Bruce v. Warwick* (in error), 6 Taunt. 118. 2 M. & S. 205.

(3) *Holt v. Ward*, Bull. N. P. 155. (a.) *Holt v. Clarencieux*, Str. 937.

(4) *Warwick v. Bruce*, 2 M. & S. 205.

(5) *Knight v. Stone*, Sir W. Jones, 164. Noy, 93.

If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he will be a trustee for the infant who may claim his share of the benefit; but if it do not prove beneficial, he must take it upon himself. (1)

Where a minor by himself and his guardian agreed to let the defendant a farm, which he refused to hold when the minor came of age, upon the ground, that the latter was under age at the time of the contract, it was decreed in equity, that the defendant should take a lease, and should pay all costs. (2)

The *onus probandi* minority does not lie with the minor, but with the adversary, in actions upon mutual contract. Thus, in an action on an agreement for a Scotch tack made with the tutors of a minor, and the action was brought in his own name, it was held, that being made for his benefit, it was competent for him to sue in his own name upon the contract, and that it lay upon the defendant to shew, that the plaintiff was a minor at the time of the action brought. (3)

An infant is not bound by any forfeiture annexed to a contract; and his obligation with a penalty, even for necessities, is absolutely void (4); therefore, an infant can recover back a sum which, while an infant, he may have paid in advance towards a share in the trade of A. B., to be retained by A. B. as a forfeiture, if the infant failed to fulfil an agreement to enter into partnership with A. B. Thus, in *Corpe v. Overton* (5) Mr. Justice Alderson observed, "The parties agree in 1832 to enter into partnership in the following January, and 100*l.* was to be paid down, to be forfeited, if the plaintiff should decline to perform his contract. Before the contract is performed, one of the parties revokes it, and remits the other to the same situation, as if the contract had never been made. There is no ground, therefore, on which he can claim to retain money for the purpose of enforcing the execution of a contract, which the law says an infant shall not enter into. In this, the case is clearly distinguishable from *Holmes v. Blogg*. (6) Here the infant has had no enjoyment of any advantage from the contract; in *Holmes v. Blogg* he had enjoyment, for a period, of premises demised to him; and so far was in the same situation, as if he had paid for expensive clothes or other articles not necessary, and, after wearing them, had brought an action for the price. In such an action, he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment."

CONTRACTS WHICH CAN BE ENFORCED BY AN INFANT.

Lessee cannot rescind a lease, in consequence of the minority of the lessee.

Infant not bound by any forfeiture annexed to a contract.

Judgment of Mr. Justice Alderson in *Corpe v. Overton*.

2. CONTRACTS MADE DURANTE MINORITATE, WHICH CAN BE ENFORCED AGAINST AN INFANT.

It is enacted by the Friendly Society Act (10 Geo. 4. c. 56. s. 32.), "that a minor may become a member of any such society, and shall be empowered to execute all instruments, give all necessary acquittances, and enjoy all the privileges, and be liable to all the responsibilities appertaining

CONTRACTS MADE DURANTE MINORITATE, WHICH CAN BE ENFORCED AGAINST AN INFANT.

Friendly Society Act, 10 Geo. 4. c. 56. s. 32.

(1) *Exp. Grace*, 1 B. & P. 376.

(2) *Clayton v. Ashdown*, 9 Vin. Abr. Infant, 393. [G. 4.].

(3) *Fitzmaurice v. Waugh*, 3 D. & R. 273. *Carnegie v. Waugh*, 2 ibid. 277.

(4) Co. Litt. 172. (a.)

(5) 10 Bing. 259.

(6) 8 Taunt. 508.

CONTRACTS
MADE DURANTE
MINORITATE,
WHICH CAN BE
ENFORCED
AGAINST AN
INFANT.

ACTS OF NE-
CESSITY BIND
AN INFANT.

Presentations
to benefices;
admittances
to, and grants
of, copyholds.

Liability for
acts of solicitor.

Money ad-
vanced to
liberate an in-
fant from im-
prisonment.

Judgment of
Lord Alvanley
in *Clarke v.*
Leslie.

Contract of
marriage.

When an eject-
ment cannot
be brought
without giving
notice to quit.

to members of matured age, notwithstanding his or her incapacity or disability in law to act for himself or herself: provided always, that such minor be admitted into such society by and with the consent of his or her parents, masters, or guardians."

Acts of necessity bind an infant—as presentations to benefices, admittances to, and grants of, copyholds. (1)

An infant is seemingly bound by the conduct of his solicitor in a cause (2); and by a decree in a court of equity. (3)

A person who pays for an infant, at his request, a debt which the latter had contracted for necessities, stands, even at law, in the situation of the original creditor, and may sue the minor for money paid. (4)

Thus, in *Clarke v. Leslie* (5) Lord Alvanley said, "If the defendant had been taken into custody for a debt contracted for necessities, discharging that demand would be to pay for necessities; so if the defendant had been in execution; that is, if at all events the defendant had made herself liable to the debt, and could not controvert it, paying that debt, I think, would be necessities. This is my opinion; and it was the opinion of other judges of great learning: but I think, that the plaintiff must shew, that debt, which was so paid here, was either for necessities, or that the party was in execution. If this was not to be required, an arrest for a supposed or fraudulent debt might be made, and the infant might be subjected to the payment of the money advanced to liberate her from an arrest, for a demand for which an infant could not legally be made liable."

A feme infant may sometimes be bound by a marriage contract, if there be an equitable and *bond fide* settlement of her property, with the consent of her friends and relations. (6)

Where an ejectment brought on the demise of an infant, has been compromised, and the tenant in possession has attorned to the infant, though the lessor of the plaintiff on his coming of age does not accept rent, or any otherwise confirm the tenancy, yet, as the former ejectment was brought at his suit and for his benefit, he will not be allowed to treat the tenant as a trespasser, and bring a new ejectment, without giving notice to quit. (7)

(1) *Zouch v. Parsons*, 3 Burr. 1801. *Evelyn (Bart.) v. Chichester*, *ibid.* 1717. In conveyance of property specifically devised to a minor, if it were made at an under value, or if there appear any circumstances from whence fraud may be presumed, a court of equity will set aside the conveyance, though made with the consent of the minor himself, and of other persons who were interested, and by the person in whom the legal estate vested. *Bailie v. Bailie*, *Ridg. Lapp, & Sch.* (Irish), 364.

A testamentary guardian can make a lease of the infant's lands for the minority. *Shaw v. Shaw*, *Vernon & Scriven* (Irish), 607.

(2) *Tillotson v. Hargrave*, 3 Madd. 495.

(3) *Wall v. Bushby*, 1 Bro. Ch. Ca. 484.

(4) *Male v. Roberts*, 9 Esp. N. P. C. 163. *Marlow v. Pufield*, 1 P. Wms. 558. *Ellis v. Ellis*, 5 Mod. 368. 12 *ibid.* 197. *Earle v. Peale*, 10 *ibid.* 67. *Finley v. Jowle*, 13 East, 6.

(5) 5 Esp. N. P. C. 29.

(6) *Ainslie v. Medlycott*, 9 Ves. 14. *Milner v. Harewood (Lord)*, 18 *ibid.* 259. 1 Powell on Contracts, 41. 51. 53. Comyn on Contracts, 622. Chitty on Contracts, 145.

(7) *Doe d. Miller v. Noden*, 2 Esp. N. P. C. 530.

3. PECUNIARY PAYMENTS, AND SECURITIES FOR PECUNIARY PAYMENTS, BY AN INFANT.

In *Holmes v. Blogg* (1) it was held, that an infant could not, in avoiding a lease made by him during his infancy, recover back a sum of money which he had paid as a premium in consideration of it; Chief Justice Gibbs stating, "In Lord Chief Justice Wilmut's notes of opinions and judgments, it appears that Lord Hardwicke and Lord Mansfield were of opinion, with the majority of the judges, that 'if an infant pays money with his own hand, without a valuable consideration, he cannot get it back again.'" (2) "We therefore think this action cannot be maintained, upon the ground, that the infant having paid the money with his own hand, cannot recover it back again." (3)

So likewise, in *Wilson v. Kearse* (4), Lord Kenyon was of opinion, that "though an infant was not compellable to complete a contract, yet that when he had paid money under it, he could not recover it back, unless he could shew, that fraud had been practised on him."

An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal. (5)

An infant cannot state an account (6), except before auditors appointed in a court of record. (7) But this could only be, where the infant was plaintiff; as an action of account does not lie against an infant (8), even though the items consist of necessaries. (9)

Yet it has been held, that an infant may bind himself by single bill, i.e. a bond without a penalty, to pay for necessaries. (10)

An infant is not liable on a bill of exchange to which he is a party, although it were given for necessaries. (11)

If a party accept a bill after he has attained the age of twenty-one, it is no objection, that it was actually drawn before, in discharge of a debt incurred, while he was an infant. (12)

PECUNIARY PAYMENTS, AND SECURITIES FOR PECUNIARY PAYMENTS, BY AN INFANT.

Money cannot be recovered, when paid by an infant for value.

Judgment of Chief Justice Gibbs in *Holmes v. Blogg*.

Judgment of Lord Kenyon in *Wilson v. Kearse*.

Bond debts.

Account stated.

Bills of exchange.

(1) 8 Taunt. 511.

(2) Wilmut's notes, 226. n.

(3) In *Corpe v. Overton* (10 Bing. 256.) Chief Justice Tindal said, "The ground of the judgment in *Holmes v. Blogg* was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before."

(4) Peake's Add. Cas. 196.

(5) *Fisher v. Mowbray*, 8 East, 330. *Baylis v. Dineley*, 3 M. & S. 477.

(6) *Trueman v. Hurst*, 1 T. R. 40.

(7) *Per Newton Serjeant*, arg. 10 Hen. 6. 14.

(8) Co. Litt. 188. (a.)

(9) *Bartlett v. Emery*, 1 T. R. 42. n. *Ingledew v. Douglas*, 2 Stark. 36. *Hedgley v. Holt*, 4 C. & P. 104.

(10) *Cupworth's case*, 1 Rol. Abr. Enfants (C.), 729. *Russel v. Lee*, 1 Lev. 86. *contra*, 21 Hen. 6. 31., *et vide* 18 Edw. 4. 2. *Monnings v. Knoppe*, 1 Rol. Abr. Action sur Case (V.), 18. S. C. nom. *Morning v. Knop*, Cro. Eliz. 700. 1 Vin. Abr. Actions, 301. [U.] *Ayliff v. Archdale*, Cro. Eliz. 920. *Stowel v. Zouche*, Plowd. 364. (b.) 9 Vin. Abr. Infant, 380. [C.] Co. Litt. 172. (a.)

(11) *Williams v. Harrison*, Carth. 160. Holt, 359., *antè*, 806. tit. BILLS OF EXCHANGE AND PROMISSORY NOTES. *Williamson v. Watts*, 1 Camp. 552. It does not appear in the latter case what party to the bill the plaintiff was.

(12) *Stevens v. Jackson*, 4 Camp. 164. Chitt. & Hul. 19.

PECUNIARY PAYMENTS TO AN INFANT.

Money advanced to an infant, although for an apprentice fee, cannot be recovered.

Judgment of Lord Kenyon in *Smith v. Gibson*.

Fraudulent concealment of age.

Equity will relieve, where money is lent to an infant to purchase necessaries.

Payments on account of wages to purchase necessaries.

4. PECUNIARY PAYMENTS TO AN INFANT.

Money advanced to an infant (1), although for the purpose of paying on behalf of the infant an apprentice fee, cannot be recovered, unless there be a written promise to pay. Thus, in *Smith v. Gibson* (2) Lord Kenyon observed, "Where a man does an act of generosity for an infant, he relies wholly on the generosity of the infant to make a suitable return. The infant ought to make a due return; but it is a duty of imperfect, not of legal obligation."

When an infant fraudulently concealed his age, and obtained from his trustees part of certain stock, which he was entitled to when of age, and upon his attaining his full age a few months afterwards, he applied for and obtained the residue:—It was held in equity, that the infant was guilty of a *fraud*; and that neither he, nor his assignees, could recover back the amount paid during nonage; and that his application for "the residue" was a binding recognition of the former payment. (3)

Although at law an infant is not liable for money lent and delivered to him to purchase necessaries, although the money be applied by him to that purpose (4), yet equity will relieve in such case, by considering, that the lender stands in the place of the infant's creditor for necessaries, who has been satisfied. (5)

Payments made to an infant on account of wages due to her to purchase necessaries are valid payments. (6)

NECESSARIES.

5. NECESSARIES.

RESPONSIBILITY OF PARENTS.

Parents bound to supply their children with necessaries.

The father is the person to judge, what is proper for his children.

A father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a mere stranger.

I. Responsibility of Parents.

It may be laid down as a general principle, that parents are bound to supply their children with necessaries; and if they do not supply them with necessaries, they will become responsible to those who do.

To charge a father with the amount of clothes or other necessaries supplied to his children, it is essential, that they should have been supplied with the assent or by the authority of his father; and the father is the person to judge, what is proper for his children. (7)

In *Mortimore v. Wright* (8) the defendant's son, an infant of twenty years of age, had lodged for some time with the plaintiff, during a part of which, he had earned wages, and paid for his board, &c. He afterwards became ill, and was unable to pay for the necessaries with which, the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer, that he could not advance any at that time, but his

(1) *Vide post*, 2054. tit. NECESSARIES.

(2) *Peake's Add. Cas.* 52.

(3) *Cory v. Gertchen*, 2 Madd. 40., *sed vide stat.* 9 Geo. 4. c. 14. s. 5., *post*, 2059.

(4) *Darby v. Boucher*, 1 Salk. 279. *Ellis v. Ellis*, 5 Mod. 368. Bull. N. P. 153.

(b.) *Probart v. Knowth*, 2 Esp. N. P. C. 472. n.

(5) *Marlow v. Pitfield*, 1 P. Wms. 558.

(6) *Hedgley v. Holt*, 4 C. & P. 104.

(7) *Rolfe v. Abbott*, 6 *ibid.* 286.

(8) 6 M. & W. 482.

son would come into possession of money in the following month, when he would be twenty-one, and would then be able to pay what he owed the plaintiff himself:—It was held, that this letter was no admission of a liability in the father; Lord Abinger observing, “In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law.” “With regard to the case in the court of King’s Bench of *Law v. Wilkin* (1), if the decision is to be taken, as it is reported, I can only say that I am sorry for it, and cannot assent to it. It may have been influenced by facts, which do not appear in the report; but as the case stands, it appears to sanction the idea, that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative; which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may reasonably be inferred, that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted: but the mere moral obligation on the father to maintain his child, affords no influence of a legal promise to pay his debts; and we ought not to put on his acts an interpretation which, abstractedly, and without reference to that moral obligation, they will not reasonably warrant. In order to bind a father in point of law, for a debt incurred by his son, you must prove, that he has contracted to be bound, just in the same manner, as you would prove such a contract against any other person; and it would bring the law into great uncertainty, if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices.”

NECESSARIES.

Judgment of Lord Abinger in *Mortimore v. Wright*.

A father is not under a legal obligation to educate his child, and cannot be made liable for such instruction, if the circumstances absolutely repudiate his assent to the contract. (2)

Parent not bound to educate his children.

II. *When the Infant is liable.*

WHEN THE INFANT IS LIABLE.

In *Maddon v. White* (3) Mr. Justice Buller said, “All the modern cases have expressly held, that an infant cannot avoid a lease, which is for his own benefit. In the argument of the case of *Zouch v. Parsons* (4), Mr. Dunning, who was arguing against the deed of the infant, says, ‘As to the infant’s lease, the benefit of the infant is to be considered. His leases are good, if rent is reserved for them: this exception arises from necessity; therefore it is necessary to validate his leases reserving rent.’ And Lord Mansfield in the case of *Drury v. Drury* (5) laid it down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him. Lord Hardwicke afterwards adopted this rule.”

If an agreement be for the benefit of an infant at the time, it will bind him.

Judgment of Mr Justice Buller in *Maddon v. White*.

Exceptions exist to the foregoing principles: thus, although an infant is

When a parent

(1) 6 A. & E. 718. 1 N. & P. 697.

(4) 3 Burr. 1806.

(2) *Hodges v. Hodges*, Peake’s Add. Cas. 79., ante, 723. tit. BARON AND FEME.

(5) Dom. Proc. 26th May, 1762. 6 Bro. App. 570.

(3) 2 T. R. 161.

NECESSARIES.

liable for
schooling.

If a father
give his son a
reasonable al-
lowance for his
expenses, the
son is solely
liable.

Judgment of
Lord Kenyon
in *Crantz v.*
Gill.

liable for his schooling, if he make the contract, yet if he be placed there by his parent or guardian, he will not be liable, because it will be implied, that the credit was given to the parent or guardian only. (1)

In *Crantz v. Gill* (2) Lord Kenyon stated, "The goods being furnished to the son, he is himself *prima facie* liable, they being necessities; if tradesmen deal with him, and he undertakes to pay them, they must resort to him for payment: the father it is true, may be liable for necessities furnished to his son on his credit; but when he gives his son an allowance, that is in lieu of all charges, and the father cannot be bound by law to pay even for necessities furnished to the son under those circumstances—it would be a great hardship on the father, who would so be obliged, twice to pay for necessities furnished to his son."

WHAT ARE
NECESSARIES.

Whether things
are necessities
or not, is
usually a ques-
tion of fact for
the jury.

III. *What are Necessaries.*

Whether things are necessities or not, is usually a question of fact for the jury: but the question generally depends upon the collateral circumstances of the case, such as the rank and situation of the party and the suitability of the articles, the finding of the jury being subject to the control of the court in point of law. (3)

A minor is only liable for necessities suitable to his state and degree, and the jury must consider, not only whether the articles delivered are suitable in point of quality, but also in point of quantity. (4)

And where an infant rented a house, and exercised his calling therein as a barber, it was held, that it was properly left to the jury to decide, whether it came within the term of necessities. (5)

The judgments of Mr. Baron Alderson in *Peters v. Fleming* and *Burghart v. Angerstein* seemingly embody the principles applicable to the oft-repeated question, What are necessities?

Judgment of
Mr. Baron Al-
derson in *Peters*
v. Fleming.

In *Peters v. Fleming* (6) Mr. Baron Alderson stated, "If it were laid down strictly, that an infant can make no contract, except for articles that would be necessary to keep him from famishing, that would be a rule which would press very hardly indeed in many cases. But that is not the rule; for a party may make contracts for necessary clothes, and for necessary education. It has been ruled, that an infant may be liable for schooling; and if it become a question, how much schooling is necessary, then you must inquire, what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another. The real question would be, Whether or not what he has contracted for be such, as a person in his station and rank in life would require? The articles must be for real use, and such as would be necessary and suitable to the degree and station in life of the infant. The question in these cases is this, Were the articles bought for

(1) *Duncomb v. Tickridge*, Aleyn, 94.

(2) 2 Esp. N. P. C. 471.

(3) Com. Dig. Infant (B. 5.)

(4) *Burghart v. Angerstein*, 6 C. & P. 690.

(5) *Semble*, that there is no distinction between a trade carried on by a minor, and

his occupation in a manual employment, and that he is not liable for the rent of a house taken for either purpose. *Lowe v. Griffiths*, 1 Scott, 458. 1 Hodges, 30.

(6) 6 M. & W. 47.

mere ornament? if so, they cannot be necessaries for any one. If, however, they are bought for *real use*, then they may be necessaries, provided they are suitable to the infant's state and degree. The jury then must say, whether they are such as reasonable persons of the age and station of the infant would require for *real use*. If so, they will be necessaries for which an infant will be liable."

NECESSARIES.

In *Burghart v. Angerstein* (1) Mr. Baron Alderson observed, "The defendant is the second son of an opulent gentleman who lives in St. James's Square, and in the bill that is the subject of the present action, he is charged for clothes supplied to him between the 19th October, 1829, and the end of July, 1830, to the amount of 421*l*. Some of the articles are clearly not necessaries. There is a racing jacket charged for. That cannot be suitable to any degree, except that of a jockey; and if that were to be considered a necessary for a young gentleman, it will next be said, that gambling is necessary for him. Eleven guineas for a waistcoat! Can that be considered necessary in any station of life, so as to charge a minor? If a person of full age orders these extravagant things, he must pay for them. If a person of full age chose to be extravagant enough, and absurd enough, to order a coat to be made of gold, and it was made for him and delivered to him, beyond all question he must pay for it; but, with respect to minors, the law is otherwise. In the present case you must consider, not only whether the articles supplied by the plaintiff were in point of quality suitable to the defendant's station and degree, but, if so, was the quantity suitable or not? It may be proper for a young man to have one thing of a sort, but not fifty; and the quantity is as much matter for your consideration as the quality. With a view to the quantity, and the quantity only, you may look at the bills of the other tradesmen by whom the defendant was also supplied; for, if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. So, if the defendant had had ten pairs of trowsers from another tailor, and just after that, the plaintiff supplied him with another pair, that other pair would not be necessary, and the plaintiff would not be entitled to be paid for it. A tradesman who deals with a minor, must look to himself, and take care of himself. With a man of full age it is matter of contract; and if, as I have already said, a man of full age orders a coat to be made of gold, he must pay for it, but not so with a minor. If a minor is supplied, no matter from what quarter, with necessaries suitable to his estate and degree, a tradesman cannot recover for any further supply made to the minor just after. You will take the plaintiff's bill, and strike out every item that is not necessary; and then, if the total of the items remaining do not exceed the amount already paid, you will return a verdict for the defendant. If they do exceed that amount, you will give your verdict for the plaintiff for the sum by which the amount is so exceeded."

Judgment of
Mr. Baron
Alderson in
Burghart v.
Angerstein.

An infant, a captain in the army, is liable to pay for a livery ordered for his servant as necessaries, but not for cockades ordered for the soldiers of his company. (2) And regimentals furnished to an infant, who was a member of a volunteer corps are also necessaries. (3)

(1) 6 C. & P. 698.

(2) *Hands v. Staney*, 8 T. R. 578.

(3) *Coates v. Wilson*, 5 Esp. N.^o P. C. 152.

- NECESSARIES.** Horses may be and are necessities, so as to subject an infant to liability for the price or hire thereof, if they be suitable to his fortune and rank in life, or are purchased and used by him for the benefit of his health under the advice of a medical man (1); and if so, he is also liable for any necessary work with regard to such horses: but then it ought to be shewn in the replication to a plea of infancy, that the horses as well as the work were necessities. (2)
- Horses.**
- Jewellery.** Jewellery may be necessities, if suitable to the rank and condition of the infant. (3)
- Lodgings.** Lodgings are also necessities, and an infant is liable for the rent of them (4); and also for a reasonable rent reserved upon a lease to him of a house which he has occupied. (5)
- House rent.**
- Necessaries supplied to the wife and children.** "Necessaries for an infant's wife are necessities for him; but if provided in order for the marriage, he is not chargeable, though she uses them." (6)
- An infant is liable for necessities supplied to his lawful children upon his express or implied credit (7); and a wife or servant can bind him for such necessities. (8)
- "But in order that the law should imply a liability in the father to repay another for supporting his child, it is absolutely necessary, that desertion of the child by the father should be proved." (9)
- Lord Bacon, in his maxims to illustrate his eighteenth rule ("*persona conjuncta æquiparatur interesse proprio*") (10) states, that the father of a bastard child is liable upon an implied contract to pay for necessities supplied to such child;—and it has been subsequently held, that he is responsible for necessities, without an order of bastardy, if he have adopted the child. (11)
- But future liability may be repudiated; and where the supposed father, having made various payments, refused to continue to support the child until the mother obtained an order of filiation, it was held, that the mother could not sue for the subsequent maintenance of the child. (12)
- Wife's child by a former husband.** If a father-in-law educate and support his wife's child by a former husband, without intending at the time to charge such child with the expenses,

(1) *Hart v. Prater*, 1 Jur. 623. Chitty on Contracts, 143.

(2) *Cloves v. Brooke*, Str 1101. Chitty on Contracts, 144., vide *Harrison v. Fane* (1 M. & G. 550.), where the court set aside a verdict for the plaintiff as perverse, because no evidence was given by him, that the horses supplied to the defendant were necessities.

(3) *Vide antè*, 2054. per Alderson B. in *Peters v. Fleming*, 6 M. & W. 47.

(4) *Crisp v. Churchill*, cit. in *Lloyd v. Johnson*, 1 B. & P. 340.

(5) *Kirton v. Elliott*, 2 Bulstr. 69. cit. per Yates J. in *Evelyn (Bart.) v. Chichester*, 3 Burr. 1719. 1 Rol. Abr. Enfants (K.), 731., sed vide *Lowe v. Griffiths*, 1 Scott, 458, Chitty on Contracts, 144. n. (d.)

(6) *Per Pratt C. J. in Turner v. Trisby*, Str. 168. Bull. N. P. 155. (a.) *Rainsford v. Fenwick*, Carter, 215.

(7) Chitty on Contracts, 144. *Manby v. Scott*, 1 Sid. 112.

(8) *Raslyns v. Vandyke*, 3 Esp. N. P. C. 250. *Rez v. Greenhill*, 4 A. & E. 624. *Cooper v. Phillips*, 4 C. & P. 581.

(9) *Per Lord Denman in Urmston v. Newcomen*, 4 A. & E. 909.

(10) Bull. N. P. 155. (a.)

(11) *Hesketh v. Gowing*, 5 Esp. N. P. C. 131. *Cameron v. Baker*, 1 C. & P. 268. *Nichole v. Allen*, 3 ibid. 36. Chitty on Contracts, 148., vide antè, 726. tit. LIABILITY OF HUSBAND IN RESPECT OF CHILDREN OF THE WIFE BY A FORMER HUSBAND. Where a testator gave a bond to parish officers, for the payment of a weekly sum in support of the bastard child of his son, he was held to have placed himself in *loco parentis*; and that such child, therefore, was entitled to interest on a legacy from the time of the testator's death. *Rogers v. Soutten*, 1 C. P. Cooper, 96.

(12) *Furillio v. Crowther*, 7 D. & R. 612.

he cannot recover a remuneration from the child on its attaining full age (1), unless there be a written promise of repayment. (2)

NECESSARIES.

IV. *What are not Necessaries.*

WHAT ARE NOT NECESSARIES.

If the plaintiff reply, that the articles supplied were necessaries, he must prove that fact.

If a tradesman trust an infant, he does it at his peril. Clothes.

If a tradesman trust an infant, he does so at his peril, and he cannot recover if it turn out that the infant has been properly supplied by his friends (3); and it is incumbent on a tradesman, before he trusts an infant with what may appear to be necessaries, to inquire, whether he is provided by his friends. (4)

If proper clothes be supplied to an infant by his father, any others furnished in addition, cannot be considered as necessaries (5); and an infant, living under the roof of his parent, who provides every thing, which in his judgment appears to be proper, cannot bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessaries. (6)

Where a minor had held a commission in the army, but sold it by reason of not having sufficient fortune to hold it;—whose father was a beneficed clergyman, and who had paid various sums for him during his minority, and had given him a further sum of 1500*l.* when he attained the age of twenty-one years:—It was held, that a stanhope was not a necessary. (7)

Stanhope.

A lieutenant in the royal navy under the age of twenty-one, is not answerable for the price of a chronometer, in an action to which he pleads his infancy, and the replication is necessaries. (8)

Chronometer.

6. IRRESPONSIBILITY FOR TRADING CONTRACTS.

Where an infant carries on trade, an action is not maintainable against him for work done for him in the course of that trade, which he so carries on, on his own account, and whereby he gains his living. Thus, in *Dilk v. Keighley* (9), in which the plaintiff was a writing painter, and the defendant a glazier and painter, and the work was done by the plaintiff in the way of his trade, in painting and gilding letters for the defendant's customers, Lord Kenyon said, "The law will not allow an infant to trade. The substratum of the present action is, therefore, that which by law cannot be done. No action can, therefore, be maintained for work done in the course of it." (10)

IRRESPONSIBILITY FOR TRADING CONTRACTS.

Judgment of Lord Kenyon in *Dilk v. Keighley*.

An infant is not liable as for necessaries in respect of goods bought to

Goods bought to sell again.

(1) *Pelly (Clerk) v. Rawlins*, Peake's Add. Cas. 226.

(2) *Cooper v. Martin*, 4 East, 76.

(3) *Story v. Pery*, 4 C. & P. 526.

(4) *Ford v. Fothergill*, Peake's N.P.C. 301.

1 Esp. N. P. C. 211. *Cook v. Deaton*, 3 C. & P. 114. *Mortara v. Hall*, 6 Simons, 465. *Charters v. Bayntun*, 7 C. & P. 52. 55. *Burghart v. Angerstein*, 6 ibid. 690. 1 M. & Rob. 458. Per Alderson B. ante, 2054, 2055.

(5) *Cook v. Deaton*, 3 C. & P. 114.

(6) *Bainbridge v. Pickering*, 2 W. Black. 1925.

(7) *Charters v. Bayntun*, 7 C. & P. 52.

(8) *Berolles v. Ramsay*, Holt, 77.

(9) 2 Esp. N. P. C. 480.

(10) Vide etiam *Whywell v. Champion*, Str. 1083. *Warwick v. Bruce*, 2 M. & S. 209. *Goode v. Harrison*, 5 B. & A. 147. *Thornton v. Illingworth*, 2 B. & C. 824.

IRRESPONSIBILITY FOR TRADING CONTRACTS.

Goods sent to a minor, but not received by him until after the age of twenty-one.

Hire of house.

House repairs.

Reference to arbitration.

Recitals in a deed.

Cognovit.

Covenant cannot be maintained for refusing to serve under an indenture of apprenticeship.

Cannot be a bankrupt; nor take the benefit of the Insolvent Act.

LIABILITY OF PARTNERS AND CO-CONTRACTORS.

Covenant of one grantor not avoided by the infancy of another.

No defence, that one of the parties is a minor, to a bill of exchange.

sell again, although he keeps an open public shop, for he has no discretion to carry on business (1); but where the debt was for grocery goods to stock his shop, but out of which his family were supplied, it was held, that *pro tanto*, as were consumed by his family, he was liable to be sued. (2)

If goods be delivered to a carrier by the vendor addressed to the purchaser, while the latter is under twenty-one, but they do not reach him till he have attained that age, infancy is a good defence to an action brought against him for the price of the goods. (3)

An infant cannot contract for the hire of a house, unless it be for the residence of himself or family (4), for the carrying on his trade or even manual occupation (5); neither is he liable for repairs done to his house (6); nor bound by an agreement to refer a dispute to arbitration (7); nor by the recitals in a deed made during infancy (8); nor by a *cognovit* executed by him. (9)

No action is maintainable against an infant, on his covenant to serve, in an indenture of apprenticeship. (10) It is however said, that by the custom of London, an infant may bind himself in an indenture of apprenticeship, so as to be subject to an action against him, even in the courts of Westminster. (11)

An infant is not liable on the custom of the realm as an innkeeper (12); nor as a bankrupt (13); and a fiat against him would be absolutely void. (14)

He cannot take the benefit of the Insolvent Act, not being in a situation to execute the necessary warrant of attorney. (15)

If an adult enter into partnership with a minor, the former will be alone responsible for the partnership engagements. (16)

The several covenant of one grantor of an annuity, is not avoided by the intimacy of another, who grants in the same deed. (17)

Where the defendant and an infant jointly and severally granted an annuity, and jointly and severally covenanted for the payment of the same, it was held, that the defendant could not avail himself of the infancy of his co-grantor under stat. 53 Geo. 3. c. 141. s. 8., in order to exonerate himself from his covenant. (18)

In an action on a bill of exchange against an adult, it is no defence, that the drawers, who had drawn the bill payable to themselves, were infants. (19)

(1) *Whittingham v. Hill*, Cro. Jac. 494.
Whywall v. Champion, Str. 1083.

(2) *Turberville v. Whitehouse*, 12 Price, 692.

(3) *Griffin v. Langfield*, 3 Camp. 254.
Dawes v. Peck, 8 T. R. 330.

(4) *Anté*, 2056.

(5) *Lowe v. Griffith*, 1 Scott, 458.

(6) *Anon.* 3 Salk. 196., *sed quare*, Whether punishable for permissive waste? *Ibid.*

(7) 4 Bac. Abr. Infancy (I.), 366., *anté*, 57. tit. ARBITRATIONS AND AWARDS.

(8) *Milner v. Harewood* (Lord), 18 Ves. 274.

(9) *Oliver v. Woodroffe*, 4 M. & W. 650.

(10) *Gylbert v. Fletcher*, Cro. Car. 179., vide *Rex v. Arnesby* (Inhab. of), 3 B. & A. 584. *Rex v. Arundel* (Inhab. of), 5 M. & S. 257. *Rex v. Queenborough* (Inhab. of), 2 B. & Ad. 219.

(11) *Stanton's case*, Sir F. Moore, 135., vide *Eden's case*, 2 M. & S. 226. 229.

(12) *Rex v. Moor*, Carth. 161.

(13) *Exp. Sydebotham*, 1 Atk. 146. *O'Brien v. Currie*, 3 C. & P. 283.

(14) *Bellon v. Hodges*, 2 M. & Sc. 196. 9 Bing. 365.

(15) *Defries v. Davis*, 3 Dowl. P. C. 629.

1 Bing. N. C. 692. *Barton v. Harworth*, 5 Madd. 50., *sed vide Weaver v. Stokes*, 1 M. & W. 203.

(16) *Glossop v. Colman*, 1 Stark. 26. *Goods v. Harrison*, 5 B. & A. 147.

(17) *Haw v. Ogle*, 4 Taunt. 10.

(18) *Gillow v. Lillie* (Sir John), 1 Bing. N. C. 695.

(19) *Taylor v. Croker*, 4 Esp. N. P. C. 187. *Drayton v. Dale*, 2 B. & C. 299. *Jones v. Darch*, 4 Fricc. 300. *Grey v. Cooper*, 3 Doug. 65.

If one of two partners be an infant, the holder of a bill accepted by both partners may declare on it, as accepted by the adult only, in the names of both; and if the defendant plead in abatement, that the other partner ought also to be sued, the plaintiff may reply his infancy, and it is no departure. (1)

IRRESPONSIBILITY FOR TRADING CONTRACTS.

7. PERSONAL INCAPACITIES.

PERSONAL INCAPACITIES.

There are various personal incapacities which attach to infants: thus, an infant cannot be appointed to the office of clerk of the court of requests, where it is part of the duty of that office for such clerk to receive the money of the suitor, as it is in the nature of an office of public trust; and if in the discharge of such trust, the infant were guilty of *crassa negligentia*, an action could not be maintained against him. (2)

Clerk of court of requests.

An infant cannot be a common informer, because he can only sue by guardian; and stat. 18 Eliz. c. 5. s. 1. requires an informer to sue, either in proper person or by attorney. (3)

Common informer.

An infant cannot exercise the office of burgess; and it seems, he cannot be a bailiff or sheriff's officer. (4)

Burgess.
Bailiff or sheriff's officer.
Executor

When an infant is sole executor, probate is not to be granted to him till he attain the age of twenty one years; and in the interim, administration with the will annexed, is to be granted to another person. (5)

But in Ireland, the office of clerk of the peace being merely ministerial, may be held by an infant. (6)

Clerk of the peace.

8. RATIFICATION AFTER FULL AGE.

RATIFICATION AFTER FULL AGE.

An infant's contract, if for his benefit, though not for necessities, is voidable only. (7)

The contract of an infant is voidable only.

If a person, on attaining his majority, ratify a voidable contract made by him during nonage, it will bind him, although there may be no other consideration, than the moral obligation to pay. (8)

Moral obligation to pay is an adequate consideration.

By stat 9 Geo. 4. c. 14. s. 5. "no action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt

Stat. 9 Geo. 4. c. 14. s. 5.

(1) *Burgess v. Merrill*, 4 Taunt. 468.

(2) *Claridge v. Evelyn*, 5 B. & A. 81.

(3) *Maggs v. Ellis*, Bull. N. P. 196. (b.)

(4) *Cuckson v. Winter*, 2 M. & R. 313.

(5) Stat. 38 Geo. 3. c. 87., *antè*, 1877, 1878. tit. EXECUTORS AND ADMINISTRATORS. *Zouch v. Parsons*, 3 Burr. 1802.

(6) *Crosbie v. Hurley*, 1 Alcock & Napier (Irish), 431. The court will, under special circumstances, permit an article clerk to be examined before he attains the age of twenty-one (*Exp. Bouafield*, 9 Dowl. P. C. 616.), if the period, at which he will be of age, be distinctly stated.

In *Exp. Cragg* (6 Dowl. P. C. 256.) Pateson J. refused a similar application; but no special circumstances were stated as the ground of the motion, nor how soon the applicant would attain his age.

(7) *Zouch v. Parsons*, 3 Burr. 1805. *Gibbs v. Merrill*, 3 Taunt. 313. *Goode v. Harrison*, 5 B. & A. 159. *Rez v. Chillesford (Inhab. of)*, 4 B. & C. 100. 1 Powell on Contracts, 54. Chitty on Contracts, 152.

(8) Co. Litt. 2. (b.), 3. (a.) *Thompson v. Leach*, 2 Vent. 203. *Southerton v. Whitlock*, Str. 690. 4 Bac. Abr. Infancy (I.), 367. Chitty on Contracts, 152.

**RATIFICATION
AFTER FULL
AGE.**

Confirmation
of promises
made by in-
fants.

"Signed by
the party
chargeable
thereby."

Nothing but a
written promise
will render an
adult liable for
a voidable debt.

Circumstances
under which a
written pro-
mise will be
invalid.

Judgment of
Lord Alvanley
in *Harmer v.
Killing*.

Date of pro-
mise.

Written pro-
mise to pay a
debt, but with-
out a date, or
amount of debt,
or creditor's
name.

contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith."

And by sect. 8. "no memorandum or other writing made necessary by this act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps."

The foregoing language, "signed by the party chargeable thereby," has been construed strictly, and will not apply to a writing signed by the agent of the party. (1)

"The word 'promise' is used to denote the engagement of a person without regard to the consideration for it, or corresponding duty of the other party." (2) From the foregoing statute, nothing but a written promise will render a person liable for a voidable debt contracted during infancy; and a part payment of money into court will not amount to a confirmation of the remainder of the demand. (3)

But if such consent be acquired by circumvention (4), or by terror of an arrest, it will be invalid; and although *ignorantia legis non excusat* (5), yet if the acknowledgment be given after age in manifest ignorance of the foregoing statute, it will not be binding: thus, in *Harmer v. Killing* (6) Lord Alvanley said, "that the infant was discharged by his nonage for goods, not necessities, if furnished to him before his full age; but that he might bind himself by a new promise, after he obtained his full age: but that he held, that such promise must be voluntary, and given with knowledge, that he then stood discharged by law. That, where an infant, under the terror of an arrest, had a promise extorted from him, or where it was given ignorant of the protection which the law afforded him, he should hold, that he was not bound to it. If therefore the jury should be of opinion, that the facts were, that this promise was so obtained, he should direct them to find for the defendant."

If a letter be dated on a day after the infant attained his majority, it will be presumed to have been written on that day. (7)

The confirmation of an infant's promise by letter is good, though not directed to plaintiff, or amount of debt named; but it lies on the defendant to shew, that the ratification in writing was made before he attained his majority: thus, in *Hartley v. Wharton* (8) it appeared, after proof of the delivery and value of the goods, that a person was sent by the plaintiff to the defendant, and presented the account, and demanded the debt; that defendant desired the messenger to call again the same day, which he did, and then received from defendant's servant a paper in defendant's handwriting, which was as follows:—

"Sir, — I am sorry to give you so much trouble in calling, but I am not prepared for you; but will without neglect remit you in a short time.

Yours respectfully,

"Monday night, 6 o'clock."

"FREDERICK WHARTON."

(1) *Hyde v. Johnson*, 2 Bing. N. C. 778.

(2) *Chitty on Contracts*, 2.

(3) *Vide Dilk v. Keighley*, 2 Esp. N. P. C. 481. *Thrupp v. Fielder*, *ibid.* 628.

(4) *Brouke v. Gallely*, 2 Atk. 34.

(5) *Stevens v. Lynch*, 12 East, 68.

(6) 5 Esp. N. P. C. 102.

(7) *Hunt v. Massey*, 5 B. & Ad. 902. 3 N. & M. 109.

(8) 11 A. & E. 934.

There was no address. The defendant's counsel objected, that this note was insufficient to satisfy stat. 9 Geo. 4. c. 14. s. 5., as it contained no date, and did not specify the debt, or the creditor's name; and, further, that the plaintiff was bound to shew, that the acknowledgment was made after the defendant attained his majority, and respecting whose age there was no evidence.

RATIFICATION
AFTER FULL
Ack.

Upon these facts Mr. Justice Patteson observed, "As to the first point, stat. 9 Geo. 4. c. 14. provides, that the promise or ratification, made after full age of the party, shall be in writing, signed by him. Now here the writing is so signed; and, no doubt, if it refers to the debt on the record, the statute is so far satisfied. The question is, Can it be so applied? There is no address on the note, but it was delivered to the plaintiff's agent for him by the defendant. On this point there is no decided case; but, if oral evidence may supply the sum and the date, it surely may supply the delivery. Now, as to the sum, we have express authority; although *Kennett v. Milbank* (1) was not expressly overruled in *Bird v. Gammon* (2), yet the effect of the latter clearly is, that the sum need not be named in the writing, but may be proved *aliunde*. *Edmunds v. Downes* (3) establishes the same rule, as to the date. Then, as to the burden of proof, *Borthwick v. Carruthers* (4), a case acted upon by Holroyd J., shews, that it lay on the defendant. In fact, the question is still, infancy or not. Suppose issue had been taken in the first instance, on the plea of infancy; no doubt the defendant must have proved it. The form of the replication is insisted upon; but it seems to have been considered, that such a replication contained a negative assertion, that the defendant was not a minor at the time of the ratification; then the rejoinder, taking issue on that, asserts the affirmative, and this on a point, within the knowledge of the defendant. I adhere to the decision in *Borthwick v. Carruthers* (5), whether I myself should, independently of authority, have so decided or not."

Judgment of
Mr. Justice
Patteson in
Hartley v.
Wharton.

As it rests entirely with the debtor, whether he will ratify voidable contracts made during his infancy, so he may confirm them conditionally; and in such case, the creditor must shew, that the condition is performed. As where an adult promises to pay "when he is able," some proof of his ability, to be inferred from his ostensible appearances and circumstances, must be given. (6) And in such case, it might be proper to declare, not only on the original demand, which is revived by the subsequent promise, but also to insert a count on the conditional promise to pay (7), subject however, to an application to strike out one of the counts. However, in all cases the confirmation must be before action brought. (8)

Voidable con-
tracts may be
confirmed con-
ditionally.

Previously to stat. 9 Geo. 4. c. 14. it was held, in the case of a *continuing* contract, voidable only by an infant on his coming of age, as in cases of partnership, that the infant was bound by and was presumed to ratify the

CONTINUING
CONTRACTS.

(1) 8 Bing. 38.

(2) 3 Bing. N. C. 883.

(3) 2 C. & M. 459. 463., *sed vide* S. C. 4 Tyrw. 173. 179.

(4) 1 T. R. 648.

(5) 8 Bing. 39.

(6) *Cole v. Sazby*, 8 Esp. N. P. C. 160.
Besford v. Saunders, 2 Hen. Black. 116.
Davies v. Smith, 4 Esp. N. P. C. 36. *Leaper v. Tutton*, 16 East, 423. So in the case of

such a promise to pay a debt barred by the Statute of Limitations. *Tanner v. Smart*, 6 B. & C. 603. *Haydon v. Williams*, 7 Bing. 163. *Gould v. Shirley*, 2 M. & P. 581.

(7) *Ibid.* *Hunt v. Massey*, 5 B. & Ad. 902.

(8) *Thornton v. Illingworth*, 2 B. & C. 824. 4 D. & R. 545. *Chitty on Contracts*, 154.

**RATIFICATION
AFTER FULL
AGE.**

contract, if he did not, within a reasonable time after he had attained his full age, give notice of disaffirmance of, or otherwise reject such contract, unless the other party dispensed with such disaffirmance. (1)

**Disaffirmance
of partnership.**

Where an infant held himself out to the world as being in partnership with J. S., and continued to act as such, till within a short period of his coming of age, but there was no proof of his doing any act as a partner after twenty-one:—It was held, that it was his duty to give notice of his disaffirmance of the partnership on his arriving at age; and, as he had neglected to do so, that he was responsible to persons, who had trusted J. S. with goods subsequently to the infant's attaining twenty-one, on the credit of the partnership. (2) Where an infant, on coming of age, mortgaged his property to a lessee by deed, reciting the lease granted during his non-age, it was held to have confirmed the release. (3)

**Confirmation
of lease.**

If a person continued in possession, without objection after his full age, of premises leased to him during his infancy, it was held, he affirmed the lease, and was liable, even for arrears of rent which accrued pending his infancy. (4)

**Employment
during mi-
nority, and con-
tinued when of
age.**

On a motion in equity to review the taxation of a bill of costs commenced during minority, the master having disallowed all the charges incurred during that period, the chancellor granted the motion, on the ground, that a continued employment when of age might, under circumstances, amount to an implied undertaking to pay the prior part of the bill. (5)

**Confirmation
of marriage
settlement.**

And it seems, that the partial accession to a feme infant's marriage settlement, on her attaining full age, confirmed and bound it *in toto*. (6)

**When bond
cannot be con-
firmed.**

But if upon the face of the instrument, it was to the prejudice of the infant, as in the case of a bond, with a penalty securing the payment of money with interest, nothing by parol could have confirmed the bond so as to have rendered him liable thereon. (7)

**LIABILITY FOR
TORTS.**

9. LIABILITY FOR TORTS.

Slander.

An infant is liable in respect of all *torts* committed by him, as for slander or battery (8); and in detinue for goods delivered to him for a particular purpose, and which he has failed to return. (9)

Battery.

Detinue.

But the plaintiff cannot, by changing the form of a breach, convert it into a *tort*.

**Breach of war-
ranty.**

An infant is not liable for a false and deceitful warranty of, or title to,

(1) *Holmes v. Blogg*, 8 Taunt. 35.

(2) *Goode v. Harrison (in error)*, 5 B. & A. 147.

(3) *Story v. Johnson*, 2 Y. & C. 586.

(4) 1 Rol. Abr. Enfants (K.), 731. *Ketsey's case*, Cro. Jac. 320. *Kirton v. Elliott*, 2 Bulstr. 69. *Evelyn (Bart.) v. Chichester*, 3 Burr. 1719. *Baylis v. Dineley*, 3 M. & S. 481. *Holmes v. Blogg*, 8 Taunt. 35. *Chitty on Contracts*, 153.

(5) *Guy v. Burgess*, 1 Smith, 117.

(6) *Milner v. Harewood (Lord)*, 18 Ves. 277.

(7) *Baylis v. Dineley*, 3 M. & S. 447., ante, 2049.

(8) 4 Bac. Abr. Infancy (H.), 354. *Jennings v. Rundall*, 8 T. R. 336.

(9) If an infant have bought goods, and on application for payment refuse to pay on the ground of his infancy, and any of the goods remain in specie, they should be demanded; and afterwards the prudent course will be, to declare in detinue for the goods, with a count in debt for goods sold and delivered; and at least on the former the plaintiff would recover, should the defendant plead infancy to the latter. 1 Chitt. Pl. 124. *Mills v. Graham*, 1 N. R. 140.

goods upon their sale (1); neither can an infant be a trespasser by prior or subsequent assent, but only by his own act. (2)

A plaintiff cannot, as previously observed, convert an action founded on a contract into a *tort*, so as to charge an infant defendant. (3) Therefore, where the plaintiff declared that, at the defendant's request, he had delivered a mare to the defendant to be moderately ridden, and that the defendant, maliciously intending, &c. wrongfully and injuriously rode the mare, so that she was damaged, &c.:—It was holden, that the defendant might plead his infancy in bar, the action being founded on a contract. (4)

This principle was also recognised in *Manby v. Scott* (5), where it was held, that if one deliver goods to an infant on a contract, knowing him to be an infant, he shall not be charged for them in *trover* and conversion; for the law will not permit a plaintiff, by changing the form of action, to vary the liability of the infant.

LIABILITY FOR TORTS.

Trespass.
An action founded on a contract, cannot be converted into an action of *tort*.

10. APPEARANCE.

An infant defendant must appear and defend by guardian. (6) But the plaintiff, if he fail in the action, cannot maintain error, because a minor defendant appeared by attorney. (7)

Upon the return of an attachment against an infant defendant, for want of appearance, the court will appoint a guardian to appear and answer. (8)

But notice of action (under stat. 3 & 4 Will. 4. c. 53. s. 103.) by an infant to an officer of the customs may be given by his *prochein amy*, although he may not be the *prochein amy* on the record. (9)

When an infant declares by his next friend, without an order for the admission of the next friend, and enters into a rule to plead, the defendant need not plead, and the rule to plead will be set aside. (10)

If a mother appear for a minor defendant as guardian, though not really so, the court will not, on that ground, set aside the appearance. (11)

The wife of a minor having committed adultery, whilst her husband was abroad in the East Indies, the father procured himself to be appointed *prochein amy*, and recovered a verdict. On motion to set aside the proceedings, on the ground of their being no authority from the son to bring the action, it was held, first, that as the defendant had reason to believe, long before the trial, that the authority of the son could not have been obtained, he ought to have made inquiries then, and that the application was now too late. Secondly, that no authority from the son was necessary, to enable the father to sue as *prochein amy*; and there being nothing to shew, that he was not properly appointed *prochein amy*, that it must be

APPEARANCE.

An infant must appear by guardian, or *prochein amy*.

When the court will appoint a guardian.

Parent falsely appearing as guardian for a minor defendant.

Prochein amy can sue without authority from his minor.

(1) *Green v. Greenbank*, 2 Marsh. 485., vide *Grove v. Nevill*, 1 Keb. 778.

(2) Co. Litt. 180. (b.) s. 4.

(3) *Jennings v. Rundall*, 8 T. R. 335.

(4) Ibid.

(5) *Manby v. Scott*, 1 Sid. 129.

(6) *Frescobaldi v. Kinaston*, Str. 784. *Castledine v. Mundy*, 4 B. & Ad. 90., sed vide *Nunn v. Curtis*, 4 Dowl. P. C. 729.

(7) Vide *Bird v. Pegg*, 5 B. & A. 418. 2 Archb. by Chitt. 943.

(8) *Carr v. Aylmer*, Vernon & Scriven (Irish), 301.

(9) *De Gondouin v. Lewis*, 10 A. & E. 117.

(10) *Major v. McIntire*, Smith & Batty (Irish), 273.

(11) *Humphreys v. Brewer*, Vernon & Scriven (Irish), 386.

APPEARANCE.

assumed, to have been properly done, and that the son would be bound by the judgment in the action. (1)

Admission of guardian.

The guardian must be (2) admitted before plea, and the admission must be stated in the plea. If, however, the defendant be of full age at the time he appears and pleads his infancy, he may appear and plead by attorney.

Effect of infant appearing in person, or by attorney.

If an infant appear in person, not by guardian or *prochein amy*, it is error in fact (3), and such error may be assigned in the court by which the judgment is pronounced. (4)

So it may be assigned in a court of error, except Dom. Proc., and (before stats. 11 Geo. 4. and 1 Will. 4. c. 70.) the court of error constituted by stat. 27 Eliz. c. 8. (5)

An appearance entered by a plaintiff for an infant defendant by an attorney is irregular, and the subsequent proceedings may be set aside without costs, even after a writ of inquiry executed. (6)

If an infant assign, by attorney, for error *coram vobis*, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error: still the court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. (7).

DECLARATION, PLEADINGS, AND PAYMENT OF MONEY INTO COURT.

11. DECLARATION, PLEADINGS, AND PAYMENT OF MONEY INTO COURT.

Where one of two parties is a minor, the action should be brought in the name of the adult, if the minor had no right to participate in the profits. (8)

Where one of the partners is a minor.

In the case of infants contracting jointly with other persons competent to enter into agreements, it is a ground of nonsuit to sue them with the persons who are legally responsible; their names should be omitted; and if the defendant plead the non joinder in abatement, the plaintiff can reply the infancy. (9)

Infant cannot be sued with his co-contractors.

If the plaintiff declare on a joint contract, and one defendant plead infancy, the plaintiff cannot enter a *nolle prosequi* and proceed against the other defendant in that action, but must commence a new action against the adult. (10)

PLEADINGS.

By Reg. Gen. H. T. 1834, infancy must be specially pleaded.

Stat. 11 Geo. 4. & 1 Will. 4. c. 47. s. 10.

By stat. 11 Geo. 4. & 1 Will. 4. c. 47. s. 10. "where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur; but such action, suit, or other proceeding, shall be prosecuted and carried on in the same manner and as effectually as any action or suit could, before the passing of this act, be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur."

Parol cannot demur by or against infants.

(1) *Morgan v. Thorne*, 7 M. & W. 400. 9 Dowl. P. C. 228.

(2) Tidd, 99. Archb. by Chitt. 941.

(3) *Castledine v. Mundy*, 1 N. & M. 635. 4 B. & Ad. 90.

(4) Ibid.

(5) Ibid.

(6) *Nunn v. Curtis*, 4 Dowl. P. C. 729.

A motion, on behalf of an infant defendant,

to set aside irregular proceedings, may be made by his father or an attorney; but it must appear to be made with the consent of the defendant. Ibid.

(7) *Beven v. Cheshire*, 3 Dowl. P. C. 70.

(8) *Tedd v. Elworthy*, 14 East, 210.

(9) 1 Chitt. Pl. 43.

(10) *Chandler v. Parkes*, 3 Esp. N. P. C. 76. *Jaffray v. Frebain*, 5 ibid. 47.

The defendant can plead in abatement, that the plaintiff (unless he sue with others as an executor) is an infant, and has declared by attorney.

DECLARATION,
PLEADINGS,
AND PAYMENT
OF MONEY INTO
COURT.

If in *assumpsit* the defendant plead in abatement, "that he made the promise jointly with another person," and that person be an infant, the plaintiff may reply the infancy. The form of the replication should be the infancy, not "that the defendant alone promised." (1)

Plea in abate-
ment.

In *assumpsit*, if the defendant plead infancy in bar, the plaintiff can, if the plea be untrue, reply, denying the fact; or if true, he may reply, that the goods mentioned in some of the counts of the declaration to have been sold to the defendant, were necessaries (which fact will not be intended unless alleged); and that the money mentioned in the count for money paid, was paid in the purchase of necessaries for the defendant; and may enter a *nolle prosequi* as to the counts for money lent, had, and received, and upon an account stated; or he may reply to the whole or part, that the defendant ratified and confirmed the promise after he came of age; and a ratification by defendant of his acceptance of a bill of exchange after he came of age, and before the bill fell due, will support a count on a promise to pay according to the tenor and effect of the bill. (2)

In a replication to a plea of infancy, enough must be shewn to support every part of the declaration. (3)

Replication.

To an action of debt on bond with a penalty, infancy was pleaded; to which it was replied, that, after the making of the bond and before commencement of the suit, the defendant attained his full age, and afterwards, and before the suit, assented to and ratified and confirmed the bond. Upon special demurrer it was held, that the replication was ill, for an infant cannot give a bond with a penalty for the payment of interest; and unless he be estopped by some act at full age of as high authority as the bond, he might avoid it. (4)

Replication to a plea of infancy, that the defendant, since the making of the promises, attained twenty-one, and that, before the exhibiting of the bill he ratified and confirmed the promises, is good after verdict, though it omit to allege, that he ratified and confirmed after he came of age. (5)

If money be paid into court when there is a plea of infancy, the defendant may still avail himself of his infancy. (6)

PAYMENT OF
MONEY INTO
COURT.

12. EVIDENCE.

EVIDENCE.

The proof of a plea of infancy lies upon the defendant (7); and if to a plea of infancy the plaintiff reply, denying the infancy, or that the defendant ratified, in writing, his promises to pay, after he came of age, it will be incumbent on the defendant to prove the time of his birth, this evidence being more particularly within his own power. (8)

Proof of in-
fancy lies upon
defendant.

(1) *Gibbs v. Merrill*, 3 Taunt. 307.

(2) 1 Chitt. Pl. 581.

(3) *Trueman v. Hurst*, 1 T. R. 40.

(4) *Baylis v. Dineley*, 3 M. & S. 477., et
vide *Fisher v. Mowbray*, 8 East, 330.

(5) *Cohen v. Armstrong*, 1 M. & S. 724.

(6) *Hitchcock v. Tyson*, 2 Esp. N. P. C.
481. n.

(7) *Jeune v. Ward*, 2 Stark. 328. *Leader*
v. Barry, 1 Esp. N. P. C. 553.

(8) *Borthwick v. Carruthers*, 1 T. R. 648.

EVIDENCE.

Mode of
proving in-
fancy.

Trial of non-
age.

Infancy may be proven by some members of the infant's family; but an entry in the register of the christening of a child, as to the time of birth, is not of itself evidence of the age. (1)

The trial of the nonage of a party is either by inspection, or in the ordinary way by a jury. In a suit to reverse a fine for the nonage of the cognisor, or to set aside a statute or recognisance, and similar cases, a writ issues to the sheriff, commanding him, that he constrain the party to appear, that, it may be ascertained by the view of his body by the king's justices whether he be of full age or not, "*ut per aspectum corporis sui constare poterit justiciariis nostris si prædictus A. B. sit plenæ ætatis necne.*" (2) Where the court entertains doubts of the fact upon inspection, it may proceed to take proofs of the fact by the examination of the infant himself and other witnesses, if necessary. (3)

If plaintiff re-
ply "neces-
saries," no proof
of infancy need
be given.

If the plaintiff reply, that the goods, &c. were necessities, no evidence of the infancy need be given; but it lies upon the plaintiff to prove the defendant's rank and situation in life, and that the goods, &c. were suitable to his means and station. (4)

Incumbent on
plaintiff to
prove the ar-
ticles were ne-
cessary.

It is incumbent on the plaintiff to prove affirmatively, that the articles were necessities, on an issue raising that question; and if he give no evidence thereon, the verdict will be for the defendant. The question is mixed of law and fact; and if the jury find contrary to the opinion of the judge, the court will grant a new trial, without costs. (5)

Ratification
after age.

In an action for goods sold to an infant, the issue being "necessaries," if any article proved to have been furnished to the defendant fall within the description of necessities, the evidence ought to be left to the jury. (6)

If the defendant have established his nonage, at the time the contract was made, the plaintiff, upon a replication of a subsequent ratification, must prove a written ratification or promise to pay by the defendant after he had attained his full age, and before the commencement of the action. (7)

Conditional
promise.

If the promise be to pay, when the party is able, the plaintiff must prove that the defendant was of ability; but it is sufficient to give evidence of ability from ostensible circumstances and appearance in the world. (8)

Prima facie
evidence of
necessaries to
charge a father.

It will be *prima facie* evidence to charge a father for necessities supplied to his son, to prove, that the son lived under his father's roof, and that the goods were necessities, and were delivered at the residence of the latter, or that the father saw the son wearing the clothes. (9)

Joint contracts.

In *assumpsit*, a plea in abatement, that the defendant made the promise jointly with another, is supported by evidence, that the promise was made by the defendant jointly with an infant: it is for the plaintiff to plead and prove, that the infant has avoided his promise, if he would reduce the joint contract to a sole contract. (10)

(1) *Wihen v. Law*, 3 Stark. 63. *Rez v. Clapham*, 4 C. & P. 29. *Burghart v. Angerstein*, 6 ibid. 690. *Doe d. Wollaston v. Barnes*, 1 M. & Rob. 339., *antè*, tit. EVIDENCE, 1677.

(2) *Le Case del Abbot de Strata Mercella*, 9 Co. 31. According to Glanville (lib. xiii. c. xv.), nonage was formerly tried by a jury of eight men. 3 Black. Com. 332. 2 Stark. Ev. 3d ed. 555.

(3) 3 Black. Com. 332.

(4) *Chitty on Contracts*, 858.

(5) *Harrison v. Fane*, 1 Scott, N. C. 287.

(6) *Maddox v. Miller*, 1 M. & S. 738. *Hands v. Slaney*, 8 T. R. 578. *Ford v. Fothergill*, 1 Esp. N. P. C. 211., *sed vide Maharell v. Bachelor*, Cro. Eliz. 583. *Coates v. Wilson*, 5 Esp. N. P. C. 152.

(7) *Thornton v. Illingworth*, 2 B. & C. 824., *antè*, 2059, 2060.

(8) *Cole v. Saxby*, 3 Esp. N. P. C. 159.

(9) *Law v. Wilkin*, 6 A. & E. 718. *Chitty on Contracts*, 146.

(10) *Gibbs v. Merrill*, 3 Taunt. 307.

13. COSTS.

Costs.

Costs are payable by an infant defendant. (1)

It seems that an attachment does not generally lie against the guardian of an infant defendant for non payment of the costs of the action, because, as observed by the court in *Coane d. Coane v. Coane* (2), "When an action is brought against an infant, by ejectment or otherwise, he *must* appear; for the plaintiff is not to be delayed, unless, indeed, in cases where the parol may demur, and the appearance of the infant *must* be by his guardian (3); so that it is not a voluntary act, as in the case where the guardian or next friend institutes the suit."

Liability of infant defendant.

Attachment does not generally lie against the guardian of an infant for costs.

But, in *Brady v. Finnegan* (4), an application for an attachment against the guardian for non payment of costs was granted. It appeared, that the remembrancer having been appointed guardian to a minor defendant, upon process of contempt for want of an appearance, the court upon motion of the minor by her mother and testamentary guardian gave her liberty to answer by her testamentary guardian, "paying the costs as offered by the defendant's notice of the 30th of January; the costs to be paid within a week after taxation, and the answer to be filed within a week after the payment of such costs." The notice of the 30th of January was served by the mother of the minor, informing the plaintiff, that she had appeared and was about to answer for the minor; and offering to pay the costs occasioned by the appointment of the remembrancer as guardian. The minor's answer was afterwards filed and accepted by the plaintiff, the costs not having been paid.

Where an attachment will be granted against a guardian for non payment of costs.

Where in an action by an infant, a person (not the father) was appointed *prochein amy*, who it afterwards appeared, was an uncertificated bankrupt, the court stayed the proceedings until he should give security for costs, or another *prochein amy* should be appointed. (5)

When security for costs will be required.

It is doubtful, whether an infant plaintiff, being nonsuited, is liable to be taken in execution for the costs of the nonsuit. (6)

Costs of an infant plaintiff when non-suited.

The court will not discharge an infant, in an action of slander, from execution for damages and costs, although the insolvent court has refused to relieve him; because, on account of his infancy, he was unable to make the assignment of property required by stat. 7 Geo. 4. c. 57. s. 11. (7)

Court will not discharge infant for costs in an action of tort.

(1) Chitty on Contracts, 858.

(2) 2 Hudson & Brooke (Irish), 358.

(3) In *Simpson v. Jackson* (Cro. Jac. 640.), where an infant defendant having appeared by *prochein amy*, it was held to be error.

(4) 1 Jones & Carey (Irish), 426.

(5) *Watson v. Frazer*, 9 Dowl. P. C. 741.

(6) *Dow v. Clark*, 2 Dowl. P. C. 302. 1 C. & M. 860.

(7) *Defries v. Davies*, 3 Dowl. P. C. 629. 1 Bing. N. C. 692.

INSURANCE [LIFE].

1. THE CONTRACT DEFINED, pp. 2068, 2069.

If there be no warranty, the insurer takes the risk upon himself — Loss upon the contract must be total — To make the insurer liable, not merely the cause of the death, but the death itself, must appear to have happened within the time limited — Duration of life is a question of fact for the jury — DATE OF POLICY.

2. INTEREST OF THE INSURER IN THE LIFE OF THE INSURED, pp. 2069—2071.

Stat. 14 Geo 3. c. 48. s. 1. — "Interest" in stat. 14 Geo. 3. c. 48. ss. 1. & 3 means, "pecuniary interest" — Wife need not prove her interest — Creditors have insurable interests in the lives of their debtors — If debt be paid, creditor cannot enforce payment of the insurance — Infancy of the debtor cannot be objected to, where the debt is voidable — Insurance not effected according to the directions of the assured — Executor in trust.

3. PAYMENT OF PREMIUM, pp. 2071, 2072.

Insurance company debiting their agent with the premium, is not a payment to the company by the assured — Agent improperly receiving money, no evidence of a new contract between the insurers and assured — Where premium, if due, must be paid in the lifetime of the assured — Interest not recoverable, although the policy be not paid at the time stipulated.

4. THE CONSIDERATION, p. 2072.

No interest is insurable unless it be legal — Wagering policies.

5. FALSE REPRESENTATIONS, pp. 2073, 2074.

Suppression of facts avoid the policy — Knowledge of the insured not requisite to constitute an untrue statement — Judgment of Lord Lyndhurst in Duckett v. Williams — Parol answers to a parol inquiry — Unusual high premium, no proof that the office considered the assured a bad life — Assured bound by the representations of his agent — Question of fact for the jury to consider, whether a material fact has been withheld.

6. HEALTH AND AGE OF THE ASSURED, pp. 2074—2076.

False reference to the medical attendant — When a warranty will not be falsified by proving, that the assured laboured under a particular infirmity — Judgment of Lord Mansfield in Ross v. Bradshaw — Agent of a company expressing himself satisfied with the age of the assured, will not dispense with proof of age — When verbal admissions of the assured will not be received to contradict the policy — Unintentional misrepresentation of age.

7. ILLEGAL ASSIGNMENT OF POLICY, p. 2076.

1. THE CONTRACT DEFINED.

THE CONTRACT DEFINED.

The insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or an annuity equivalent, upon the death of the person whose life is insured, *whenever this shall happen*, if the insurance be for the whole life,

or in case this shall happen within a certain period, if the insurance be for a limited time.

If there be no warranty the insurer takes the risk upon himself: thus, in *Stackpool v. Simon* (1) Lord Mansfield stated, "When there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of any knowledge of the state of the life, it is a fraud. It is a rule, that every subsequent underwriter gives credit to the representation, made to the first; and it is allowed, that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here, does not pretend to any knowledge of his own, but speaks from information. There is no fraud in him."

As by the terms of this contract, the entire sum insured is to be paid on the happening of one single event, which cannot *partially* happen, and by the happening of which the insured must suffer all the injury against which he meant to be protected by the insurance, the loss must always be total, and never can be partial.

Not only the cause of the loss, but the loss itself, must appear to have happened during the continuance of the risk; therefore, if a man's life be insured for a year, and "some short time before the expiration of the term, he receives a mortal wound, of which he dies *after the year*, the insurer would not be liable." (2)

The duration of life is a question of a fact for the determination of a jury:—thus, if an insurance be made upon a man's life who goes to sea, and the ship in which he sailed is never afterwards heard of, the question whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances which shall be produced in evidence before them. (3)

Chief Justice Holt stated in *Sir Robert Howard's case* (4), "that from the day of the date excludes the day; but from the date includes it."

But, in *Pugh v. Leeds (Duke of)* (5) it was holden, that the words "from the date" and "from the day of the date" mean the same thing; that they are taken to be either inclusive or exclusive, according to the context and subject-matter; and that either meaning shall be adopted which shall most effectually support, not defeat, the intention of the parties.

THE CONTRACT DEFINED.

If there be no warranty, the insurer takes the risk upon himself.

Judgment of Lord Mansfield in *Stackpool v. Simon*.

Loss upon the contract must be total.

To make the insurer liable, not merely the cause of the death, but the death itself, must appear to have happened within the time limited.

Duration of life is a question of fact for the jury.

DATE OF POLICY.

2. INTEREST OF THE INSURER IN THE LIFE OF THE INSURED.

By stat. 14 Geo. 3. c. 48. s. 1. "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made, contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever."

And by sect. 2. "it shall not be lawful to make any policy or policies on

INTEREST OF THE INSURER IN THE LIFE OF THE INSURED.

Stat. 14 Geo. 3. c. 48. s. 1.

Any insurance made on any life, or other event, wherein the insured shall have no interest, shall be void.

(1) Cit. Marshall on Insurance, 775.

(2) Per Willes J. in *Lochyer v. Offley*, 1 T. R. 260.

(3) *Patterson v. Black, Park* on Insurance, 644.

(4) 2 Salk. 625. *Anon.* 1 Ld. Raym. 480.

(5) Cowp. 714.

**INTEREST OF
THE INSURER
IN THE LIFE OF
THE INSURED.**

And the name of the person interested in the event, shall be inserted in the policy.

And the insured shall recover no more than the amount or value of his interest.

This act not to extend to marine insurances.

The word "interest" in stat. 14 Geo. 3.

c. 48. ss. 1. & 3., means "pecuniary interest."

Wife need not prove her interest.

Creditors have insurable interests in the lives of their debtors.

If debt be paid, creditor cannot enforce payment of the insurance.

Infancy of the debtor cannot be objected to, where the debt is voidable.

the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote."

And by sect. 3. "in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

The fourth section contains a proviso, that this act shall not extend to insurances *bond fide* made on ships, goods, or merchandise.

To render a policy valid within stat. 14 Geo. 3. c. 48. ss. 1. & 3., the party for whose benefit it is effected, must have a pecuniary interest in the life or event insured; and therefore a policy effected by a father in his own name, on the life of his son, he not having any pecuniary interest therein, was holden to be void. (1)

A wife making an insurance on her husband's life, need not prove, that she was interested therein. (2)

A creditor has an insurable interest in the life of his debtor: thus, in *Anderson v. Edie* (3) Lord Kenyon said, "A creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied, might materially depend upon it; and that, at all events, the death must, in all cases, in some degree, lessen the security."

If A., being indebted to B., die, and C. agree to pay the debt by instalments in five years, A. has an insurable interest in the life of C. for those five years. (4)

Where a policy of insurance has been effected on the life of a debtor, as a security to the lender of money, and the lender charges the premiums to the account of the debtor, who pays them, if the principal be afterwards paid, the debtor, or his representative, is entitled to the policy. (5)

It is however questionable, whether a party may insure his life for the benefit of another, who provides the funds to pay the premiums, and intends to take the benefit of the policy. (6)

If after the death of a debtor, whose life is insured by a creditor, and before any action brought on the policy the debt be paid, no action will lie, because the action is founded on a supposed damnification of the plaintiff's, occasioned by his death, and existing at the time of the action brought; and therefore, if, before the action brought, the damages occasioned by his death were prevented by payment of his debt, the ground of the action is destroyed. (7)

The infancy of the debtor cannot be objected to by the insurer, where the debt is voidable; because the interest is contingent, whether the minor upon coming of age will ratify the debt or not; and until a voidable security be avoided by the infant, it must be taken as against a third person, to be the security of a person of full age; and besides which, it is the infant alone who can take the objection of infancy. (8)

(1) *Halford v. Kymer*, 10 B. & C. 724.

(2) *Reed v. Royal Exchange Assurance*
Comp. Peake's Add. Cas. 70.

(3) *Marshall on Insurance*, 777.

(4) *Von Lindenau v. Desborough*, 3 C. & P. 353. 8 B. & C. 586. 3 M. & R. 45.

(5) *Holland v. Smith*, 6 Esp. N. P. C. 11.

(6) *Wainwright v. Bland*, 1 M. & W. 32.

(7) *Godsall v. Boldero*, 9 East, 72.

(8) *Dwyer v. Edie*, cit. *Marshall on Insurance*, 779.

In *Barron v. Fitzgerald* (1) it appeared, that Messrs. Barron and Stewart, having been directed by defendant to effect an insurance on his life in his own name, or in their names to whom he was indebted, effected an insurance in their own names, and also in that of a third person named Smith, whom they had taken into partnership:—upon which it was held, that they had no authority for effecting the assurance in the three names; and the defendant never having acknowledged the transaction, that they could not recover from him the amount of premiums paid on the policy; Mr. Justice Bosanquet observing, “The question is, whether he authorised such a policy, and whether the difference in the names might not seriously affect his interests; one way has been shewn in which it might. If Barron and Stewart had both died, Smith as survivor might have received the money, or released the insurance office, to the inconvenience of the defendant’s executor. I think, therefore, that the insurance was not according to the power, and that the rule for a nonsuit must be absolute.”

INTEREST OF
THE INSURER
IN THE LIFE OF
THE INSURED.

Insurance
not effected
according to
the directions
of the assured.
Judgment of
Mr. Justice
Bosanquet in
*Barron v. Fitz-
gerald*.

An executor in trust has a sufficient interest to enable him to make assurance in his own name, on the life of a person who has granted an annuity to the testator. (2)

Executor in
trust.

3. PAYMENT OF PREMIUM.

The policy will be void, unless the premium be paid within the stipulated periods.

PAYMENT OF
PREMIUM.

Upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the insurance company, through whom the assurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were, that the premium on every life policy must be received within fifteen days of its becoming due; if not paid within that time, that he was to give immediate notice to the office of that fact; and in the event of his omitting to do so, that his account would be debited for the amount after the fifteen days had expired. No notice was given to the company of the non payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount:—It was held, first, that the mere debiting the agent with the premium could not be considered as a payment to the company by the assured, because it was in fact to operate as a penalty on him; secondly, that, as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company’s books debiting him with the amount, were no evidence of a new agreement between the company and the assured. (3)

Insurance com-
pany debiting
their agent
with the pre-
mium, is not a
payment to the
company by
the assured.

Agent im-
properly receiv-
ing money, no
evidence of a
new contract
between the
insurers and
assured.

The conditions annexed to a personal contract, like a policy of insurance, must be performed according to the terms used, and the apparent intent of the parties, and are not satisfied by a performance *cy près*.

(1) 6 Bing. N. C. 201.

(3) *Acey v. Fernie*, 7 M. & W. 151.

(2) *Tidswell v. Ankerstein*, Peake’s N. P. C. 204., *et vide post*, 2081.

**PAYMENT OF
PREMIUM.**

Where pre-
mium, if due,
must be paid
in the lifetime
of the assured.

Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of insurance with the society for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society during his life; and the society covenanted with him and his executors, &c. that if he should pay to their clerk the quarterly premiums on the quarter days, during his life, and if he should also pay his proportion of contributions, which the members of the society should, during his life, be called on to make, in order to supply any deficiencies in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: and by the rules of the society, if any member neglected to pay up the quarterly premiums for fifteen days after they were due, the policy was declared to be void, unless the member (continuing in as good health as when the policy expired) paid up the arrears within six months, and 5s. per month extra:—It was held, that a member insuring, having died, leaving a quarterly payment over-due at the time of his death, the policy expired; and that a tender of the sum by the member's executor, though made within fifteen days after it became due, did not satisfy the requisition of the policy and the rules of the society, which required such payment to be made by the member in his lifetime, continuing in as good health as when the policy expired. (1)

Interest not re-
coverable, al-
though the
policy be not
paid at the
time stipulated.

Interest is not recoverable in an action of covenant upon a policy of assurance on the life of A., by which a certain sum was made payable six months after due proof of his death, although the money insured, was not paid at the time stipulated for that purpose. (2)

**THE CONSIDER-
ATION.****4. THE CONSIDERATION.**

No interest is
insurable un-
less it be legal.

No creditor has an insurable interest in the life of his debtor, unless the debt be incurred upon a good and legal consideration; and therefore, the holder of a note, given for money won at play, has not an insurable interest in the life of the maker of such note. (3)

Consideration
against public
policy.

When policy
not to be void
in case of sui-
cide or death.

If a party effect an insurance for life, on condition, that the sum insured shall be paid, in case of suicide, or death by sentence of the law, such contract would be void, as being contrary to public policy, by taking away the restraint of public crimes; and if no such clause be inserted in the policy, the effect will be the same, because, if such condition be void when expressed, it cannot be sustained, where it has no other foundation than a mere inference. (4)

Wagering life
policies legal
in Ireland.

It seems, that wagering life policies in Ireland are lawful; and that in an action on such a policy, interest could neither be averred nor proved. (5)

(1) *Want v. Blunt*, 12 East, 183.

(2) *Higgins v. Sargent*, 3 D. & R. 613.
2 B. & C. 348.

(3) *Dwyer v. Edie*, cit. Marshall on In-
surance, 779., post, 2076.

(4) *Amicable Assur. Soc. v. Bolland*, 2 Dow
& C. 1. 4 Bligh, N. S. 194.

(5) *Shannon v. Nugent*, 1 Hayes (Irish),
536. *Schweiger v. Magee, Cooke & Alcock*
(Irish), 182.

5. FALSE REPRESENTATIONS.

In *Wainwright v. Bland* (1) Mr. Baron Parke observed, "From the nature of the contract, a suppression of any material fact, or a false answer to any material question, must avoid the policy." (2) And it is immaterial, whether such facts have been withheld by fraudulent design or innocent omission. (3)

In *Duckett v. Williams* (4), where by a declaration and statement as to health, &c. signed by the assured, previous to effecting a policy on a life, it was agreed, that if any untrue averment was contained therein, or if the facts required to be set forth in the proposal (annexed) were not truly stated; the premiums should be forfeited, and the assurance be absolutely null and void. But upon its appearing, that the statement as to the health of the life was untrue in point of fact, but not to the knowledge of the party making it:—It was holden, that the premiums were forfeited, and could not be recovered back, Lord Lyndhurst observing, "The point is, whether the facts stated were *not truly* stated within the meaning of the declaration and agreement. It was contended, on behalf of the plaintiffs, that the words must mean "truly" or "untruly," within the knowledge of the party making the statement; and that if the party insuring ignorantly and innocently makes a misstatement, he is not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue, because the party making it is not apprised of its untruth; and looking at the context, we think it clear, that the parties did not mean to restrict the words in the manner contended for. Two consequences are to follow, if the statement be untrue—one, that the premiums are to be forfeited; the other, that the assurance is to be void. Now, if the statement were untrue, within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and, therefore, must be so as to the first; for it would be contrary to all the rules of construction to hold, that it was material as to one consequence, and not as to the other. We are, therefore, of opinion, that these premiums are forfeited under the clause in question, and that a nonsuit must be entered."

A suppression of facts will vitiate a policy, although it be in answer to a parol inquiry; and the policy is, by the articles of the insurance office, to be void on false answers being given to certain written inquiries. (5)

Thus, where a party going to insure her life for two years, gave false answers to verbal inquiries, whether she had effected similar insurances at other offices:—It was held, that the policy was thereby avoided. (6)

And the fact that, on a life policy, an unusually high premium was paid, is quite immaterial, and therefore not to be taken as a proof, that the office considered the party to be a bad life. (7)

FALSE REPRESENTATIONS.

Suppression of facts avoid the policy.

Knowledge of the insured, not requisite to constitute an untrue statement.

Judgment of Lord Lyndhurst in *Duckett v. Williams*.

Parol answers to a parol inquiry.

Unusual high premium no proof, that the office considers the assured a bad life.

(1) 1 M. & W. 35.

(2) *Lindenau v. Desborough*, 8 B. & C. 586. 3 C. & P. 353.

(3) *Abbott v. Howard*, 1 Hayes (Irish), 381.

(4) Vide etiam *Maynard v. Rhode*, 5 D. & R. 266. 1 C. & P. 360.

(5) *Wainwright v. Bland*, 1 M. & W. 32.

(6) Ibid.

(7) *Lindenau v. Desborough*, 3 C. & P. 353.

FALSE REPRESENTATIONS.

The assured bound by the representations of his agent.

Question of fact for the jury to consider, whether a material fact has been withheld.

In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they be false, although he is unacquainted with the life insured, and the servant of the insurance office undertakes to do all that is required by his office. (1)

It is a question of fact for the jury to consider, whether a material fact has been withheld. Thus, where the conditions of a life insurance required a declaration of the state of the health of the assured, and the policy was to be valid only, if the statement were to be free from all misrepresentation and reservation: the declaration described the assured as resident at Fisher-ton Anger; she was then a prisoner in the county gaol there:—It was held, that it was a question for the jury, whether the imprisonment was a material fact, and ought to have been communicated. (2)

A female upon whose life it was proposed to effect an insurance, was represented to the insurers in December, 1822, by A. a medical man, as enjoying ordinarily a good state of health. The same representation was repeated by A. in March, and the insurance was effected in April, 1823. Between December, 1822, and March, 1823, she had been ill with a pulmonary attack, and was attended by B.; but no disclosure of these circumstances was made to the insurers. In April, 1824, she died of a pulmonary disease:—It was decided on motion for a new trial, that the jury ought to have been called on to consider, whether the illness in 1823, and the attendance of B., ought to have been disclosed to the insurers; and that it was not sufficient to direct them generally to consider, whether or not there had been any misrepresentation. (3)

6. HEALTH AND AGE OF THE ASSURED.**HEALTH AND AGE OF THE ASSURED.**

It is generally a condition or warranty, in an insurance upon a life, either inserted in the policy, or contained in a declaration or agreement signed by the insured, that the person whose life is meant to be insured, has not any disorder which tends to the shortening of life; that he has or has not had the small-pox; and that his age does not exceed a certain period; that this declaration shall be the basis of the contract between the insurers and the insured; and, that if any untrue averment be contained therein, the contract shall be void, and all money paid on account of the insurance forfeited.

False reference to the medical attendant.

In *Everett v. Desborough* (4) the plaintiff effected an insurance on the life of another, with whom he was unacquainted, and desired the agent of the insurance office to do all that was requisite. The agent knew the insured well, and made the usual inquiries. One of the terms of the contract was, a reference to the usual medical attendant of the party:—It was held, that as the assured had given a false reference, he could not recover.

Reference to a

In *Morrison v. Muspratt* (5) the court held, that "if there was a reference

(1) 5 Bing. 503.

(2) *Huguenin v. Rayley*, 6 Taunt. 186.

(3) *Morrison v. Muspratt*, 4 Bing. 60. 12 Moore, 231.

(4) 5 Bing. 503.

(5) Cit. per Best C. J. in *Everett v. Desborough*, ibid. 503.

to a man who *had been* the medical attendant, and no reference to the person who *was* the medical attendant of the life insured at the time the policy was effected, such an omission to refer to the proper person would vacate the policy."

A warranty that the insured party is in good health, will not be falsified by proving that he laboured under a particular infirmity, if it had no tendency to shorten life. Thus, in *Ross v. Bradshaw* (1) Lord Mansfield said, "that there was a distinction between a common insurance and one with warranty; that the concealment of many circumstances will vitiate the first, which will not vitiate the second; because in the second, the insured takes it upon him to prove, in case of death, that *cestui que vie* was in a general good state of health."

It is not to be concluded, that a disorder with which a person is afflicted before he effects an insurance on his life, is a "disorder tending to shorten life" within the meaning of the declaration required by the Equitable Insurance Office, from the mere circumstance, that he afterwards dies of it, if it be not a disorder which generally has that tendency. (2)

A warranty of good health will not be falsified by shewing, that the party was troubled with spasms and cramps from violent fits of the gout. Thus, in *Willis v. Poole* (3) Lord Mansfield observed, "The imperfection of language is such, that we have not words for every different idea; and the real intention of the parties must be found out by the subject-matter. By the present policy, the life is warranted to some of the underwriters in health; to others, in good health; and yet there was no difference, in point of fact: such a warranty can never mean, that a man has not in him the seeds of some disorder; we are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract." (4)

A policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appear, that the disorder was of such a character, as to prevent the party from being conscious of what had happened to him while suffering under it. (5)

If the agent of the insurers, at the time of effecting the policy, expressed himself satisfied as to the age of the life insured as represented to him, it will not dispense with the necessity of proving the age, as stated in the warranty. (6)

In an action on a policy of insurance upon the life of W. M., which contained a warranty, that W. M. did not exceed the age of fifty-nine years:—It was held, that, after the death of W. M., his unsworn declarations as to his own age, made several years before the date of the policy, were not admissible in evidence in proof of his age. (7)

In covenant upon a policy of insurance upon the life of M. L., reciting

HEALTH AND AGE OF THE ASSURED.

former medical attendant, but not to the person who was the medical attendant at the time the policy was effected.

When a warranty will not be falsified by proving that the assured laboured under a particular infirmity.

Judgment of Lord Mansfield in *Ross v. Bradshaw*.

Warranty of good health will not be falsified from the party having spasms and cramp from the gout.

Person formerly afflicted with a disorder tending to shorten life.

The agent of a company expressing himself satisfied with the age of the assured, will not dispense with proof of age.

When verbal admissions of the assured, will not be received to contradict the policy.

(1) 1 W. Black. 312.

(2) *Watson v. Mainwaring*, 4 Taunt. 763.

(3) *Cit. Marshall on Insurance*, 774.

(4) Since the decision of this case (1780), the insurance offices generally require an express statement from the person desirous

of having his life insured, whether he has ever been afflicted with the gout.

(5) *Sweet v. Fairlie*, 6 C. & P. 1.

(6) *Westropp v. Bruce*, 1 Batty (Irish), 155.

(7) *Ibid*.

**HEALTH AND
AGE OF THE
ASSURED.**

**Unintentional
misrepresentation
of age.**

that M. L. had declared his age did not exceed forty-three years on a day named, and containing a proviso, that if any thing stated in such declaration should be untrue, then the policy should be null and void. The plaintiff averred, that the age of M. L. did not exceed forty-three years on that day; upon which fact issue was joined. At the trial, there being conflicting evidence as to the age of M. L., and some evidence having been given that the agent of the insurers was satisfied with the representation made by him as to his age, and acquiesced in it, the judge left it to the jury to say, whether the age of M. L. exceeded forty-three years or not, or whether the insurers had adopted the age as given in by him, and acquiesced in it; and the jury found a verdict for the plaintiff, at the same time declaring, that there was misrepresentation of the age, but not intentional; and that the insurers, by their agents, had adopted the age as given in, and acquiesced in it. Upon motion to set aside this verdict for misdirection of the learned judge, it was held, that, upon this finding, a verdict ought to have been directed for the defendants; and although they did not call for any such direction at the trial, and made no objection to the charge at that time, the defendants might move to set aside the verdict upon payment of the costs of the trial, the jury having found in their favour the only fact in issue between the parties, viz. that the age of M. L. had been misrepresented by him. (1)

7. ILLEGAL ASSIGNMENT OF POLICY.

**ILLEGAL AS-
SIGNMENT OF
POLICY.**

In *Scott v. Roose* (2) it appeared, that A. promised B. his clerk to increase his weekly salary, if B. would insure his own life, and assign the policy to A. B. did so, and without consideration assigned the policy to A., who shortly after dismissed B. from his service on unfounded pretences. On a bill filed by the representatives of B. the assignment was declared void, and the amount of the policy (deducting the premiums which were proved to have been paid by A.) was decreed to be handed over to the plaintiffs, and the defendant was made to pay the costs;—Mr. Baron Richards observing, “I think it against public policy, that a master should be allowed to insure the life of his dependant servant.”

(1) *Murphy v. Harris*, 1 Batty (Irish), 206.

(2) *Longfield & Townsend* (Irish), 54., et vide ante, 2069—2071.

INSURANCE [FIRE].

1. THE CONTRACT GENERALLY, pp. 2077—2079.

Several insurances on the same property — If a policy refer to printed proposals, the proposals will be considered as part of the policy — Commencement and termination of risk — Where the insurance company have the option to determine the insurance at the end of the year — There must be an actual fire or ignition — “Usurped power” — “Civil commotion.”

2. PAYMENT OF PREMIUM, p. 2080.

3. INTEREST OF THE ASSURED, pp. 2080, 2081.

Insurance against fire without interest is void at common and by statute law — Stat. 14 Geo. 3. c. 48. — Parties may insure without having the absolute property — Profits of a business are insurable — Assignment of policies — Judgment of Lord Chancellor King in Lynch v. Dayrell.

4. DESCRIPTION OF THE PROPERTY, pp. 2081—2084.

Suppression of a material fact vitiates the policy — What is a material concealment — The property insured must be defined with certainty — Where property will be considered as household, and not stock in trade — “Granary” — “Kiln for drying corn in use” — “Where no fire is kept, and no hazardous goods are deposited” — “Barn” — “Dwelling-house” — “Mill worked by day only” — “Plaintiff can repel the evidence adduced for the defendant” — When the defence is, that the assured had wilfully destroyed his property, the evidence for the plaintiff, must be as conclusive, as if it were in a criminal proceeding — Proof of policy.

5. ADJUSTMENT OF DAMAGES — PAYMENT OF MONEY INTO COURT — VENUE, pp. 2084—2086.

The question for the jury is the actual loss of the plaintiff — Judgment of Mr. Baron Pennefather in Vance v. Forster — Plaintiff not bound by his account of the loss as delivered to the insurance company — PAYMENT OF MONEY INTO COURT — VENUE.

1. THE CONTRACT GENERALLY.

In the contract of insurance against fire, the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against all loss or damage, which he may sustain in his houses or other buildings, stocks, goods, and merchandise, by fire during a limited period of time. THE CONTRACT GENERALLY.

It frequently occurs, that no one office will insure to the full amount required by a particular person, who has a large property to insure, and under such circumstances, the party can only cover his whole interest by several insurances made at different offices.

But in all the printed proposals, there is an article which declares, that persons insuring must give notice of any other insurance, made elsewhere, upon the same houses or goods, that the same may be allowed by indorsement on the policy, in order, that each office may bear its rateable propor-

Several insurances on the same property.

THE CONTRACT
GENERALLY.

If a policy refer to printed proposals, the proposals will be considered as part of the policy.

Commence-
ment and ter-
mination of
risk.

tion of any loss that may happen. But unless such notice be given of each insurance, to the office where another insurance is made, on the same effects, the insurance, made without such notice, will be void. (1)

If a policy of insurance refer to certain printed proposals, the proposals will be considered as part of the policy. (2)

By the proposals of the Phoenix Company it is stipulated, that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, churchwardens, and some reputable householders of the parish, importing, that they knew the character, &c. of the assured, and believe that he really sustained the loss, and without fraud."—It was held, that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial, that the minister, &c. wrongfully refused to sign the certificate. (3)

A deed-poll containing an insurance against fire may refer to conditions in a printed paper, without stamp, seal, or signature; and it may be a part of those conditions, that the insured shall procure a certificate of his character, and that the loss happened without fraud. (4)

The risk commences from the signing of the policy, unless some other time be specified, and it will of course end with the term for which it is made.

Insurances against fire are in general either annual, or for the term of seven years at an annual premium, and the offices, as an indulgence to the insured generally, allow fifteen days from the expiration of each year for the payment of the premium for the next succeeding year. But the insured has always been considered, as being under the protection of the policy, till the expiration of the fifteen days, provided the premium were paid within that time.

In a policy of insurance against loss by fire, after reciting a proposal to effect an insurance for one year, the agreement was stated to be—that if during the continuance of the policy the property should be burnt, the directors would pay for or reinstate the same; and that the policy should not be valid for more than fifteen days after the time limited, unless the premium and stamp duty for the renewal should be paid within that time; a loss happened after the end of the year, but before the expiration of the fifteen days:—It was held, that the insurers were liable. (5)

In a policy of insurance against loss by fire, from half a year to half a year, the assured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within fifteen days after the expiration of the former half year; and it was also stipulated, that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the end of one half year, but before the premium for the next was paid:—It was held, that the insurers were not liable, though the assured tendered the premium before the end of the fifteen days, but after the loss. (6)

(1) Marshall on Insurance, 789.

(2) *Worsley v. Wood* (in error), 6 T. R. 710. 2 Hen. Black. 574., et vide *Oldman v. Bewicke*, ibid. 577. n.

(3) Ibid.

(4) *Routledge v. Burrell* (Bart.), 1 Hen. Black. 254.

(5) *M'Donnell v. Carr*, 1 Hayes & Jones (Irish), 256.

(6) *Tarleton v. Staniforth* (in error), 1 B. & P. 471. 5 T. R. 695. 3 Anst. 707.

If the insurance company, having an option to determine the insurance at the end of the year, give the insured notice of their intention to do so, they are not liable for a loss happening within the fifteen days after the end of the year. (1)

By a policy under seal, three of the directors of a fire association admitted the plaintiff as a member of that society upon the terms and conditions prescribed by the deed of settlement of the association; and he subscribed a certain sum as the consideration money for one year's insurance. It was declared, that he should be entitled to a remuneration out of the society's funds, in case of loss by fire happening to any property therein specified, not exceeding the sums set against each article respectively; and it was further stipulated, that neither of the directors who signed the policy, nor the plaintiff, nor the holder of it, should, as members of the society, be subject or liable to any demand for loss, except under the articles establishing the society, and as was provided by the same. The plaintiff having sustained a loss by fire, brought an action of covenant against the directors who signed the policy, and averred in his declaration, that the funds of the association were sufficient to satisfy the amount of such loss, and the jury found a verdict for him: — It was held, that such declaration was sufficient, and that the defendants were liable by the terms of the policy, and the court of Common Pleas refused to arrest the judgment. (2)

F., W., and M., being trustees and directors of a fire insurance company, executed a policy to indemnify A. and others from loss by fire, whereby they ordered, directed, and appointed the directors for the time being, to pay the loss which A. and others should sustain in the event of a fire happening; and the policy, amongst other clauses, went on to recite, certain provisions containing the words "conditions and agreements;" and a loss having happened: — It was held, that the policy was not an instrument or agreement upon which covenant would lie, and consequently, that neither the executing parties, nor the directors for the time being, were liable at law. (3)

There must be actual fire or ignition to entitle an assured to recover; for where there had been damage merely by heat in the chimney of a sugar house, in consequence of negligently lighting the fire without opening the register at the top, the court held, that the assured could not recover, there being no ignition. (4)

In the printed proposals it is provided, that "no loss or damage by fire happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

The words "usurped power" mean an invasion from abroad (5), or an internal rebellion, where armies are drawn up against each other, where the laws are silent, and where the firing of towns becomes unavoidable.

The words "civil commotion" in a policy of insurance against fire, were held to exclude losses happening in consequence of the riots in London of 1780. (6)

THE CONTRACT GENERALLY.

When insurance company have the option to determine the insurance at the end of the year.

Where covenant cannot be maintained.

There must be an actual fire or ignition.

"Usurped power."

"Civil commotion."

(1) *Salvin v. James*, 6 East, 571.

(2) *Andrews v. Ellison*, 6 Moore, 199., et vide *Severa v. Olive*, *ibid.* 235.

(3) *Alchorne v. Saville*, *ibid.* 202. n.

(4) *Austin v. Drewe*, Marshall on Insurance, 790. 6 Taunt. 436. 4 Camp. 360. Holt's N. P. C. 126.

(5) *Drinkwater v. London Assurance Comp.* 2 Wils. 363.

(6) *Langdale v. Mason*, Marshall on Insurance, 793. An insurance company, who paid a loss occasioned by riot, were enabled to sue the hundred upon the Riot Act (stat. 1 Geo. 1. c. 5. s. 6.), in the name of the

2. PAYMENT OF PREMIUM.

PAYMENT OF
PREMIUM.

In the body of the policy, the company acknowledge the receipt of the premium at the time of making the insurance; and by the printed proposals of the different societies it is expressly stipulated, that no insurance shall take place, till the premium be actually paid by the insured, his, her, or their agent or agents. This premium or consideration money is in all the offices at the rate of 2s. per cent. for any sum not exceeding 1000*l.*, and 2s. 6*d.* from 1000*l.* upwards. But this must be understood to mean the premium upon common insurances only; for upon hazardous trades and wooden buildings, &c. the premium is proportioned to the risk. (1)

Apportionment
of premium.

Whenever the risk to be run is entire, there never is a return of premium, though the contract should cease and determine the next day after its commencement; consequently, if the property insured should be destroyed by fire, arising from the act of a foreign enemy, the very day after the commencement of the policy, though the underwriter would be discharged, yet there can be no apportionment or return of premium.

Where assured
entitled to a
return of pre-
mium.

In *Fish v. Masterman* (2) it appeared, that an insurance was effected on the 12th of April on a cargo of cotton then at sea, by five several policies, at the rate of 50 guineas *per cent.*; and on the 13th news of the vessel's safety having arrived, a farther insurance was *bond fide* effected by six different policies, at 10 and 5 guineas *per cent.* The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not:—It was held, that the assured were entitled to a return of premium on the amount of over insurance, to which the underwriters who subscribed the policies of the 13th of April were to contribute rateably, in proportion to the sums insured by them respectively (the amount of over insurance to be ascertained by taking into account all the policies); but that no return of premium was to be made in respect of the policies offered on the 12th.

INTEREST OF
THE ASSURED.

Insurance
against fire
without in-
terest, is void
at common and
by statute law.

3. INTEREST OF THE ASSURED.

An insurance against fire, without interest, is void at common law. Thus in *Lynch v. Dayrell* (3) Lord Chancellor King held, that the party insuring must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction. And in the case of *The Sadlers' Company v. Badcock* (4) Lord Hardwicke observed, "that the insured must have an interest or property at the time of insuring, and at the time the fire happens."

Stat. 14 Geo. 3.
c. 48.

The stat. 14 Geo. 3. c. 48. s. 1. prohibits all insurances without interest, "upon any event or events whatsoever." The 4th section indeed provides,

insured. *Mason v. Sainsbury*, Marshall on Insurance, 796.

Stat. 1 Geo. 1. c. 5. s. 6. was repealed by stat. 7 & 8 Geo. 4. c. 27., *vide etiam* stat. 7 & 8 Geo. 4. c. 31.; but the case of *Mason v. Sainsbury* was recognised in *Clark v. Blything* (*Inhab. of*), 2 B. & C. 254., and in *Yates v. Whyte*, 4 Bing. N. C. 279.

(1) Respecting the amount of duties, *vide* stats. 22 Geo. 3. c. 48. ss. 1 & 2., 37 Geo. 3. c. 90. s. 19., 55 Geo. 3. c. 184., 9 Geo. 4. c. 14. s. 1., 3 & 4 Will. 4. c. 23.

(2) 8 M. & W. 165.

(3) Cit. 2 Atk. 557. 3 Bro. P. C. 497.

(4) 2 Atk. 554.

that it shall not extend to marine insurances, which shews, that it was the intention of the legislature that it should extend, according to the above words in the enacting clause, to every other species of insurance; and therefore there can be no doubt of its extending to insurances against fire; and consequently the insured, whatever may be the amount of his insurance, can only recover to the extent of his interest." (1)

It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor, or agent, with the custody of goods to be sold upon commission, may insure; but generally with this limitation, that the nature of the property be distinctly specified, and that all the insurances upon the same property, taken together, shall not exceed the full value thereof.

The profits of a business are insurable, but they must be insured *quid* profits: thus, In *re Wright and Pole* (2) Mr. Justice Taunton said, "If a party would recover such profits as these, he must insure them *quid* profits. I never heard before of a recovery of profits of a business as an incidental part of the loss under an insurance upon a house or ship."

But under an insurance by A. of his "interest in the Ship Inn and offices," A. cannot recover compensation for the loss of his business as an innkeeper, in the interval between the fire and the rebuilding. (3)

In *Lynch v. Dayrell* (4) Lord Chancellor King said, "These policies are not insurances of the specific things mentioned to be insured; nor do such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment; but they are only special agreements with the persons insuring, against such loss or damage as they may sustain." "These policies are not in their nature assignable; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office."

Policies can be transferred to executors, administrators, and heirs. (5)

INTEREST OF THE ASSURED.

The insured can only recover, in case of loss, to the extent of his interest.

Parties may insure without having the absolute property.

Profits of a business are insurable.

Assignment of policies.

Judgment of Lord Chancellor King in *Lynch v. Dayrell*.

4. DESCRIPTION OF THE PROPERTY.

The purest equity and good faith are essentially requisite, to the validity of a policy against fire; and if there be a suppression of a material fact, or a false statement, the policy will be vitiated.

A. having two warehouses abroad, writes to this country to effect an insurance upon one of them only, without stating, as was the fact, that a house nearly adjoining it had been on fire on that evening, and that there was danger

DESCRIPTION OF THE PROPERTY.

Suppression of a material fact vitiates the policy.

What is a material concealment.

(1) By stat. 14 Geo. 3. c. 78. s. 83. (Party Wall Act) if a house be insured and situate within the limits of that act, and is burnt down, any person interested has a right to insist upon the insurance money being laid out in rebuilding. Thus, where A. bought a house on a bad title, and insured, and B. recovered in ejectment, but before the possession was delivered, the house was burnt down: — It was held, that

B. had a right to insist on the money being laid out in rebuilding. *Pearce v. Watts*, B. R. T. T. 20 Geo. 3. B. P. B. 97; Dampier's MSS. Lincoln's Inn Library.

(2) 1 A. & E. 621. S. C. *nom.* In *re Sun Fire Office*, 3 N. & M. 819.

(3) *Ibid.*

(4) 3 Bro. P. C. 497.

(5) *Ibid.* *Park on Insurance*, 662., *ante*, 2071.

DESCRIPTION
OF THE PRO-
PERTY.

The property
insured must
be defined with
certainty.

Where prop-
erty will be
considered as
household, and
not stock in
trade.

"Granary;"
"kiln for dry-
ing corn in
use."

Judgment of
Lord Denman
in *Shaw v. Rob-
berds*.

of the fire again breaking out; and sends his letter after the regular post time. The fire having broken out again on the day next but one following, and consumed A.'s warehouse, it was held, that this was a material concealment, although A.'s letter was written without any fraudulent intention. (1)

When a thing is warranted to be of a particular nature or description, it must be exactly such, as it is represented to be, otherwise the policy will be void; therefore, where a mill was insured as being of one class, and turned out to have been of another at the time it was insured, it was held, that an action on a policy against a loss by fire, could not be sustained, because, whether the misrepresentation was in a material point or not, or whether the risk was equally great in the one class as in the other, was wholly immaterial, the only question being, whether the building was *de facto* that, which was insured. (2)

But it seems, that even in a case of warranty, it would be a good answer, that the mistake or misrepresentation was to be attributed solely to the insurers themselves or their agent. (3)

Where a person who is not a linendraper, insures his "stock in trade, household furniture, linen, wearing apparel, and plate," by a policy against fire, this will not protect linendrapery goods subsequently purchased on speculation; for the word "linen" in the policy, must be confined to household linen by way of apparel: thus, in *Watchorn v. Langford* (4) Lord Ellenborough observed, "Here we may apply '*noscitur a sociis*;' the preceding words are 'household furniture,' and the succeeding 'wearing apparel;' the 'linen' must be 'household linen or apparel.'"

In *Shaw v. Robberds* (5) the plaintiff insured premises against fire, by the description of a granary, &c. and "a kiln for drying corn in use," communicating therewith. By the conditions of insurance, the policy was to be forfeited unless the buildings were accurately described; and the trades carried on therein specified; and if any alteration were made in the building, or the risk of fire increased, the alteration, &c. was to be notified and allowed by indorsement on the policy, otherwise the insurance to be void. The plaintiff carried on no trade in the kiln except drying corn; but, on one occasion, he allowed the owner of some bark, which had been wetted, to dry it gratuitously in the kiln, and this occasioned a fire, by which the premises were destroyed on the third day after the drying of the bark commenced. Drying bark was a distinct trade from drying corn, and more hazardous, and insurers charged a higher premium for bark kilns than corn kilns:—It was held, that the assured was not precluded from recovering, either on the ground of an alteration of risk, or, in the absence of fraud, because the fire arose from his negligence; Lord Denman observing (6), "The condition points at an alteration of business, at something permanent and habitual; and if the plaintiff had either dropped his business of corn drying, and taken up that of bark drying, or added the latter to the former, no doubt the case would have been within that condition. Perhaps, if he had made any charge for drying this bark, it might have been a question for the jury, whether he had done so as a matter of business, and whether he had

(1) *Bufe v. Turner*, 6 Taunt. 333. 2 Marsh. 46.

(2) *Newcastle Fire Insurance Comp. v. Macmorran*, 3 Dow, 255.

(3) *Ibid.*

(4) 3 Camp. 422.

(5) 6 A. & E. 75.

(6) *Ibid.* 82.

not thereby, although it was the first instance of bark drying, made an alteration in his business within the meaning of that condition." "No clause in this policy amounts to an express warranty, that nothing but corn should ever be dried in the kiln; and there are no facts, or rule of legal construction, from which an implied warranty can be raised."

DESCRIPTION
OF THE PRO-
PERTY.

If the policy be on premises "where no fire is kept, and no hazardous goods are deposited;" it means the habitual use of fire and deposit of hazardous goods; and therefore, where a fire happened in consequence of making a fire, and bringing a tar-barrel on the premises for the purpose of repairing them, it was held, the insured were entitled to recover. (1)

"Where no fire is kept, and no hazardous goods are deposited."

An agricultural building was described in a policy as a barn, though it was not strictly so:—It was held, not to be such a misdescription as would vacate the policy, as the building, had it been rather more correctly described, would have been paid the same rate of insurance. (2)

"Barn."

Goods insured were described in the policy to be in the dwelling-house of the insured; the insured had only one room, as a lodger, in which the goods were:—It was held, correctly described within the condition, that "the houses, buildings, or other places where goods are deposited and kept, shall be truly and accurately described;" such condition relating to the construction of the house, and not to the interest of the parties in it. (3)

"Dwelling-house."

A policy of insurance on a mill, millwright's work, including standing and going gear therein, engine house and steam engine, recited "that the aforesaid buildings were brick built, warmed by steam, lighted by gas, &c. and worked by the steam engine above mentioned, in the tenure of one firm,"—"standing apart from all other mills, and worked by day only." In an action of covenant to recover the amount of a loss by fire, it was held, that the recital did not mean, that the steam engine was not worked by night. (4)

Mill "worked by day only."

A condition was likewise indorsed on the foregoing policy avoiding it, if after the insurance was effected, the risk should be increased by the erection of any stove, or the carrying on any hazardous trade, &c. The defendant pleaded, that after the making of the policy, the said steam engine was worked by night, and not by day only, whereby the risk was increased:—It was held, that the plaintiff was entitled to judgment, notwithstanding a verdict for the defendant on this plea, it being bad in omitting to state, that the engine was not worked in the same way before the policy was effected. (5)

In an action against insurers, on a fire insurance policy upon the machinery of cotton mills, containing a warranty, that the mills should be worked by day only;—a plea, that a steam engine and horizontal shafts, being parts of the mills, were without defendant's consent worked by night, and not by day only, was held bad on motion for judgment *non obstante veredicto*, as not shewing a breach of the warranty. (6)

Where a plea does not shew a breach of the warranty.

Upon an issue, whether the plaintiff was interested in goods destroyed by fire, a witness called by the plaintiff stated, that invoices of the goods and letters of advice, purporting to be written by him at Edinburgh, were fabricated in London after the fire by the plaintiff's direction, upon which it

Plaintiff can repel the evidence adduced for the defendant.

(1) *Dobson v. Sotheby*, M. & M. 90.

(2) *Ibid.*

(3) *Friedland v. London Assurance Comp.*
M. & Rob. 171.

(4) *Whitehead v. Price*, 2 C. M. & R.
447. 1 Gale, 151.

(5) *Ibid.*

(6) *Mayall v. Mitford*, 6 A. & E. 670.

**DESCRIPTION
OF THE PRO-
PERTY.**

When the defence is, that the insured had wilfully destroyed his property, the evidence for the plaintiff must be as conclusive as if it were a criminal proceeding.

was holden, that the plaintiff might call other witnesses to disprove the alleged fabrication, and shew the genuineness of the documents. (1)

In an action against an insurance company to recover a loss sustained by fire, the defence was, that the plaintiff had wilfully set fire to the premises, and the judge directed the jury, that, in order to find a verdict against the plaintiff, they should be satisfied that the crime imputed to him was as fully and satisfactorily proved, as would warrant them in finding him guilty on a criminal charge for the same offence:—It was held, that such direction was right. (2)

A plaintiff effected a policy of insurance against fire, with a condition, that he should forfeit all benefit under the policy, if there were any fraud or false swearing in the claim he made; a fire ensued, and the plaintiff made affidavit of the damage to the extent of 1085*l.*: having sued for the amount, and a jury having found a verdict for him with only 500*l.* damages, the court granted a new trial. (3)

Proof of policy. To prove an insurance from fire at a public office, the policy must be produced. (4)

**ADJUSTMENT
OF DAMAGES —
PAYMENT OF
MONEY INTO
COURT —
VENUE.**

The question for the jury is, the actual loss of the plaintiff.

Judgment of Mr. Baron Pennefather in *Vance v. Forster*.

**5. ADJUSTMENT OF DAMAGES — PAYMENT OF MONEY INTO COURT —
VENUE.**

In adjusting the damages in an action on a policy of insurance against fire, the question for the jury is, the actual loss of the plaintiff: that loss is to be estimated by the expense of restoring the premises to the state in which they were at the time of the fire, not by any settled rule of deduction for the difference between old and new materials, or by the first cost of the property insured.

Thus, in *Vance v. Forster* (5) Mr. Baron Pennefather observed, "It has been truly stated, that a policy of insurance is a contract of indemnity; and that while the insured may name any sum he likes, as the sum for which he will pay a premium, he does not, by so proposing that sum, nor does the company by accepting the risk, conclude themselves as to the amount which the plaintiff is to recover in consequence of the loss; because, although the plaintiff cannot recover beyond the sum insured upon each particular item of insurance, he cannot recover even that sum, unless he proves that he has sustained damage, and then he will recover a sum commensurate to the loss which he has sustained; and therefore, what the jury have to inquire is, What is the actual damage sustained by the plaintiff on the subjects of insurance, in consequence of the fire? In order to arrive at a conclusion on this subject, it strikes me, that they are to take into account the state of the machinery at the time the fire happened. They are to endeavour to ascertain that state by the examination of witnesses; by a consideration of the first cost, and by the state of repair in which the machinery was kept and was in immediately before the fire. It is said, on the one hand, that it is not unfair to go pretty near to the actual value of new machinery; — and on the

(1) *Friedlander v. London Assurance*
Comp. 1 N. & M. 31.

(2) *Thurtell v. Beaumont*, 8 Moore, 612.
1 Bing. 339.

(3) *Levy v. Baillie*, 7 Bing. 349 5 M.
& P. 208.

(4) *Rez v. Doran*, 1 Esp. N. P. C. 127.
(5) 1 Irish Circuit Cases, 51.

other side it is contended, that a certain rateable deduction ought to be made from the price of new machinery; and that, after that rateable deduction has been made, the balance is to be given to the plaintiff. These are not, in my mind, the tests by which the plaintiff's loss should be estimated. It is impossible to lay down any general rule that one third, or one fourth, or one half should be deducted from the original price, or from the price of new machinery, because that would be excluding from the consideration of the jury the actual state or serviceable order of the machinery at the time of the fire. But the jury are to say what state of repair the machinery was in; what it would cost to replace that machinery by new machinery, taking into account the entire expense of replacing such new machinery; and how much better (if at all,) the mill would be with the new machinery than it was at the time of the fire; and the difference is to be deducted from the entire expense of placing there such new machinery. I put this only as an instance, — I think the plaintiff must be borne harmless from his actual loss, and therefore allowance should be made for transporting the machinery — for putting it up, and replacing it '*in statu quo*.' The company had a right, if they chose, to put the place '*in statu quo*.' It is fair, that they should have this right to protect themselves against fraud or excessive demands, if they chose to compensate the plaintiff in that way; and therefore the loss is to be estimated by the expense the plaintiff would be at, in restoring the premises to the state in which they were at the time of the fire. But inasmuch as there may be a difficulty or an impossibility in restoring the premises to the state in which they were, I think it would be a fair criterion to see, what would be the expense of placing new machinery, such as was in the mill before, and to deduct from that expense, the difference in value between such new machinery and the old machinery which was destroyed. I think such difference is the actual loss sustained by the plaintiff; he should be indemnified in his actual loss, but the company should not be called on to go beyond that. There is no settled rule of deduction of one third, or one fourth, or of any other sum; but the jury are to exercise their judgment on what has been the actual loss of the plaintiff. I have thrown out what occurs to me as one good way of ascertaining that loss. Other ways may strike the minds of intelligent men acquainted with these matters. My opinion on the point of law is, that the plaintiff is entitled to his actual loss, and nothing more."

Where a detailed account of the loss sustained by the fire is delivered in compliance with a stipulation in the policy, the plaintiff is not precluded from giving evidence of the loss of property not specified in such account. Thus, in *Vance v. Forster* (1) Mr. Baron Pennefather observed, "I do not think, that the plaintiff is concluded by the account, which he furnished to the company. It may be evidence to go the jury, that any addition is fraudulent; but I think it is going too far to say, that no addition is to be made. There is no stipulation in the policy, that the plaintiff shall be precluded or barred from going any further than the account, which he is required to furnish."

In *Solomon v. Bewicke* (2) it was held, that stat. 19 Geo. 2. c. 37. s. 7. extended to insurances from fire, and was not confined to marine insur-

ADJUSTMENT OF
DAMAGES—
PAYMENT OF
MONEY INTO
COURT—
VENUE.

Judgment of
Mr. Baron
Pennefather in
Vance v. For-
ster.

Plaintiff not
bound by his
account of the
loss, as del-
ivered to the
insurance com-
pany.

(1) 1 Irish Circuit Cases, 52.

(2) 2 Taunt. 317.

ADJUSTMENT
OF DAMAGES—
PAYMENT OF
MONEY INTO
COURT—
VENUE.

ances, because that statute ought to be construed as extensively as the mis-
chief.

Money can be paid into court. (1)

The venue will be changed in an action on a fire policy, upon an affidavit
of the materiality of a view of the premises burnt. (2)

PAYMENT OF
MONEY INTO
COURT.
VENUE.

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(2) *McDonnell v. Carr*, 1 Hayes (Irish), 375.

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12. GENERAL AVERAGE — PARTIAL LOSS — PARTICULAR AVERAGE, pp. 2188—2194.

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14. BOTTOMRY AND RESPONDENTIA, pp. 2197—2203.

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17. THE PLEADINGS, pp. 2209, 2210.

18. EVIDENCE, pp. 2210, 2217.

THE POLICY — PLAINTIFF'S INTEREST — In ship — When title claimed by transfer — Stat. 6 Geo. 4. c. 110. s. 43. — In goods — In freight — PROOF OF LOSS — INCEPTION OF RISK — CAPTURE — AMOUNT OF LOSS — ADJUSTMENT — BREACH OF WARRANTY — DOCUMENTARY EVIDENCE — Licensed vessel — Certificate of consul — Official report of an officer of the customs — Protest of the captain — COMPETENCY OF WITNESS — Underwriter — Captain — Agent — Trustees — Interested witness — Opinions of underwriters.

19. DAMAGES—STATUTE OF LIMITATIONS—PAYMENT OF MONEY INTO COURT — NEW TRIAL, p. 2218.

1. DEFINED.

DEFINED.

Marine insurance, which is as old as the laws of Oleron and Rhodes, is a contract whereby one party, in consideration of a stipulated sum of money, undertakes to indemnify the other against certain perils or risks to which he is exposed, or to pay him a certain sum upon the happening of some uncertain event.

Insurer.

Underwriter.

Insured or assured.

Premium.

Policy.

The person who takes upon himself the risk is called the insurer, and sometimes the underwriter, from his subscribing his name at the foot of the policy; the party protected by the insurance, the insured or assured; the sum paid to the insurer as a consideration for his undertaking, is called the premium; and the written instrument in which the terms of the contract are set forth, is called a policy of insurance:— which is generally divided into interest — wager — open — and valued policies.

MARINE INSURANCE.

Marine insurance is that which is applied to maritime commerce, and is made for the protection of persons having an interest in ships, or goods on board, from the loss or damage which may happen to them from the perils of the sea during a certain voyage, or a fixed period of time. (1)

DOUBLE ASSURANCE.

When several policies are effected for the benefit of the same person, and upon the same subject-matter, it is called a double assurance. (2) This practice is not, in its ordinary effects, prejudicial either to the insured or the insurer. To the former it is attended with advantage, as it provides with greater certainty for the protection of the whole amount of his interest; and the several underwriters on different policies, being in the nature of co-insurers, he is enabled to select any whose responsibility he may prefer for satisfaction of the amount of his loss.

(1) Marshall on Insurance, 2.

(2) Godin v. London Assurance Comp. 1 Burr. 492.

On the other hand, no inconvenience is sustained by an insurer in the case of a double insurance, for his contract is not varied by it; and if the insurers in one policy pay the whole amount of the loss, it seems they will be entitled to recover a rateable contribution from the insurers in the other policy. (1)

The insured may proceed in the first instance upon either of the policies, and are not restricted to that which is first in point of date. In case of arrival, a return of half the premium will become payable, because as to one half the risk never attached.

The insurance is not double when only the actual interest is covered by the policies effected; and, in an action on a valued policy, it affords no defence to prove, that the assured have received the amount of the valuation from the underwriters on another policy, if the subject-matter insured be proved to be of a value equal to the sum received, and that sought to be recovered. (2)

A re-assurance differs from a double assurance in this, that in the case of a double assurance both policies are effected by the insured; a re-assurance is a contract entered into by an insurer for his own protection. The statute 19 Geo. 2. c. 37. s. 4. provides, "that it shall not be lawful to make re-assurance, unless the assurer shall be insolvent, become a bankrupt, or die; in either of which cases such assurer, his executors, administrators, or assigns may make re-assurance, to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-assurance." The words of this section are express and positive; and under it every re-insurance, either by British subjects or foreigners, whether on British or foreign ships, is illegal unless the insurer be insolvent, become bankrupt, or die. (3)

The title of the act and the first section are confined to the property of his majesty's subjects; but the fourth section has no such qualification. And in the case of an illegal re-insurance, an action will not lie to recover back the premium after a capture. (4)

Another species of insurance referred to in the books is a policy effected by the insured upon the solvency of the insurer. (5) This species of contract appears to have prevailed in some foreign countries, but is not adopted in England — because the same protection is afforded by a double insurance. (6)

DEFINED.

Recovery for amount of insurance.

When the insurance is not double.

RE-ASSURANCE.

Stat. 19 Geo. 2. c. 37. s. 4.

Re-assurance in what cases admitted.

INSURANCE UPON SOLVENCY OF THE INSURED.

2. THE POLICY.

THE POLICY.

I. Construction of Policy.

Policies of insurance are not arbitrarily interpreted by the *strictum jus*, or *apex juris*, but are construed liberally.

CONSTRUCTION OF POLICY.

(1) *Rogers v. Davis*, and *Davis v. Gildart*, Park on Insurance, 423, 424. Beawe's Lex Merc. 242. 2 Phillips on Insurance, 60.

(2) *Bousfield v. Barnes*, 4 Camp. 228. Hughes on Insurance, 59.

(3) *Andree v. Fletcher*, 2 T. R. 161. 3 ibid. 266. 1 Phillips on Insurance, 204.

(4) 3 ibid. 266. On the continent of Europe, re-insurances are generally valid.

It shall be lawful to insurers, says the ordinance of Louis XIV., to make re-assurance with others, of those effects which they had themselves before insured. Ord. Louis XIV., tit. ASSURANCE, art. 20. 1 Emerigon, c. 8. s. 15. Park on Insurance, 422.

(5) 1 Emerigon, c. 8. s. 15. Park on Insurance, 422.

(6) Hughes on Insurance, 59, 60.

THE POLICY.

Judgment of Lord Ellenborough in *Robertson v. French*, stating the principle by which policies of insurance are to be construed.

In *Robertson v. French* (1) Lord Ellenborough said, "In the course of the argument it seems to have been assumed, that some peculiar rules of construction apply to the terms of a policy of assurance, which are not equally applicable to the terms of other instruments, and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it; which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject, indeed, always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch, as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula, adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects."

II. *Who may be Insurers, and Insured.*

WHO MAY BE INSURERS, AND INSURED.

Alien enemy defined.

Mere residence will not make an alien enemy.

INSERTION OF NAME OF THE INSURED, HIS

All persons, whether British subjects or aliens, may in general be insured, unless the alien be an *alien enemy*. (2)

Any person, whether a British subject or a neutral, who resides in an enemy's country, and carries on trade there, is for all civil purposes to be regarded as an alien enemy; he is thereby incapacitated from suing in an English court of justice, and consequently cannot be insured. (3)

The mere residence, however, of a British subject in an enemy's country, is not sufficient to subject him to the disabilities of an alien enemy, inasmuch as he may be detained there against his will; there must be some evidence of the purpose of his residence, or of his adhering to the enemy, as that he traded there. (4)

Formerly, it was customary for the broker to produce the policy in blank to the underwriters, who signed it without seeing more than a short memo-

(1) 4 East, 135. recog. in *Hunter v. Leathley*, 10 B. & C. 871.

(2) *Brandon v. Nesbitt*, 6 T. R. 23.

(3) *McConnell v. Hector*, 3 B. & P. 113. *Roberts v. Hardy*, 3 M. & S. 536. *Allretcht v. Sussmann*, 2 Ves. & B. 323. *O'Mealey v. Wilson*, 1 Camp. 482.

(4) *Harman v. Kingston*, 3 Camp. 153. *Roberts v. Hardy*, 3 M. & S. 533. *Willison v. Patteson*, 7 Taunt. 439. *The Ocean*, 5 Robinson, 90. *Flindt v. Waters*, 15 East, 260.

random indorsed on it, and the broker afterwards filled it up at his leisure.

THE POLICY.

This practice having been attendant with essential mischiefs, induced the legislature to enact stat. 25 Geo. 3. c. 44., by which it was directed, that where the insured resided in Great Britain, his name, or that of his agent, should be inserted in the policy as the person interested; and where he resided abroad, the name of his agent should be inserted.

AGENT, OR
TRUSTEE, IN
POLICY.
Stat. 25 Geo. 3.
c. 44.

It was adjudged under the foregoing statute to be requisite, that the agent's name should be inserted, *eo nomine*, as agent; and that if the principal were abroad, the agent, in whose name the insurance was made, must be resident in England (1); and that the names of *all* the persons interested must be inserted. (2)

This state of the law being unsatisfactory, stat. 25 Geo. 3. c. 44. was repealed by stat. 28 Geo. 3. c. 56., by which it was enacted, that no policy should be made on any ship or goods without inserting thereon the name or names, or the firm of dealing, of one or more of the persons interested in such assurance; or the name of the consignor or consignee, or of the person residing in Great Britain who should receive or give the order for such policy; and that policies made contrary thereto should be void.

Stat. 28 Geo. 3.
c. 56.

Upon the construction of this statute it has been holden, that it should not be taken in its strict literal sense, "but ought," as observed by Mr. Justice Buller (3), "to receive the most liberal construction that the words will bear;" and therefore, if bills of exchange, drawn on the consignee of a cargo of goods for the amount of them, be sent, together with bills of lading, by the consignor to his general agent, with directions to deliver the bills of lading to the consignee on his accepting the bills of exchange—and the consignee refuse to receive the goods, or to accept the bills of exchange, the agent becomes in effect the consignee within the meaning of the statute, and may insure the goods as agent for the consignor, or in his own right, if he have accepted bills on the credit of the goods. (4)

Statute con-
strued liberally.

It is not requisite, when a policy is effected by an agent, to add the word "agent," or any other description to his name, in the policy itself (5); and a policy effected by a broker, describing himself therein "as agent," is a sufficient compliance with the requisitions of the statute (6), the intention of the statute being satisfied by inserting the names of the persons immediately employed to effect the policy.

What is a suf-
ficient descrip-
tion.

With respect to the words "usual style and firm of dealing," where the persons interested were denominated in the policy "The Trustees of Messrs. K. F. and Co.," Lord Ellenborough thought, that this might be considered as their usual style and firm of dealing for the purposes of this act. (7)

"Usual style
and form of
dealing."

It will be presumed after verdict that it was proved, that the plaintiffs fell within one or other of the descriptions in the foregoing statute. (8)

After verdict,
an accurate
description will
be presumed.

By the common law and usage of merchants any person whatever might

(1) *Pray v. Edie*, 1 T. R. 313.

(5) *De Vignier v. Swanson*, 1 B. & P. 346. n.

(2) *Wilkin v. Reaston*, Park on Insurance, 346.

(6) *Bell v. Gilson*, *ibid.* 345. *Mellish v. Bell*, 15 East, 4.

(3) *Wolff v. Horncastle*, 1 B. & P. 316.

(7) *Hibbert v. Martin*, 1 Camp. 538.

(4) *Ibid.*

(8) *Mellish v. Bell*, 15 East, 4.

THE POLICY.**WHO MAY BE INSURERS.**

Stat. 6 Geo. 1. c. 18.

be an insurer, however unable he might be, from poverty, to make up the losses insured against, provided the merchant was weak enough to trust to such a security. This license occasioned much mischief, and was productive of stat. 6 Geo. 1. c. 18., under which the king was authorised to grant charters to two distinct companies [Royal Exchange Assurance and London Assurance Companies], for assurance of ships, goods, and merchandises at sea, or going to sea, and for lending money at bottomry; and that "all corporations, societies, and partnerships (other than the two corporations) should be restrained from underwriting.

This statute exclusively applies to marine insurance, and expressly declares, that any private persons might underwrite as fully and beneficially as before that statute, provided they did not underwrite upon the account or risk of a corporation, or persons acting in partnership.

Stat. 5 Geo. 4. c. 114. ss. 1 & 2.

By stat. 5 Geo. 4. c. 114. s. 1. the exclusive privileges granted to these companies were abolished; and now any corporation or body politic, society, or partnership, or persons acting in any society or partnership, may grant, sign, and underwrite any policy of assurance, or make any contract for assurance, upon any ship or goods, at sea or going to sea, or lend money by way of bottomry.

But by the second section it is expressly provided, that the rights and privileges of the corporations of the Royal Exchange and London Assurance Companies shall not be affected, otherwise than by making it lawful for other corporations and bodies politic, and persons acting in society or partnership, to grant and make such policies of assurance and contracts of bottomry.

**PROPERTY
THAT MAY BE
INSURED.
GENERALLY.**

III. *Property that may be insured.*

The subjects of marine insurance are, ships; goods; merchandise; freight(1); bottomry and *respondentia* interest; or special interest in goods, as the lien of a factor (2), or money expended by the captain for the use of an East India ship. (3)

The party making the insurance should insure his interest in direct terms (4), that is, the interest should appear on the face of the policy, for the court are bound to look to the instrument, and decide upon that. (5)

Where an action was instituted on the following memorandum:—"In consideration of 40 guineas for 100*l.* received of —, we, who have hereunto subscribed our names, do for ourselves severally here assume, engage, and promise, that we respectively will pay unto the said — the sum and sums of money which we have hereunto respectively subscribed, in case the Imperial Brazilian 'mining' shares be done at or above 100*l.* per share, on or before the 31st December, 1829:"—It was held, that this was a policy of insurance within stat. 14 Geo. 3. c. 48., and void, the assured not

(1) *Montgomery v. Eggington*, 3 T. R. 362.

(2) *Park on Insurance*, 14.

(3) *Gregory v. Christie*, *ibid.* 14. 3 Doug. 419.

(4) By stat. 14 Geo. 3. c. 48. no insurance shall be made on any event whatsoever,

wherein the persons for whose use, benefit, or on whose account the policy shall be made, shall have no interest, or by gaming or wagering.

(5) *Kulen Kemp v. Vigne*, 1 T. R. 304.

being interested in the subject-matter insured, or his name mentioned in the body of the instrument. (1) The Policy.

In the insurance of ships, "interest or no interest is almost constantly inserted; and, if not inserted, you cannot recover unless you prove a property" (2): but, if in the case of a foreign ship the words "interest or no interest" be omitted in the policy, it is not requisite in declaring on such policy to aver, that the assured had an interest. (3) "Interest or no interest."

The policy must specify the subject-matter of insurance, and the assured should take care, that the terms used are large and comprehensive enough to embrace accurately and precisely all the objects of the insurance. (4) Property must be specified.

Respondentia and bottomry securities must be insured *eo nomine* as such, for, under the general denomination of "goods," these securities cannot be insured (5) — but the usage of a particular trade may sanction a departure from this rule. (6) *Respondentia* and bottomry securities must be insured *eo nomine*.

An insurance on a ship does not comprehend both ship and cargo, and therefore, if a merchant insure a ship generally, and she then happen to be laden, the insurer, in case of loss, will have to answer only for the ship, but not for the goods. (7) Insurance on a ship does not comprehend ship and cargo.

Where the particular goods insured are meant to be specified, this is usually done at the foot of the policy: thus, on "woollen cloth," sometimes on goods generally, with the mark of each bale, cask, &c. It is not necessary, that the goods should be specified in the policy, yet this is sometimes done for the satisfaction of the underwriters.

Where goods are specified, if they be not put on board, the policy will be void, although the assured have other goods of equal value on board, as if an insurance be made on goods by the name of *piece goods*, and by the invoice it appear, that the goods shipped were hats, the insurer will not be liable for any loss upon the hats (8), because the species of a thing is ascertained by its substantial form. That being changed, produces a new species and destroys the whole: thus, an insurance on ingots of gold will protect the metal converted into utensils or coin, because the substance is specifically the same, and may be converted into ingots again. (9) Goods specified, but not put on board.

Where the goods consist of but few articles, or are valued by the hogshead, pipe, bale, &c. they are generally specified; but if an insurer subscribe a policy "upon any kind of goods and merchandises," there can be no question, but that he is bound by it, though no one article be specified. (10) "Any kind of goods and merchandises."

In many cases it would be impossible to specify the different sorts of goods of which a cargo may consist; and this is the less necessary, because the memorandum inserted at the foot of every policy protects the underwriter from any partial losses on those articles which are most perishable, and from small partial losses on all others.

If goods insured generally be exchanged for others in the course of the Insured goods exchanged for others.

(1) *Puterson v. Powell*, 2 M. & Sc. 399. 9 Bing. 320.

(2) *Per Lord Hardwicke in Sadlers' Comp. v. Badoech*, 2 Atk. 556.

(3) *Crawford v. Hunter*, 8 T. R. 13. *Nantes v. Thompson*, 2 East, 385.

(4) *Winter v. Haldimand*, 2 B. & Ad. 649.

(5) *Glover v. Black*, 3 Burr. 1394. 1 W. Black. 399. 405. 422.

(6) *Recog. in Simonds v. Hodgson*, 6 Bing. 114. *Gregory v. Christie*, B. R. T. T. 24 Geo. 3. *Marshall on Insurance*, 326.

(7) *Marshall on Insurance*, 320.

(8) *Per Chief Justice Mansfield in Hunter v. Prinsep*, at G. H. 18 July, 1806, cit. *Marshall on Insurance*, 323.

(9) 1 *Emerigon*, 299—301.

(10) *Marshall on Insurance*, 324.

THE POLICY.	voyage, the new goods become part of the subject-matter of the insurance. (1)
Money, jewels, or bullion.	Money, jewels, or bullion may be insured under the denomination of goods, but the insurer is not liable for the risk of a clandestine exportation of these articles.
What cannot be insured as goods.	The jewels and ornaments which are worn by persons on board, are not considered as forming a part of the cargo, nor liable to contribute to a general average, and, consequently, would not be considered as included in a general policy on goods. (2)
EXPECTED PROFITS.	The master's clothes, the ship's provisions, and goods lashed to the deck, cannot be insured as goods, because they are not comprehended under the general denomination of goods, wares, and merchandises in the policy. (3) "Profits" may be defined as being an excrescence upon the value of the goods beyond the prime cost.
Profits on ship and goods.	The difficulty of the calculation neither affects the question of interest, or the legality of the contract. An insurance may be effected on profits generally, without more description, and engrafted upon a policy on ship and goods in the common printed form, for a certain voyage, with a return of premium for short interest, the assured proving an interest in the cargo. (4)
Profits on a cargo.	On an insurance on ship and goods, valued at so much on a voyage to Africa and the West Indies, the assured is entitled to recover the whole sum on a total loss, which happened in the latest period of the voyage, although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. (5)
Seamen who are to receive something at the end of the voyage in lieu of wages.	Expected profits on a cargo may be insured (6): thus, a policy on the profits of a cargo of molasses, to be used in a contract with government, which contained a clause, "that, in case of loss, it was agreed, that the profits should be valued at 1000 <i>l.</i> , without any other voucher than the policy:" — It was held valid, and not a wagering policy. (7) So the profits of a cargo employed in trade on the coast of Africa may be insured. (8) And an insurance on the imaginary profits of a cargo of indigo from Bordeaux, to be sold at Hamburgh, was likewise held good. (9) Where a mate of a ship, or a sailor, is to receive something at the end of the voyage in lieu of wages (<i>e. g.</i> slaves), he cannot insure it. (10) Nor can he recover the value of such thing in an action against his agent for negligence in not procuring such an insurance, because slaves are not the subject of insurance. (11)
	Upon an insurance on profits valued at 400 <i>l.</i> , where the plaintiff declared

- (1) Valin, 78. Pothier, 63. 2 Emerigon, 38. Park on Insurance, 402. Marshall on Insurance, 95. 3 B. & P. 85. n. 3 Doug. 16.
- (2) Marshall on Insurance, 327.
- (3) *Brough v. Whitmore*, 4 T. R. 206. *Ross v. Thwaites*, Park on Insurance, 26.
- (4) *Eyre v. Glover*, 16 East, 218. 3 Camp. 276.
- (5) *Shaw v. Felton*, 2 East, 109.
- (6) *Grant v. Parkinson*, cit. 6 T. R. 483.
- (7) Ibid.
- (8) *Barclay v. Cousins*, 2 East, 544.
- (9) *Henrickson v. Margelson*, ibid. 549. n.
- (10) *Webster v. De Tastet*, 7 T. R. 157.
- (11) Ibid.

THE POLICY.

as for a total loss, and it appeared that, after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were there sold; and it did not appear what profit was made of them, or whether, if all had arrived, any profit would have been made, though it was found, that the produce of those who were sold, did not give a profit upon the whole adventure:— It was holden, that the plaintiff was not entitled to recover, because the assured did not in fact shew what his loss was, and also, from having declared for a total loss, when it was only an average loss. (1)

The freight of a vessel can be insured; but if it be so, it must be insured **FREIGHT.**
eo nomine as freight. (2)

In *Devaux v. J. Anson*, the plaintiff, owner of a ship, effected a policy on freight at and from Coromandel Coast to Bourbon, which covered perils of the seas, and all other perils, losses, and misfortunes. The ship put into a port on the Coromandel Coast for repairs, where the plaintiff purchased a cargo, and had it, ready to be sent on board, about seven miles from the port; but the ship was lost by an accident in going out of dock:— It was held, that the plaintiff's interest in the profit of conveying the cargo, was properly described as freight. (3)

In *Forbes v. Aspinall* (4) Lord Ellenborough said, "Freight is the profit earned by the shipowner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit to the shipowner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon freight has no reference to the hull of the ship, or to its outfit for the voyage, both of which are protected by insurance upon the ship; but its sole object is to protect the assured from being deprived by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy, evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract, under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; and in either case, if the policy be open, the sum payable to the shipowner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable." (5)

Judgment of
Lord Ellen-
borough in
*Forbes v. As-
pinall*.

In *Devaux v. J. Anson* (6) Chief Justice Tindal said, from the case of *Flint v. Fleming* (7) it is now established law, "that the assured under an insurance upon freight may recover the profits expected to be made by carrying their own goods in their own ship upon the voyage insured."

Judgment of
Chief Justice
Tindal in *De-
vaux v. J. An-
son*.

(1) *Hodgson v. Glover*, 6 East, 316.

(2) *Baillie v. Mondighiani*, Park on In-
surance, 90.

(3) *Devaux v. J. Anson*, 5 Bing. N. C. 519.

(4) 13 East, 325.

(5) Vide etiam *Forbes v. Cowie*, 1 Camp.
520. *Patrick v. Eames*, 3 ibid. 441.

(6) 5 Bing. N. C. 537.

(7) 1 B. & Ad. 45.

THE POLICY.

Stipulation in a charter-party may be varied by subsequent instruction.

Commencement of risk.

When part of the cargo shipped.

Ship lost on her way to her port of lading.

Where insurance on freight is effected from several places of departure.

The stipulation in a charter-party may be varied by subsequent instructions, which may amount to a new contract *pro tanto*; and an insurance of the freight upon the new voyage, though different from that described in the charter-party, may be good. (1)

The risk on freight attaches, if the goods be either actually shipped on board, or if there be an actual contract for shipping them. (2) Thus, in *Williamson v. Innes* (3) it was held, that a homeward policy on freight at and from A., attaches when the ship is at A. in a condition to begin to take in her homeward cargo; but this is a mere question of fact for the jury. If, before any goods are put on board, an accident happen to the ship which prevents her sailing, the insured cannot recover for the loss of freight, which the ship might have earned, if the accident had not happened. (4)

If part of the cargo have been put on board, and the rest be ready to be shipped, the insured may recover for the whole freight upon a valued policy. (5)

Although the commencement of the risk on freight is, in general, from the taking the goods on board, yet, if the ship be to sail to a distant place to take in her cargo, the risk commences on the freight from the time of her sailing for that place. Thus, where a ship was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine, and proceed to Barbadoes, &c., for which the owner was to receive freight at the rate of so much per pipe:—a policy of insurance on such freight was held to attach, from the sailing of the ship from London. (6)

Where a ship was chartered on a voyage from London to Dominica, and back to London, at a certain rate of freight upon the outward cargo; and, after delivering her outward cargo at Dominica, the charterers were to provide her a full cargo homewards, at the current freight, from Dominica to London, &c.:—It was held, that an insurance by the owner of the ship on the freight, at and from Dominica to London, attached whilst the ship lay at Dominica delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy, the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced. (7)

If there be several ports of departure mentioned in the policy, and the insurance be at and from any one of them to the port of destination, the risk on freight will not commence upon the ship's departure from any one of them to another of them before her final departure to her port of destination. Thus, a policy was effected on freight valued at 500*l.* on a voyage at and from Demerara, Berbice, and the Windward and Leeward Islands to London; the ship being at Demerara, an agreement was entered into by the master with a house there, for a freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks from Demerara to Berbice, and deliver them there; while

(1) *Hall v. Brown*, 2 Dow, 367.

(2) *Flint v. Flemyng*, 1 B. & Ad. 45. *Mackenzie v. Shedden*, 2 Camp. 431. *Phillips v. Champion*, 6 Taunt. 3. *Everth v. Smith*, 2 M. & S. 278.

(3) 1 M. & Rob. 88., vide etiam *Devaur v. P. Anson*, 5 Bing. N. C. 519.

(4) *Tonge v. Watts*, Str. 1251., vide etiam *Bell v. Bell*, 2 Camp. 475.

(5) *Montgomery v. Eggington*, 3 T. R. 362

(6) *Thompson v. Taylor*, 6 ibid. 478.

(7) *Horncastle v. Stuart*, 7 East, 400. vide etiam *Davidson v. Willasey*, 1 M. & S. 313.

proceeding from Demerara to Berbice with the bricks and planks on board, she met with an accident, and in consequence never earned her freight: — It was held, not to be a loss within the policy. (1)

In *Taylor v. Wilson* (2) Lord Ellenborough said, "There is no doubt that a party may insure his ship and goods during part of a voyage, and I cannot conceive, why he may not also insure freight in the same manner." Mr. Justice Le Blanc in the same case likewise observed, "The ship, with her cargo, sailed upon a voyage from St. Ubes to Gottenburgh, and was to go in the way to Portsmouth for convoy; therefore the voyage to Portsmouth was a part of the intended voyage, and the assured insured their freight for that part of the voyage, and the ship was certainly on the voyage insured when the loss happened: what more can be required to entitle the assured to recover? In the case of *Wooldridge v. Boydell* (3) there was no inception of the voyage insured, which was from Maryland to Cadiz: the ship never intended to go to Cadiz, and therefore could not be said to have sailed upon her voyage to Cadiz. Here the voyage to Portsmouth was commenced: it was intended to be part of the voyage to Gottenburgh; and in case of a loss between St. Ubes and Portsmouth, the assured would lose the freight he was earning in the course of the entire voyage to Gottenburgh. The opinion delivered at Nisi Prius in the case of *Murdock v. Potts* (4), though entitled to great weight, was not afterwards followed up by taking the opinion of the court in banc: and when it now comes for the first time to be considered, how far it is reconcilable with other decisions and established principles of insurance law, it cannot be supported. The power of making an effectual abandonment in the voyage insured, is not a necessary ingredient to shew, that the interest is insurable. That point was considered in *Craufurd v. Lucena* (5), and the judges did not think that such a power was a necessary criterion of an insurable interest. Here, too, the underwriters were not deceived as to the interest insured."

In *Mordy v Jones* (6), in an action on a policy of insurance on freight, it appeared, that the ship in the course of her voyage having been injured by a peril of the sea, was obliged to put into a port, and land the whole of her cargo. Part of the cargo had been so wetted by sea-water, that it could not be reshipped without danger of ignition, unless it went through a process, which would have detained the vessel six weeks, and have been attended with expense equal to the freight. Under these circumstances the master sold these goods, and finding that he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such, as a prudent man uninsured would have adopted: — It was held, that the underwriters were not liable for the loss of the freight of these goods, Chief Justice Abbott observing, "It may be very true, that the most prudent thing for the master of the ship might be to leave the goods behind, and sail without them; but it does not, therefore, follow, that the underwriter is to make good the freight

THE POLICY.

A freight voyage may be insured part of the way.

Judgments of Lord Ellenborough and Mr. Justice Le Blanc in *Taylor v. Wilson*.

Ship sailing and leaving the freight insured behind.

Judgment of Chief Justice Abbott in *Mordy v. Jones*.

(1) *Sellar v. M'Vicar*, 1 N. R. 23.

(4) *Park on Insurance*, 451.

(2) 15 East, 329., vide etiam *Violet v.*

(5) 2 N. R. 269.

Allatt, 3 Taunt. 419. recog. in *Leathley v.*

(6) 4 B. & C. 394., vide etiam *Brocklebank v. Sugrue*, 1 M. & Rob. 102.

Hunter, 7 Bing. 529.

(3) *Doug.* 16.

THE POLICY.

Mode of calculating the loss of freight.

Judgment of Lord Ellenborough in *Forbes v. Aspinall*.

thereby lost. If it should be held in a case of this kind, that the underwriter would be liable to make it good, it would open a temptation to the master of a ship to sail away under circumstances like these, instead of stopping until the goods could be reshipped, which would be very mischievous."

In *Forbes v. Aspinall* (1) Lord Ellenborough observed, "The valuation in the case of goods, looks to *all the goods* intended to be loaded; and in the case of freight, it looks to *freight upon all the goods* the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, *part* only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of *that part*: and so, if by the perils insured against the *freight of part only* of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum, at which the entire freight was estimated in the valuation."

A policy on freight, at and from the ship's port of loading at J. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of goods loaded at an intermediate port: and therefore, where the ship having sailed with a cargo loaded at J. was, during the voyage, cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight: — It was held, that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the said freight. (2)

NAMES OF THE
SHIP AND
MASTER.

Should be specified in the policy.

When a mistake will not vitiate.

IV. *Names of the Ship and Master.*

In almost all cases of insurance upon goods, it is usual and necessary to specify in the policy the ship in which they are to be transported; therefore, if the ship be not truly named, but the name of another ship inserted by mistake in its place, the policy will be void. (3) Thus, if three parcels of goods be insured on board three several ships, and all are put on board one, the policy will be good only as to the particular parcel destined for that ship. (4)

But to prevent the ill-consequences, that might result from a mistake in the name of the vessel or the master, there are inserted in every policy these words, "or by whatsoever other name or names the same ship or the master thereof is, or shall be, named or called." So that, if the identity of the ship can be proved, and no fraud be meant, a mistake in the name of the ship will not vitiate the contract; as where a ship insured was called the "Leopard" in the policy, but it appeared in evidence that her true name was the

(1) 13 East, 327.

(2) *Barclay v. Stirling*, 5 M. & S. 6.

(3) Pothier, 105.

(4) *Ibid.* 68.

"Leonard;" it was objected, that this was not the ship insured. But the identity being proved, it was holden, that the above words in the policy protected the insured (1):—upon the rule, *error nominis navis non attenditur, quando aliis conjecturis constat de identitate navis*; which is founded on the general principle, that *error nominis non nocet, cum de re constat*. (2)

THE POLICY.

In *Robinson v. Touray* (3) Lord Ellenborough said, "The declaration of interest does not require any assent on the part of the underwriters. They put their initials to it, not for the purpose of expressing their assent, but to authenticate the declaration, and to prevent fraud in changing the subject-matter intended to be covered by the insurance. The contract between the parties is complete, when the underwriters have signed the policy. The declaration of interest is the mere exercise of a power conferred upon the assured. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing." Therefore, where there was a policy on goods by ship or ships, to be thereafter declared, if the broker by mistake makes a written declaration upon goods by a wrong ship, to which the underwriters put their initials, he may afterwards in compliance with the orders of the assured declare upon goods by another ship, without the assent of the underwriters, and without a new stamp.

Judgment of Lord Ellenborough in *Robinson v. Touray*.

If it be uncertain in what ship the goods may be sent, the policy in such cases is upon the goods "on any ship or ships."

Uncertain, in what ship the goods may be sent.

Not only the name, but the species of vessel should be described; and if it be done falsely in order to mislead the insurer, and diminish the risk; as if a brig, or sloop, or other small vessel be described as a ship, the contract will be vitiated.

Species of vessel.

But if the error in the description of the vessel arise only from mistake, or inadvertence, and it do not affect the risk, or if the insurers knew upon what vessel the risk was to run, the false description on the policy will not affect the contract. (4)

The name of the master should also be specified, because his character and ability are material subjects of consideration in estimating the risk.

NAME OF MASTER.

If the name of the master stand alone in the policy, without any clause to enable the insured to employ another in his place, it would be a part of the contract that he, and no other, should go for master; nor could any other be substituted in his place, unless in a case of necessity, or by consent of the insurer.

To obviate the difficulties that must arise from this, the following words are always added in our policies, "or whosoever else shall go for master in the said ship."

But this clause does not authorise an owner to name one master, when he means to employ another.

(1) *Hall v. Molineaux*, cor. Chief Justice Lee at G. H. 17th Dec. 1744, cit. 6 East, 385.

(2) Pothier, 105., vide etiam *Le Mesurier v. Vaughan*, 6 East, 382. *Kewley v. Ryan*, 2 Hen. Black. 343.

(3) 3 Camp. 158. 1 M. & S. 217.

(4) The owners of goods insured by the

act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned. *Plantamour v. Staples*, 1 T. R. 611, n.

THE POLICY.

V. *The Voyage insured.* (1)THE VOYAGE
INSURED.

The voyage insured must be truly and accurately described in the policy, viz. the time and place at which the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end, whether on goods, or on the ship.

If a blank be left for the place either of the ship's departure or destination, the policy will be void for the uncertainty, (2)

Duration of
risk how spe-
cified.

The continuance of the risk on goods is generally expressed to be "from the loading thereof on board the ship," and to continue "until the same be discharged and safely landed" at the port of delivery. The duration of the risk, in a policy on freight, is the same as in a policy upon the goods, for which the freight is to be paid. Upon the ship, on an outward voyage, it is sometimes from her beginning to load, at some particular place, or at and from such place; sometimes from a particular day. On a homeward voyage, it is generally made to commence on the ship's arrival at a particular place abroad, or at and from such place; and to continue till she arrives at her place of destination, "and is there moored twenty-four hours in good safety." Provisions are often added, to enable the ship to touch, stay, trade, &c. at certain places out of the direct course of the voyage, without being guilty of a deviation; and when the insured intends a deviation from the direct or usual course of the voyage proposed, it is always provided for, and the policy adapted to it, unless fraud be intended.

If the policy be made for a term, it must not exceed twelve months.

The commencement and end of the term must be specified.

Literal description calculated to induce a false conclusion.

Sometimes privateers and vessels, which are constantly employed in the coasting trade, are insured for a term. But by stat. 35 Geo. 3. c. 63. s. 12. this term must not exceed twelve calendar months; if it exceed this time, the policy will be void.

In policies for time, the commencement and end of the term should be distinctly specified. If however that should not be so precisely stated as it ought to be, it will be sufficient, if it can be collected by construction from the policy, and the intention of the parties. (3)

Though the description of the voyage be literally true, yet if it be calculated to induce a false conclusion, the policy will be void. (4)

Where goods were insured "at and from Genoa to Dublin, the adventure to begin from the loading to equip for the voyage:"—It was held, that from the terms of the policy it must be implied, that Genoa was the port of loading, which was not true; and this being a misrepresentation of a material circumstance, the underwriter had a right to say, that this was not his contract. (5)

Goods are insured from the loading at A., but those intended to be insured are taken in at B. and then carried to A.

So, if a ship and goods be insured "at and from the coast of Brazil, to the Cape of Good Hope, beginning the adventure on the goods from the loading thereof on the coast of Brazil, from the 17th of September, and upon the ship, in the same manner," and the goods be taken on board at the Cape, and the ship sail with them to the coast of Brazil; the policy will not attach on the goods, because they were not loaded on the coast of Brazil, though they were the goods which the insured meant to insure, and were on board

(1) *Vide post*, 2134. tit. DEVIATION.

(2) Marshall on Insurance, 328.

(3) *Ibid.*

(4) *Hodgson v. Richardson*, 1 W. Black 463.

(5) *Ibid.*

after the 17th of September, on the coast of Brazil;—and if the policy did not attach on the goods, it could not attach on the ship. (1)

In *Rickman v. Carstairs* (2) Lord Denman said, “The cases of *Robertson v. French* (3), *Spitta v. Woodman* (4), *Horneyer v. Lushington* (5), *Langhorn v. Hardy* (6), and others, have established, that where the policy is upon goods, ‘from the loading thereof,’ either at a particular place, or in blank upon a voyage from one place to another, it does not attach upon goods previously on board; but this, being a strict construction, has been relaxed, where there was any thing upon the face of the instrument to satisfy the court, that the policy was intended to cover goods previously on board. Thus, in *Bell v. Hobson* (7), where the policy was declared to be ‘in continuation of others,’ which were upon a voyage to the port from which the risk insured began; and in *Gladstone v. Clay* (8), where the words used were, ‘wheresoever, &c.’ it was held, that the assurance was not confined to goods put on board in the course of the voyage insured.” (9)

In *Rickman v. Carstairs* (10) it appeared, that a valued policy of insurance on ship and goods, at and from the coast of Africa to the ship’s port of discharge in the United Kingdom, had been effected, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards in any order, and to call at or proceed to the Azores, Madeira, &c. and all African islands, beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa, including the risk in boats in loading and unloading, with liberty to load, unload, sell, barter, or exchange with any ships or factories wheresoever she might call:—It was holden, that the policy did not protect an outward cargo shipped before the vessel’s arrival on the coast of Africa.

Where a considerable proportion of the intended homeward cargo not being shipped at the time of a total loss, and the part shipped not being equal to the value put on the goods in the policy, it was held, that the valuation was opened, and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss; Lord Denman observing (11), “It is very true that there will be some difficulty in making the proper calculation as to the sum to be paid, on the supposition, that the subject of insurance is the full homeward cargo; because, on such a voyage, it is not easy to say, what the value of a full home cargo will be, nor what proportion of a full cargo is on board at the time of the loss. That difficulty occurred, and nearly to the same extent in *Forbes v. Aspinall* (12), though it does not seem to have been brought to the attention of the court; but it cannot enable us to reject the words which cause the policy to attach on the homeward cargo only, and to declare, ‘that the policy was meant to include both.’”

THE POLICY.

Judgment of Lord Denman in *Rickman v. Carstairs*.

Where part of the intended homeward cargo was not shipped at the time of the total loss, and the part shipped not being equal to the value put on the goods in the policy.

(1) *Robertson v. French*, 4 East, 130.

(2) 5 B. & Ad. 663.

(3) 4 East, 130.

(4) 2 Taunt. 416.

(5) 15 East, 46.

(6) 4 Taunt. 630.

(7) 16 East, 240

(8) 1 M. & S. 418.

(9) Vide etiam *Horneyer v. Lushington*, 15 East, 46.

(10) 5 B. & Ad. 665.

(11) Ibid.

(12) 13 East, 323., ante, 2099.

THE POLICY.

VI. *Perils insured against.*

PERILS INSURED AGAINST

"Lost or not lost."

Insurer takes the risk of a loss that may have already happened, if the assured were ignorant of the loss.

If both insurer and assured are aware that a vessel has been lost, the latter can claim indemnification.

Judgment of Lord Denman in *Mead v. Davison*.

The perils against which the insurer undertakes to indemnify the assured must be inserted in the policy.

In the modern printed form of policy, the perils enumerated are, "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, taking at sea, arrests."

In all English policies the words "lost or not lost," are inserted, by which the insurer takes upon himself, not only the risk of a future loss, but also the loss of any that may already have happened; because the thing insured is, by a sort of fiction of law, founded on the good faith of the insured, supposed still to exist, so as to be a proper subject of insurance, and not to be considered as lost, till intelligence of the loss arrives.

If the insurer and assured are aware, that a vessel has been lost, the latter can claim indemnification: thus, in *Mead v. Davison* (1) Lord Denman stated, "This was an action on a policy of insurance on the plaintiff's ship. He and the defendant were members of an association for mutual insurance. The ship was accepted in February, 1829, when the premium was paid, and the insurance was to be from that period, for twelve months from that date. The policy was formally executed in October, 1829, and that, not by the defendant himself, but under a power of attorney, and according to the rules of the society; and the ship was in fact lost, and known by all parties to be so, before the execution of the policy. On these facts being proved, Lord Lyndhurst directed a nonsuit, on a rule for setting which aside, and entering a verdict for the plaintiff, the case has been fully argued before us.

"The material question was, whether an assured can recover on a policy executed after the loss had accrued, and become known to both parties. The case of *March (Earl of) v. Pigot* (2), referred to in the argument, is a direct authority in principle, in favour of the right to recover if the loss was known to neither party at the time of effecting the policy. According to the same case, and indeed on the plainest general principles, if the loss had been known to the assured only, the policy would be void. But no case has determined, that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. His conduct might indeed appear extraordinary, if it were not clear, that he had a good legal consideration for entering into the contract, viz. the payment of the premium, which may be regarded as a price actually given and received for the underwriter's indemnity against the contingency that has arisen. There is considerable analogy between this case and *Paine v. Meller* (3), decided in 1801 by Lord Eldon, who held the purchaser bound to perform his contract, though the house was burnt before the time appointed for conveying it. 'As to the mere effect of the accident itself,' said his lordship, 'no solid objection can be founded upon that simply: for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes.' (4) He also said, adverting to the case of annuities, where the purchasers have been compelled to pay the

(1) 3 A. & E. 307.

(2) 5 Burr. 2802.

(3) 6 Ves. 349.

(4) Ibid. 352.

THE POLICY.

**Judgment of
Lord Denman
in *Mead v.
Davison*.**

The sum insured is generally placed in the subscription after the signature, in the underwriter's handwriting, and in words at length, not in figures.

THE SUBSCRIPTION AND DATE.

But it is not essential, that the sum should be specified in the policy. An insurer may bind himself to pay the value of the effects insured, or a given proportion of it, without fixing that value in the policy. (1)

A policy should have a date, and no prudent underwriter ever affixes his signature without such an insertion, as it might open a door to fraud and litigation.

THE DATE.

The date is not inserted in the body of the policy, for as each subscription to a policy makes a distinct contract, each underwriter sets down the day, month, and year of his own subscription.

Unless a policy be stamped at the time when the insurance is effected, it will be a void contract, and no subsequent payment of the duty will render it valid. (2)

THE STAMP,

The stamp duties payable on policies of assurance are regulated by stat. 3 & 4 Will. 4. c. 23., that statute having repealed stats. 55 Geo. 3. c. 184. and 56 Geo. 3. c. 56., respecting the amount of duties, and are as follow:—

Duty.		
£	s. d.	
		100
		200
		300
		400
		500
		600
		700
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		900
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		1100
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		9800
		9900
		10000

SEA INSURANCES in Great Britain and Ireland respectively.

**SCHEDULE TO
STAT. 3 & 4
WILL. 4. c. 23.**

For and in respect of every policy of assurance or insurance, or other instrument, by whatever name the same shall be called, whereby any insurance shall be made upon any ship or vessel, or upon any goods, merchandise, or other property on board of any ship or vessel, or upon the freight of any ship or vessel, or upon any other interest in or relating to any ship or vessel, which may lawfully be insured for or upon any voyage other than a voyage from any port or place in the United Kingdom of Great Britain and Ireland, or in the islands of Guernsey, Jersey, Alderney, or Sark, or the Isle of Man, to any other port or place in the said kingdom or islands, or Isle of Man.

Where the premium or consideration for such insurance actually and *bond fide* paid, given, or contracted for, shall not exceed the rate of 15s. per centum on the sum insured.

If the whole sum insured shall not exceed 100l. - - - 0 1 9

(1) Marshall on Insurance, 343.

(2) *Roderick v. Hovil*, 3 Camp. 103.

THE POLICY.

	Duty. £ s. d.
And if the whole sum insured shall exceed 100 <i>l.</i> , then for every 100 <i>l.</i> and also for any fractional part of 100 <i>l.</i> whereof the same shall consist	0 1 0
And where the premium or consideration for such insurance, actually and <i>bonâ fide</i> paid, given, or contracted for, shall exceed the rate of 15 <i>s.</i> per centum, and shall not exceed the rate of 30 <i>s.</i> per centum on the sum insured, If the whole sum insured shall not exceed 100 <i>l.</i>	0 2 6
And if the whole sum insured shall exceed 100 <i>l.</i> , then for every 100 <i>l.</i> and also for any fractional part of 100 <i>l.</i> whereof the same shall consist	0 2 6
And where the premium or consideration for such insurance, actually and <i>bonâ fide</i> paid, given, or contracted for, shall exceed the rate of 30 <i>s.</i> per centum on the sum insured, If the whole sum insured shall not exceed 100 <i>l.</i>	0 5 0
And if the whole sum insured shall exceed 100 <i>l.</i> , then for every 100 <i>l.</i> and also for any fractional part of 100 <i>l.</i> whereof the same shall consist	0 5 0
But if the separate interests of two or more distinct persons shall be insured by one policy or instrument, then the said duty of 1 <i>s.</i> 3 <i>d.</i> , 2 <i>s.</i> 6 <i>d.</i> , or 5 <i>s.</i> , as the case may require, shall be charged thereon, in respect of each and every fractional part of 100 <i>l.</i> , as well as in respect of every full sum of 100 <i>l.</i> which shall be thereby insured upon any separate and distinct interest.	

And for and in respect of every policy of assurance or insurance, or other instrument, by whatever name, the same shall be called, whereby any insurance shall be made upon any ship or vessel, or upon the freight of any ship or vessel, or upon any other interest in or relating to any ship or vessel, which may lawfully be insured for any certain term or period of time, the following rates or sums for every 100*l.* and also for any fractional part of 100*l.* whereof the same shall consist; that is to say,

Where any such insurance shall be made for any time or period not exceeding three calendar months	0 2 6
Exceeding three calendar months	0 5 0

In *Shipton v Thornton* (1) it appeared, that the defendant was interested solely in certain goods conveyed by the ship S., and was also interested jointly with his partners, who with him formed the firm of T. and W., in other goods also sent by the ship S. He signed a promise to make certain payments in respect of freight on board the S., not stating upon which goods, beginning, "I hereby engage to pay," but signed with the style of T. and W. In an action against him solely for the freight of his own goods, it was held, that such engagement was evidence of a several contract by him, and, for the purpose of the action, required only one stamp.

Alteration from
"ship and outfit," to "ship and goods."

Judgment of
Lord Ellenborough in
Hill v. Patten.

In *Hill v. Patten* (2) Lord Ellenborough said, "The question in this case was, Whether the alteration of this policy upon 'ship and outfit' to one on 'ship and goods' required an additional stamp within the meaning of the stat. 35 Geo. 3. c. 63. s. 13. The policy was 'at and from London to the South Seas, during the ship's stay and fishing there, and at and from thence to Great Britain,' &c. The alteration was made from 'ship and outfit' to 'ship and goods,' by consent of the underwriters, after the ship had sailed on the voyage insured, and of course after the policy had fully attached upon what was, at the time of such sailing, the thing or subject insured, viz 'ship and outfit.' 'Outfit,' particularly for such a voyage as is described in the policy, differs materially from what is comprehended under the term 'goods.'

"The 35 Geo. 3. c. 63. s. 13., on which the question arises, provides

(1) 9 A. & E. 314.

(2) 8 East, 374., vide etiam *French v.*

Patten, 9 *ibid.* 351. 1 Camp. 180. (b.) *Reed v. Deere*, 7 B. & C. 261.

THE POLICY.

that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require an additional stamp duty, by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10*s. per cent.* on the sum insured; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration.' And the question is, Whether that part of the provision which requires that 'the thing insured shall remain the property of the same person or persons,' has been in this case well complied with or not? The words 'the thing insured shall remain the property,' &c. appear to us properly to require and apply to one identical and continued subject-matter of insurance, such subject-matter all along remaining the property of the same proprietor, and to be ill suited to a case like the present, where the thing last insured is not only in fact, but in name and kind, (as a specific subject of insurance) essentially different from the thing first insured, and which begins also to have an existence at a different and much later period than the other, and when the thing first insured hardly, or in a small degree, remains or continues to exist at all."

A policy duly stamped was effected on a ship on a voyage at and from Liverpool to Quebec. The ship being detained beyond the intended time of sailing, the following memorandum was indorsed on the policy:—the "Hebe being unavoidably detained beyond the intended time of sailing to Quebec, the voyage is changed, and the vessel proceeds from Liverpool to St John's, New Brunswick, at and from thence back to London; and in consideration of one guinea *per cent.* additional, the underwriters agree to continue on the risk until the vessel shall be arrived back in London, or her port of discharge in the United Kingdom:—"—It was held, that the change of destination of the ship, provided for by the memorandum, was an alteration in the terms and conditions of the policy within the meaning of the 35 Geo. 3. c. 63. s. 13.; and therefore the policy so altered by the memorandum did not require a new stamp. (1)

Where there was a policy on goods at and from S. to R., and the ship being driven into W. and detained, the assured wrote to their agents in L. "that the captain had been ordered to proceed to C., as they were not certain whether the enemy might be at R. or not, and that the passage to C. was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters;" which letter the agents receiving on the 12th of July, applied to the underwriters for their consent to alter the policy, by adding the words "S. or M. after R.," which consent was obtained, and the ship and goods were afterwards lost in the voyage to C.:—It was held, that this alteration did not require a new stamp, it being within stat. 35 Geo. 3. c. 63. s. 13. (2); Lord Ellenborough observing, "It seems to me, that the argument for the defendant, has confounded a con-

When change of destination will be an essential alteration.

Judgment of Lord Ellenborough in

(1) *Brocklebank v Sugrue*, 1 B. & Ad. 81.

(2) *Ramstrom v. Bell*, 5 M. & S. 267.

THE POLICY.

Ramstrom v. Bell.

temptation to determine the voyage with the actual determination of it. The assured had a purpose of change arising *ex justâ causâ*; and while it was in contemplation, the proposal was made to the underwriter, and assented to by him, that Königsberg should be the ship's destination. If the underwriter had not assented, the assured might have thrown the risk upon him by going to Swinemunde; instead of which, the application is made for the underwriter's benefit. The act says, 'so that the alteration be made before notice of the determination of the risk.' This alteration was made, while there was only an intention to determine the risk."

Goods and specie to a certain amount having been insured by a policy on ship or ships, which should sail on the voyage insured between the 1st of October, 1799, and the 1st of June, 1800, a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August, 1800, does not require a new stamp, being within the thirteenth section of the stat. 35 Geo. 3. c. 63., which provides that the act imposing the stamp, shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy, &c. (1)

Absolving assured from a warranty of sailing on a specific day.

In *Hubbard v. Jackson* (2) a policy was effected at four guineas *per cent.* on hemp, marked R., and valued, with certain returns of premium upon arrival at certain ports, and warranted to sail before the 20th of August, which was a summer risk and premium: by a memorandum indorsed, the underwriter, for four guineas additional, and the return of 5s. less for arrival, absolved the assured from the warranty of sailing before the 20th of August, so making it a winter risk; and withdrew the mark of the hemp:—It was held, that these were not such alterations of the subject-matter insured, and of the terms of the policy, but that they might be made by stat. 35 Geo. 3. c. 63. s. 13. without any new stamp.

Declaration of interest.

A mistake made by the agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified by inserting the true name without a fresh stamp. (3)

Subscribing memorandum in margin.

And where a broker was instructed to effect a policy on goods, effected it on ship, and the mistake was afterwards rectified by the underwriter subscribing a memorandum in the margin:—It was held, that no new stamp was necessary (4); Mr. Justice Heath observing, "The intention of the parties ought to be considered; they never meant to enter into the first contract; therefore it was, in truth, no contract at all; consequently, the alteration is not such an alteration of the subject-matter as requires a new stamp."

A stamped policy, on which an unstamped memorandum has been afterwards indorsed, is not admissible in evidence unless the memorandum be also stamped. (5)

(1) *Kensington v. Inglis* (in error), 8 East, 273.

(2) 4 Taunt. 169.

(3) *Robinson v. Touray*, antè, 2103. 3 Camp. 160. 1 M. & S. 217.

(4) *Sawtell v. London*, 5 Taunt. 359. Marshall on Insurance, 348.

(5) *Rex v. Gillson*, 1 Taunt. 95. 2 Leach, C. C. 1007. R. & R. C. C. 138.

3. CONTRACTS AGAINST PUBLIC POLICY.

I. *Wager Policies.*

Though a valued policy, when fairly made, is distinguishable from a wager in this, that the former is founded on real interest, the amount of which is agreed by the policy, but in the latter, the insured has avowedly no interest, yet, it must be owned, that a valued policy often partakes of the nature, both of a policy on interest, and of a wager; for though it supposes a *bond fide* interest in the insured, this interest is not always expected to be exactly commensurate with the amount of the insurer's obligation. There is a real interest, it is true; but this, in many instances, falls far short of the nominal value in the policy; and it too often happens, that, under colour of a small interest, and in the form of a valued policy, many insurances, which are in truth mere wagers, are effected, and the beneficial purposes of the stat. 19 Geo. 2. c. 37. thereby evaded. (1)

In *Kent v. Bird* (2) Lord Mansfield said, "A policy of insurance is, in the nature of it, a contract of indemnity, and of great benefit to trade; but the use of it was prevented by its being turned into a wager. To remedy this evil, the stat. 19 Geo. 2. c. 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract, and amongst others that of gaming or wagering, under pretence of insuring vessels, &c., proceeds under general words to prohibit *all* contracts of insurance by way of gaming or wagering." (3)

It is requisite to consider what that interest is, the protection of which is the proper object of a policy of insurance.

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AGAINST PUB-
LIC POLICY.WAGER PO-
LICIES.

How a valued
policy is dis-
tinguishable
from a wager
policy.

Judgment of
Lord Mansfield
in *Kent v. Bird*.

SUFFICIENCY OF
INTEREST.

(1) Marshall on Insurance, 129.

(2) Cowp. 583.

(3) Stat. 19 Geo. 2. c. 37. ss. 1, 2 & 3. (an act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon), after reciting, "it hath been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted; and that which was intended for the encouragement of trade and navigation has, in many instances, become hurtful

of and destructive to the same; enacted that no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his majesty, or any of his subjects, or on any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes."

Sect. 2. "that assurance on private ships of war, fitted out by any of his majesty's subjects, solely to cruise against his majesty's enemies, may be made by or for the owner's thereof, interest or no interest, free of average, and without benefit of salvage to the assurer, any thing herein contained to the contrary thereof in anywise notwithstanding."

Sect. 3. "that any merchandises or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be assured in such way and manner as if this act had not been made."

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AGAINST PUBLIC POLICY.

Nature of the interest which is protected by a policy of insurance.

Judgment of Mr. Justice Lawrence in *Lucena v. Craufurd*.

According to Scaccia (1), "*Assecurationis contractus habet locum in quâvis re, seu de quâvis re quæ subjacere possit periculo seu interitui*." A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it—in *quantum mea interfuit*, i.e. *quantum mihi abest quantumque lucrari potui* (2); and whom it importeth, that its condition as to safety or other quality should continue.

In *Lucena v. Craufurd* (3) Mr. Justice Lawrence said, "Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that, which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it, as to have benefit from its existence, prejudice from its destruction. The property of a thing, and the interest devisable from it, may be very different: of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing may be considered as being comprehended."

EQUITABLE INTEREST.

Judgment of Mr. Justice Ashhurst in *Smith v. Lascelles*.

An insurance may be effected upon an equitable interest: thus, in *Smith v. Lascelles* (4) Mr. Justice Ashhurst said, "The plaintiff had only mortgaged his interest in the goods and freight to the defendant; and therefore, although the defendant may have insured the legal interest on his own account, he might also have insured the equitable interest remaining in the plaintiff on the plaintiff's account."

INDEFEASIBILITY OF PROPERTY, NOT THE CRITERION OF AN INSURABLE INTEREST.

Consignee of goods.

In *Stirling (Sir Walter) v. Vaughan* (5) Lord Ellenborough said, "Is it not in common experience that a defeasible interest is insurable? It is the case of every consignee of goods under a bill of lading; the goods on their passage home are liable to be stopped *in transitu*, and his interest defeated; yet can it be said, that the property is not so far vested in the consignee as to entitle him to insure. The indefeasibility of the property, therefore, is not the criterion of an insurable interest."

Prize captors and trustees for prize vessels.

A prize taken by the navy and army conjointly is insurable, on account of the interest of the captors under stat. 45 Geo. 3. c. 72. s. 3., which grants a prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the crown as to the respective shares. (6)

Commissioners appointed by the crown under stat. 35 Geo. 3. c. 80., which enabled them "to take into their possession and care all Dutch ships and effects detained or brought into the ports of Great Britain, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive from his majesty and his privy council," can insure in their own names such ships and effects after seizure abroad, and while they are *in transitu* to this country. (7)

(1) *Questio prima*, No. 153.

(2) Dig. lib. 46. lib. 8. c. 13.

(3) 2 N. R. 302.

(4) 2 T. R. 188.

(5) 11 East, 628.

(6) *Sterling (Sir Walter) v. Vaughan*, 11 ibid. 619.

(7) *Craufurd v. Hunter*, 8 T. R. 13. *Lucena v. Craufurd*, 3 B. & P. 75. 2 N. R. 269., vide *Routh v. Thompson*, 13 East, 274.

Where it is stipulated by a charter-party, that in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money, which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage; because, as observed by Lord Ellenborough (1), "He was not bound to trust exclusively to the credit of the charterer, but might likewise protect himself by a policy of insurance."

It was formerly a matter of doubt, whether stat. 19 Geo. 2. c. 37. was intended to extend to insurances of foreign property, and on foreign ships; but, in *Thellusson v. Fletcher* (2) it was held, that such property and ships were not included within the statute, on account of the difficulty of bringing witnesses from abroad to prove the interest.

In order to make a policy void on the ground of want of interest in a party who once had it, the party must have parted with all his interest in that, which is the object of the insurance: thus, if the shipper of goods abroad indorses over to another the bills of lading, he thereby transfers the whole property in the goods to the indorsee, and he has no insurable interest therein; but if it appear, that there was any agreement between the indorser and indorsee, that such property was not meant to be given at the time, as if it were only to secure to the indorsee the net proceeds, or that the indorser, in case of a loss, was to pay the sum for which the goods were assigned, he then has an insurable interest. (3)

If the contract between the parties be one, that cannot be enforced, an insurable interest cannot be derived therefrom.

In *Stockdale v. Dunlop* (4) it appeared, that Messrs. H. and Co. being the owners of two ships called the Antelope and Maria, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm oil, agreed verbally to sell to the plaintiff 200 tons of oil to arrive by the Antelope, and 100 tons to arrive by the Maria. The Antelope did afterwards arrive with 100 tons of oil on board, which were delivered by H. and Co. to the plaintiffs. The Maria, having 50 tons of palm oil on board, was lost by perils of the seas. The plaintiffs having insured the oil on board the Maria, together with their expected profits thereon, it was held, that they had no insurable interest, as the contract which they entered into with H. & Co. being verbal only, was incapable of being enforced, Mr. Baron Parke observing, "I concur in opinion with the Lord Chief Baron, that the plaintiffs have no insurable interest. I admit that profits may be insured, but that is on the ground, that they form an additional part of the value of the goods in which the party has already an interest. Thus, the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee, or a factor in respect to his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation, that the claim to retain the goods will be allowed. So may the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession. There the profits are insured as an additional value upon the goods, in which the insurer has a present interest. Here, however, the assured are not interested at the time of the goods being put on

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Owners not bound to rely upon the credit of the charterer.

Foreign vessels not within stat. 19 Geo. 2. c. 37.

UNINSURABLE INTEREST.

Where a party once interested, has assigned such interest.

If the interest between the parties be one, that cannot be enforced, an insurable interest cannot be derived therefrom.

Judgment of Mr. Baron Parke in *Stockdale v. Dunlop*.

(1) *Hobbs v. Hannam*, 3 Camp. 94.

(2) *Doug.* 315.

(3) *Hibbert v. Carter*, 1 T. R. 745.

(4) 6 M. & W. 224.

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AGAINST PUB-
LIC POLICY.**

board, but only upon their arrival. They rely upon the honour of the vendor, that the goods shall be put on board the ship specified in the contract, and that they shall be delivered to them when the ship arrives. It is an engagement of honour merely. If it is not a contract capable of being enforced at law, it is nothing. The contract is to sell the goods when they arrive; but there was no memorandum in writing, and consequently no contract which was capable of being enforced, at the time either of the insurance or the loss; and if it ultimately did become capable of being enforced, that was only by the subsequent part delivery and acceptance, which was after the loss had occurred. At the time of the insurance and of the loss, there was merely an expectation of possession on the part of the plaintiffs, founded on the mere promise of the vendors, but there was a total absence of interest in the subject-matter of the insurance. There was no contract which could be enforced, but a mere promise on the part of Messrs. H. and Co. to deliver the oil when it arrived. There was no interest whatever, either special or general, in the cargo. The defendant is therefore entitled to a verdict on the third plea."

The advantage or interest should not be contingent.

The object of the insurance should be *bond fide* property, and not be made to cover a contingent interest or advantage. Thus, an agreement to pay 20*l.* to the defendant at the next port a ship should reach, provided, that if she did not save her passage to China, the defendant would pay to plaintiff 1000*l.* at the end of one month after she arrived in the river Thames, without reference to any property, though one of the parties had some goods on board liable to suffer by the loss of the season, has been held to be a wagering policy within stat. 19 Geo. 2. c. 37. (1)

An insurance "on the ship, at and from Bristol to St. Thomas and Jamaica, and from thence back to Dublin, on commission valued at 1000*l.*," which appeared to bear insurance upon the commissions expected to arise upon the sale and disposition by the plaintiff in Dublin, of produce expected to be shipped on board such ship at Jamaica—was held to be a wagering policy. (2)

Bounty for vessels sailing in certain degrees of latitude.

A French law provides, that "the vessel which shall have fished either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn at 62° of latitude at the least, shall obtain on its return a supplemental bounty, if it bring back in the produce of its fishery one half at least of its burden, or if it can prove a navigation of sixteen months at least;" but where a vessel which had caught fish to the amount of half its burden in the Atlantic, then doubled Cape Horn, and fished without success, and was lost within sixteen months after setting sail, it was holden, she had not complied with the conditions of the law, so as to be entitled to the bounty; and that the practice of the French government to allow the bounty under such circumstances was a mere matter of favour, and did not constitute a vested interest which could be the subject of assurance (3); Chief Justice Tindal observing, "It is undoubtedly true, that in the case of *Le Cras v. Hughes* (4) the court expressed a decided opinion, that the expectation of future benefit, founded on the contingency of a

Judgment of Chief Justice Tindal in *Devaux v. Steele*.

(1) *Kent v. Bird*, Cowp. 583.

(2) *Knox v. Wood*, Park on Insurance, 405. 1 Camp. 543. A wagering policy cannot be abandoned by the assured at any

time. *Kulen Kemp v. Vigne*, 1 T. R. 304.

(3) *Devaux v. Steele*, 6 Bing. N. C. 358.

(4) *Park on Insurance*, 406.

future grant from the crown, but warranted by universal practice, did amount to an insurable interest. But after the observations made on that case by Lord Eldon, in giving judgment in the House of Lords in *Lucena v. Craufurd* (1), and by Lord Ellenborough in *Routh v. Thompson* (2), the doctrine laid down in *Le Cras v. Hughes* (3), if still to be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances. 'If the *Omoa case*,' says Lord Eldon, 'was decided upon the expectation of a grant from the crown, I never can give my assent to that doctrine. That expectation, though founded upon the highest probability, was not interest; and it was equally not interest, whatever might have been the chances in favour of the expectation.'

"The case, however, of *Le Cras v. Hughes* (4) did in its circumstances shew an expectation approaching much nearer to certain interest, than the present. In that case it was stated by Lord Mansfield, 'The crown *always* makes the grant, and there is no instance to the contrary.' In the case before us, the bounty referred to in the policy is stated both in the special case itself, and also upon the fourth plea, to be the bounty allowed by the French government under a written law, which is set out in the case in the fourth plea. When, therefore, it is once determined, that the bounty which is so created by the written law, and by nothing else, is not, under the facts stated in the case, allowable by the legal construction of that law, it would require the most cogent and indubitable evidence of the actual and uniform allowance of the bounty under that state of facts to induce us to hold it a bounty, allowed by the government." (5)

II. Contraband of War.

In time of war it is the duty of those, who are not engaged in it, and who profess to be neutral, to observe an exact impartiality between the contending parties, and to afford no assistance to either, to the prejudice of the other:—" *Pacem utrique parti quod medios deceat amicos, optent; bello se non interponant.*" (6)

CONTRABAND
OF WAR.

The articles which shall or shall not be contraband, as between particular states, are often regulated and ascertained by particular treaties.

It is high treason for a British subject to send *belli instrumenta* to the king's enemies in time of war.

By the common law of England, no British subject can legally trade with an enemy, without the king's license. (7) The reason is, that war puts every individual of the respective belligerent governments into a state of mutual hostility; and there is no such thing as a war for arms, and a peace for commerce. In a state of war, all treaties, civil contracts, and rights of property are put an end to. Trading, therefore, which supposes the existence of civil relations, the rights of property, and the obligations of contracts, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to

Commerce
with the enemy.

(1) *In error*, 2 N. R. 321.

(2) 11 East, 434.

(3) *Park on Insurance*, 406.

(4) *Ibid*.

(5) *Devauz v. Steele*, 6 Bing. N. C. 371.

(6) *Livy*, lib. xxxv. c. 48.

(7) *Vandyck v. Whitmore*, 1 East, 475.
Marshall on Insurance, 80.

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aid and comfort the enemy; and trading not only affords that aid in the most effectual manner, by enriching the enemy's country, and increasing their resources, but also facilitates the means of carrying on a traitorous correspondence, which may more than counterbalance any advantage likely to accrue from such trading. This being so, it follows, that every contract of insurance against the risks attendant on such trading must be illegal. (1)

III. *Illegal Commerce with British Colonies.*

ILLEGAL COM-
MERCE WITH
BRITISH COLO-
NIES.

If an insurance be effected upon property, which is either exported or imported, in contravention of the laws made in this country for the regulation of the commerce with any of the British colonies, such policy will be illegal—because it would be inconsistent with the protection, which the sovereign owes to the subordinate state, to encourage any commerce injurious to its interests, or to countenance any infraction of those laws, to which the king, as the head of the state, has given his sanction. (2)

Intercourse
prohibited with
a British co-
lony.

If intercourse be prohibited with a British colony, an insurance on goods intended to be carried there would be void. (3)

IV. *Smuggled Goods.*

SMUGGLED
GOODS.

No insurance can be made on goods and merchandise intended to be imported or exported contrary to the laws of this kingdom, or those of its dependencies, or to the law of nations; and if the intended commerce be contrary to any of these laws, an insurance made to protect it, will be illegal and void. For the law would be inconsistent with itself, were it to give validity to a contract, which is meant to protect a party from the risks attendant upon the infringement of the law (4); and the insurer can take advantage of this objection, though he knew the trade to be illegal. (5)

The law of England pays no attention to the revenue laws of other countries (6); and though the intention of the assured be to carry on a trade with the subjects of a foreign state, forbidden by the laws of that state, yet it will be lawful; and, if known to the insurer, the policy will bind him. (7)

V. *Slaves.*

SLAVES.

Slaves were never the subject of insurance; and the throwing overboard of some slaves in consequence of a scarcity of water, arising from the cap-

(1) It is not against public policy for a governor of a factory or settlement for trade to insure a fort against the capture of an enemy. *Carter v. Boehm*, 3 Burr. 1912.

(2) Marshall on Insurance, 57. *Chalmers v. Bell*, 3 B. & P. 604. *Camden v. Anderson*, 6 T. R. 723. *Wilson v. Marryat*, 8 T. R. 31. *Bird v. Appleton*, *ibid.* 562.

(3) *Johnston v. Sutton*, Doug. 254. *Van-*

harthals v. Halhed, *cit.* Marshall on Insurance, 77. *Gist v. Mason*, 1 T. R. 84.

(4) Marshall on Insurance, 52. *Stats* 6 Geo. 4. c. 108. s. 47. 4 & 5 Will. & M. c. 15. s. 14. *Chalmers v. Bell*, 3 B. & P. 604.

(5) *Holman v. Johnson*, Cowp. 343.

(6) *Antè*, 273. tit. *Assumpsit*.

(7) *Lever v. Fletcher*, Park on Insurance, 360. Marshall on Insurance, 56.

tain's having missed the island of Jamaica, and being longer than the ordinary passage, was held not to be a loss by perils of the sea. (1)

CONTRACTS
AGAINST PUBLIC POLICY.

VI. Seamen's Wages.

In order to restrain all insurances whereby the interest of the seamen in the care and preservation of the ship may be lessened, seamen cannot insure their wages (2); but this restraint is meant only to apply to such wages as are not due till the voyage is absolutely concluded. (3)

SEAMEN'S
WAGES.

VII. Effect of a License from the Crown.

In *Usparicha v. Noble* (4) Lord Ellenborough said, "The crown in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end. For adequate purposes of state policy and public advantage, the crown, it must be presumed, has been induced in this instance to license a description of trading with an enemy's country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the crown has thought fit to permit (which, in respect of its prerogatives of peace and war, the crown is by its sole authority competent to prohibit or permit) must be regarded by all the subjects of the realm, and by the courts of law, when any question relative to it comes before them, as legal, with all the consequences of its being legal; one of which consequences is a right to contract with other subjects of the country, for the indemnity and protection of such property, in the course of its conveyance to its licensed place of destination through an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy as consignee or purchaser. In the present case the license was obtained for the purpose of protecting the subject-matter insured in the course of its conveyance by sea from England to certain ports in Spain, to be there delivered to the purchasers thereof, who are the persons in whom the interest is averred in the first and second counts of this declaration; and the action is well brought, upon the principles above stated, in the name of the plaintiff for their benefit. For the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the crown of Great Britain: his trading, as far as the disabilities arising out of a state of war are concerned, is British trading." (5)

EFFECT OF A
LICENSE FROM
THE CROWN.

The crown can license a trading which would be otherwise illegal.

Judgment of Lord Ellenborough in *Usparicha v. Noble*.

(1) *Gregson v. Gilbert*, 3 Doug. 232. *Park on Insurance*, 103. *Tatham v. Hodgson*, 6 T. R. 656., *antè*, 2098., *et vide stat.* 3 & 4 Will. 4. c. 73.

(2) *Webster v. De Tastet*, 7 T. R. 157.

(3) Seamen can insure goods which they purchase with their wages.

The captain can insure the goods which he has on board; his commission; privileges; or his share in the ship, if he be a part owner. 1 *Emerigon*, 236.

But a policy effected on money lent to the captain of a ship, payable out of the freight, has been held to be illegal on the face of it.

Wilson v. Royal Exchange Comp. 2 Camp. 626. So was a policy on money advanced to the captain of a vessel "lost or not lost." *Siffitt v. Allnutt*, 1 M. & S. 39.

(4) 13 East, 341.

(5) *Vide Bazett v. Meyer*, 5 Taunt. 824., *vide etiam Hullman v. Whitmore*, 3 M. & S. 337. *Rucker v. Ansley*, 5 *ibid.* 25. *Anthony v. Moline*, 5 Taunt. 711. *Robinson v. Touray*, 1 M. & S. 217. *Flindt v. Waters*, 15 East, 260. *Oom v. Bruce*, 12 *ibid.* 225., *sed vide Mennett v. Bonham*, 15 *ibid.* 495. *Flindt v. Crokatt*, *ibid.* 522.

CONTRACTS
AGAINST PUB-
LIC POLICY.

Goods bought of an enemy cannot be insured without the king's license (1), but the terms of the king's license must be strictly pursued; and if it be provided in such license, that the party acting under it, shall give bond for the due exportation to the places proposed, of the goods intended to be exported to such country, and they are exported without such bond having been given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. If a license to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient, that the goods were shipped before the expiration of the time, the ship not sailing until after that time. But, if the licensed adventure be *bond fide* prosecuted within a part of the time limited, it will not become illegal, because by some accident the voyage was protracted beyond that period. (2)

A license granted under an order in council to H. S. (a British resident merchant) permitting a vessel bearing any flag, except the French, to proceed in ballast from any port north of the Scheldt to Archangel, there to load a cargo of such goods, as are permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to H. S. or to any particular class of persons (3); and therefore, where Russian subjects at Archangel, who were alien enemies, had shipped goods under such license, for the purpose of being brought into this country:—It was held, that they were protected by it, and an insurance made for their benefit was legal. (4)

If a vessel bring from a hostile country, under a license, a cargo of enumerated goods, and also certain other goods not licensed, the insurance will be valid, *quoad* the licensed goods (5); but if there be "any infirmity in any part of an integral voyage, it will make the whole illegal, so that the insured cannot recover upon a policy on any part of it." (6)

In *Parkin v. Dick* (7) Lord Ellenborough said, "The stat. 53 Geo. 3. c. 2. having made the exportation of and trade in naval stores, contrary to the king's proclamation, illegal, impliedly avoids all contracts made for protecting the stores so exported. It is an illegal act to sail with such stores on board, and subjects the ship itself to forfeiture. The policy is one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification by the assured, cannot alter the nature of the contract with respect to the underwriters, so as to sever that, which was originally one entire contract. It has been decided a hundred times, that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void."

The crown, however, cannot, by its license, authorise the importation of any property, if the importation be prohibited by statute. (8)

Licensed and
unlicensed
goods.

Illegality in
any part of an
integral voy-
age.

Judgment of
Lord Ellen-
borough in
Parkin v. Dick.

When the
crown cannot
grant a license.

(1) *Potts v. Bell*, 8 T. R. 548.

(2) *Shroeder v. Vaux*, 15 East, 52.

(3) *Robinson v. Touray*, 1 M. & S. 217.
Same v. Cheeswright, *ibid.* 220. recog.
in *Hulman v. Whitmore*, 3 *ibid.* 340. The
same subject was discussed again in *Rucker*
v. Anley, 5 M. & S. 25.

(4) *Vide etiam Hagedorn v. Reid*, 1 M. & S. 567.

(5) *Pieschell v. Allnutt*, 4 Taunt. 792.

(6) *Per Lord Kenyon in Wilson v. Maryat*, 8 T. R. 46.

(7) 11 East, 503.

(8) *Shiffner v. Gordon*, 12 East, 296.

4. WARRANTIES.

WARRANTIES.

I. *Construction of.*

A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent.

CONSTRUCTION OF.

It may be either *affirmative*; as where the insured undertakes for the truth of some positive allegation, as, that the thing insured is neutral property, that the ship is of such a force, that she sailed or was well on such a day, &c.;—or it may be *promissory*; as where the insured undertakes to perform some executory stipulation, as, that the ship shall sail on or before a given day; that she shall depart with convoy; that she shall be manned with such a complement of men, &c.

Affirmative and promissory warranties.

Warranties are either express or implied. An express warranty, is a particular stipulation, introduced into the written contract, by the agreement of the parties, as, that the thing insured is neutral property, that the ship shall sail by a given day, that she shall depart with convoy, &c.

Warranties are either express or implied.

An implied warranty is that, which necessarily results from the nature of the contract, as, that the ship shall be seaworthy when she sails, that she shall be navigated with reasonable skill and care, that the voyage is lawful, and shall be performed according to law. (1)

A warranty, like every other commercial contract, is to be construed according to the understanding of merchants, and does not bind the insured, beyond the commercial import of the words. (2)

Warranties construed according to the understanding of merchants. Performance.

A warranty being in the nature of a condition precedent, must be performed by the insured, before he can demand performance of the contract on the part of the insurer; and it is quite immaterial for what purpose, or with what view, it is made; or whether the insured, had any object in making it.

The warranty being once inserted in the policy, it becomes a binding condition on the insured; and unless he can shew that it has been strictly fulfilled, he can derive no benefit from the policy. The very meaning of a warranty is, to preclude all question, whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed.

The breach of a warranty, therefore, consists, either in the falsehood of an affirmative, or the non performance of an executory stipulation. In either case the contract is void *ab initio*, the warranty being a condition precedent; and whether the thing warranted was material or not—whether the breach of it proceeded from fraud, negligence, misinformation, or any other cause—the consequence is the same. The warranty makes the contract hypothetical; that is, it shall be binding if the warranty be complied with. With respect to the compliance with warranties, there is no latitude, no equity: the only question is, has the thing warranted taken

Breach of warranty avoids the contract *ab initio*.

(1) Marshall on Insurance, 353, 354. 1 (2) *Hyde v. Bruce*, B. R. H. T. 23 Geo. 3. MS. cit. Marshall on Insurance, 354.;

WARRANTIES.

To whatever cause the non compliance is attributable, the contract is void.

How an express warranty should be made. It must appear on the face of the policy.

A paper wrapped up in the policy will not make a warranty.

place or not? If not, the insurer is not answerable for any loss, even though it did not happen, in consequence of the breach of the warranty. (1)

It is also immaterial to what cause the non compliance is attributable; for if it be not in fact complied with, though perhaps for the best reasons, the policy is void. The condition has not been performed, or the contingency has not happened, on which the contract was made; and the underwriter has a right to say, that there is no contract. Therefore, if a ship be warranted to sail on or before a given day, and she be prevented by any accident, as the sudden want of repair, the appearance of an enemy, &c. from sailing till the next day, yet the warranty is not complied with, and there is an end of the policy. (2)

An express warranty, must appear upon the face of the policy, in order that there may be indisputable and unequivocal evidence of a stipulation, the non compliance with which, will have the effect of avoiding the contract:—consequently, instructions in writing for effecting a policy, unless inserted in the instrument itself, do not amount to a warranty. (3)

As where a written paper of instructions, relating to the force of the ship, with these words, "twelve guns and twenty men," was wrapped up in the policy, when brought to the underwriters to be subscribed; and evidence was offered to prove, that a written memorandum inclosed in the policy was always among merchants considered as part of the policy;—Lord Mansfield held, that, whether this was or was not a part of the policy was a question of law, and therefore such evidence could not be received; and that a written paper, by being folded up in the policy, did not become a warranty. (4)

Even a paper wafered to the policy will not make a warranty; but it will be sufficient if it be written in the margin. (5)

Yet if a policy refer to printed proposals, they will be considered as a part of the policy, even though they make a condition precedent.

II. Seaworthiness.**SEAWORTHINESS.**

In every insurance, whether on ship or goods, there is an implied warranty, that the ship shall be seaworthy, when she sails on the voyage insured; that is, that she shall be "tight, staunch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage." (6)

The implied warranty of seaworthiness on the part of the assured, refers to the commencement of the risk; the only exception is, where pilots or a particular description of crew are necessary in certain parts of the voyage. There is no difference, as to such implied warranty, between time policies and others. (7)

The consideration upon which the insurance is paid.

The consideration of the insurance is paid to the intent, that the insured may be indemnified against certain contingencies, and it supposes, that the

(1) *Hibbert v. Pigou*, cit. *Marshall on Insurance*, 375.

(2) *Bond v. Nutt*, Cowp. 606.

(3) *Pawson v. Watson*, Cowp. 787.

(4) *Pawson v. Barnevelt*, Doug. 12. n. *Pawson v. Ewer*, ibid.

(5) *Bize v. Fletcher*, ibid. 13.

(6) *Vide post*, 2212, 2213. tit. EVIDENCE.

(7) *Hollingsworth v. Brodrick*, 7 A. & E. 40.

insurer may gain the premium : but if the ship be incapable of performing the voyage, there is no possibility of his gaining the premium ; and in that case, the contract on his part would be without consideration, and consequently void.

Upon which principle, if a ship be insured at and from a foreign port, it is essential, that she should have been once at the place in good safety, for if she arrive at the outward port so shattered, as to be a mere wreck, a policy will not attach on the homeward voyage. (1)

A ship to be seaworthy must be rendered as secure as possible from capture, as well as from the perils of the sea (2); and a neutral vessel is not seaworthy, unless she be provided with documents to prove her neutrality. (3)

Although there are different degrees of seaworthiness, yet the implied warranty renders it unnecessary in the first instance to disclose any thing, that forms an ingredient in seaworthiness, because no representation need be made to the underwriters of any thing, which the insured warrants.

Thus, in *Schoolbred v. Nutt* (4) Lord Mansfield said, "That there should be a representation of every thing relating to the risk, which the underwriter has to run, except it be covered by a warranty. It is a condition, or implied warranty, in every policy, that the ship is seaworthy; and therefore there need be no representation of that. If she sailed without being so, there is no valid policy."

It is not requisite, that the ship should in all cases be seaworthy from the moment the policy attaches and the risk commences. By the words "at and from," the risk on a ship is often made to commence while she is in dock, and undergoing the requisite repairs to render her seaworthy, and capable of performing the intended voyage. If the ship, at the time the risk commences, be in such a state as her situation then requires, that is sufficient; nor is it necessary, that she should be completely seaworthy till she sails on the voyage insured. (5)

As the insurer is only liable for losses arising from the extraordinary and unforeseen perils of the voyage, if the ship become un navigable, or incapable of proceeding on the voyage insured, all the writers agree, that the presumption shall be, that this proceeded from the age and rottenness, or other defect of the ship, unless it be made appear to have been occasioned by sea damage, or some unforeseen accident. (6) The reason assigned for this is, that, by the marine law, an indefinite innavigability is never classed among the perils to which the insurer is liable, because a thing so subject to be injured by time and the use which is made of it, cannot be supposed always to retain its original state; and that though a ship may at the time of her departure appear capable of performing the voyage insured, yet if the voyage should prove longer than usual, her in-

WARRANTIES.

When a policy will not attach on the homeward voyage.

Vessel must be rendered as secure as possible from capture.

Neutral vessel must have proofs of her neutrality.

No information respecting the seaworthiness of the vessel need be disclosed unless required.

Not requisite that the ship should be seaworthy until she sails.

WHEN A SHIP WILL BE PRESUMED UNSEAWORTHY.

(1) *Annen v. Woodman*, 3 Taunt. 299.

(2) *Wedderburn v. Bell*, 1 Camp. 1.

(3) *Steel v. Lacy*, 3 Taunt. 285.

(4) *Park on Insurance*, 346. *Haywood v. Rodgers*, 4 East, 590., vide etiam *Weir v. Aberdeen*, 2 B. & A. 320., post, 2145.

(5) *Forbes v. Wilson*, cit. *Marshall on Insurance*, 148., vide etiam per *Patteson J.*

in *Hollingsworth v. Brodrick*, 7 A. & E. 47.

(6) *Marshall on Insurance*, 149. *Watson v. Clark*, 1 Dow, 344. *Munro v. Vandam*, *Park on Insurance*, 333. *Douglas v. Scougall*, 4 Dow, 269. *Parker v. Potts*, 3 ibid. 23. *Franco v. Natusch*, 1 Tyrw. & G. 401.

WARRANTIES.

Insured ignorant of the unseaworthiness of his ship.

Vessel must be provided with the requisite tackle.

Owner bound to provide a crew of competent skill.

Underwriters not liable if there be not a competent person to supply the place of the captain when ill.

Effect of vessel sailing with an insufficient crew.

ternal defects will sometimes become apparent from time, from the pressure of the cargo, and from the action of the sea, without any extraordinary accident.

If a ship at the time of her departure, was not in a condition to perform the voyage insured, neither the innocence nor ignorance of the assured, nor any precautions he may have taken to make her seaworthy, will avail him against the breach of this implied warranty. (1)

Under the implied warranty as to seaworthiness, it is necessary not only that the hull of the vessel be tight, staunch, and strong, but that she be also furnished with ground-tackling sufficient to encounter the ordinary perils of the sea; and therefore, where it appeared, that the best bower-anchor and the cable of the small bower-anchor were defective, the vessel was held not to be seaworthy. (2)

Where a vessel had been lengthened and insured for a foreign voyage, but the new parts were not fastened with hanging knees, it was held, that she was not seaworthy for such a voyage at the commencement of the risk. (3)

In a policy by a member of a mutual insurance club, there was a memorandum, amongst other exceptions, warranties, rules, terms, conditions, and agreements, that "all ships were to be inspected and approved by a committee of the club, and that all chain cables were to be properly tested:"—It was held in an action for a loss, that it was not a condition precedent which made it necessary for the insured to prove, that a chain cable had been tested previously to the voyage; it being only a direction to the committee. (4)

In *Shore v. Bentall* (5) Lord Tenterden said, "The owner, as a condition precedent, is bound to provide a crew of competent skill:" thus, the underwriters were held not be liable where the crew were insufficient, in not having a person on board able to take the captain's place on his being dangerously ill, and the ship was consequently obliged to deviate from her course to find a person to direct her. (6)

But the question, whether a ship, on a voyage from Madras to London, is not seaworthy, if she have no person on board her besides the captain who is capable of navigating her, is a question of fact for the jury, and not a question of law to be determined by the judge.

Where a vessel engaged in the southern whale and seal fishery, and with liberty to chase and capture prizes, was insured in August, 1807, with a retrospect to the 1st of August, 1806, although, at the time of her insurance, she was not competent to pursue all the purposes of her voyage, her crew being reduced by death and casualties:—It was held, that if she had a competent force to pursue any part of her adventure, and could be safely navigated home, she was seaworthy. (7)

Where a ship sailed on her outward voyage from Liverpool to Cuba, with a crew of thirteen men; and, on her arrival at the latter place, three

(1) *Lee v. Beach*, Marshall on Insurance, 152. *Oliver v. Cowley*, Park on Insurance, 343., sed vide *Mills v. Roebuck*, *ibid.* 335.

(2) *Wilkie v. Geddes*, 3 Dow, 57.

(3) *Watt v. Morris*, 1 *ibid.* 32.

(4) *Harrison v. Douglas*, 3 A. & E. 396. Payment of money into court in an action

(5) 7 B. & C. 798. n.

(6) *Clifford v. Hunter*, M. & M. 103. 3 C. & P. 16.

(7) *Hucks v. Thornton*, Holt's N.P.C. 30.

had died, and two deserted there, and the captain could only procure eight men for the whole of the homeward voyage, and two for Montego Bay in Jamaica (ten men being a competent crew to navigate the vessel); and he accordingly touched at Montego Bay for the sole purpose of landing those two men and procuring others in their stead, which he did; and the vessel was lost by the perils of the sea in proceeding from thence on the voyage to Liverpool:—It was held, that, on a policy from Cuba to Liverpool, the ship was not seaworthy, as to her crew for the whole of her homeward voyage when she sailed from Cuba; or that, even if she then had a sufficient crew, the touching at Montego Bay was a deviation; and that the circumstance of her having become seaworthy by having a sufficient crew at the time of the loss, did not entitle the assured to recover against an underwriter on the policy. (1)

An owner is responsible for the ignorance of his captain: thus, where in a policy on a voyage up the Mediterranean, on the coast of Spain, the underwriters stipulated, that they would not be liable higher up the Mediterranean than Tarragona, the assured could not recover, where the captain of the ship, through entire ignorance of the coast, which the occasion and the terms of the policy required him to distinguish, went into Barcelona, an enemy's port, which is higher up than Tarragona; for this was either a deviation without any just cause (and on this ground the plaintiff was held not entitled to any return of premium), or there was a failure of an implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the declared purpose of the voyage should be provided. (2)

In *Shore v. Bentall* (3) Lord Tenterden said, "We are all of opinion, that underwriters are responsible for the misconduct or negligence of the captain and crew."

The question respecting the nature of the implied warranty as to seaworthiness, or mode of navigation between the assured and the underwriter on a time policy, is illustrated by the judgment of Mr. Baron Parke in *Dixon v. Sadler* (4), who observed, "In the case of an insurance for a certain voyage, it is clearly established, that there is an implied warranty that the vessel shall be seaworthy, by which it is meant, that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough, that the state of the ship be commensurate to the then risk (5); and if the voyage be such, as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters, that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immedi-

WARRANTIES.

Not requisite to have a full complement of men in harbour.

Owner responsible for the ignorance of his captain.

Underwriters responsible for the misconduct or negligence of the captain and crew.

Nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured and underwriters.

Judgment of Mr. Baron Parke in *Dixon v. Sadler*.

(1) *Forshaw v. Chabert*, 6 Moore, 369. 3 B. & B. 158. 1 Phillips on Insurance, 312.

(2) *Tait v. Levi*, 14 East, 481.

(3) 7 B. & C. 798. n.

(4) 5 M. & W. 414.

(5) *Annen v. Woodman*, 3 Taunt. 299. *Hibbert v. Martin*, Park on Insurance, 344. n.

WARRANTIES.

ately occasioned by the peril insured against. This principle is now clearly established by the cases of *Busk v. Royal Exchange Assurance Comp.* (1), *Walker v. Maitland* (2), *Holdsworth v. Wise* (3), *Bishop v. Pentland* (4), and *Shore v. Bentall*. (5) Nor can any distinction be made, between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not, whether a fire which causes a loss be lighted improperly, or after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference, whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences."

EFFECT OF NOT HAVING PILOTS.

In *Law v. Hollingsworth* (6), a ship, insured from Stetten to London, took a pilot on board at Orfordness on entering the Thames, who quitted her at Halfway Reach; after which, and before she came to her moorings higher up the river, she struck upon a ship's anchor, which entered her bottom, in consequence of which she sunk, and filled with water before she had been moored twenty-four hours. In an action on the policy it was objected, that there was actual negligence in the management of the ship, by not keeping the pilot on board till she had been moored in safety. Upon this ground the court were clearly of opinion, that the underwriters were discharged. Lord Kenyon said, "The principle upon which this case must be determined, seems to be admitted on all hands, namely, that the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage. The ship herself must be seaworthy; she must have a sufficient crew, and a captain and pilot of competent skill." "But in this case the captain did not perform his duty; for he had no pilot on board at the time the accident happened." "If the underwriters had been previously informed that there would be no pilot on board during the ship's sailing up the river Thames, probably they would not have undertaken the risk."

Judgment of
Lord Kenyon
in *Law v. Hol-*
lingsworth.

Judgment of
Mr. Baron
Parke in *Dixon*
v. Sadler.

In *Dixon v. Sadler* (7), in allusion to the foregoing case, Mr. Baron Parke said, "We cannot help thinking, that the case, although attempts were made to distinguish it, in some of the decided cases, must be considered as having been overruled by *Busk v. Royal Exchange Assurance Comp.* (8), *Walker v. Maitland* (9), *Holdsworth v. Wise* (10), *Bishop v. Pentland* (11), and *Shore v. Bentall* (12); and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The

(1) 2 B. & A. 73.

(2) 5 *ibid.* 171.

(3) 7 B. & C. 794.

(4) *Ibid.* 219.

(5) *Ibid.* 798. n.

(6) 7 T. R. 160.

(7) 5 M. & W. 415.

(8) 2 B. & A. 73.

(9) 5 *ibid.* 171.

(10) 7 B. & C. 794.

(11) *Ibid.* 219.

(12) *Ibid.* 798. n.

great principle established by the more recent decisions is, that if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance."

The duties of captains respecting pilots has been defined by Mr. Justice Parke in *Phillips v. Headlam* (1) as follows: — "The rule of law is, that the assured is bound to have the ship seaworthy at the commencement of the risk. He is bound, therefore, to have a sufficient crew, and a master of competent skill and ability to navigate her, at the commencement of the voyage; and if she sail from a port, where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. So, if in the course of her voyage, the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased. (2) But if a vessel sails to a port, where the establishment is such, that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that it can require in such a case is, that the master use all reasonable efforts to obtain one. If such efforts are used and fail of success, I do not think it material, that in the exercise of his discretion in the navigation of the ship, in the absence of a pilot, the master afterwards commits an error by which a loss is incurred, any more, than if he does so in any other part of the voyage, always supposing, that he is a person of competent skill and ability." (3)

WARRANTIES.

Duties of captains respecting pilots.

Judgment of Mr. Justice Parke in *Phillips v. Headlam*.

III. Warranty that a Ship shall sail on a given Day.

The warranty that a ship shall sail on a given day must be strictly performed. Thus, if a ship, warranted to sail on or before a particular day, be prevented from sailing on the day by an embargo, the warranty is not complied with (4); and if there be a warranty to sail after a specific day, it is broken and the policy avoided by sailing before the day. (5)

WARRANTY THAT A SHIP SHALL SAIL ON A GIVEN DAY.

(1) 2 B. & Ad. 383.

(2) *Law v. Hollingsworth*, 7 T. R. 160.

(3) Pilotage from Dover, Deal, and the Isle of Thanet, up the rivers Thames and Medway, is regulated by stat. 3 Geo. 1. c. 13., 7 Geo. 1. c. 21., and 43 Geo. 3. c. 152. Pilotage down the Thames, and through the North Channel, to or by Orfordness, and round the Long Sand Head into the Downs, and down the South Channel into the Downs, and from or by Orfordness up the North Channel and the Thames and Medway, by stat. 5 Geo. 2. c. 20.; and pilotage into or out of the port of Liverpool, by stat. 37 Geo. 3. c. 78., *vide etiam* regulations respecting pilots in stat. 47 Geo. 3. sess. ii. c. 70.; 48 Geo. 3. c. 104., amended by stats.

55 Geo. 3. c. 87.; 6 Geo. 4. c. 125. The 6th section of stat. 6 Geo. 4. c. 125., enacting that it shall be lawful for the Trinity House of Hull and Newcastle to appoint sub-commissioners of pilotage to examine and license pilots, is permissive and not imperative. (*Beilby, q. t. v. Raper*, 3 B. & Ad. 284.) Stat. 6 Geo. 4. c. 125. has been amended by stat. 9 Geo. 4. c. 86. (*vide Lucy v. Ingram*, 6 M. & W. 302. *Beilby v. Scott*, 7 *ibid.* 93.), and extended and altered by stat. 3 & 4 Vict. c. 68.

(4) *Hore v. Whitmore*, Cowp. 784. *Bond v. Nutt*, *ibid.* 601.

(5) *Vezian v. Grant*, Park on Insurance, 485. *Lang v. Anderdon*, 3 B. & C. 495. 5 D. & R. 393.

WARRANTIES.

To depart means to be out of port.

Judgment of Lord Ellenborough in *Moir v. Royal Exch. Ass. Comp.*

"Sailing or breaking ground."

Judgment of Lord Tenterden in *Pittegrew v. Pringle*.

"At and from London."

A sailing without a departure from the port.

In *Moir v. Royal Exchange Assurance Company* (1) Lord Ellenborough said, "A warranty to depart on or before a particular day is, I think, a warranty to be out of the port on or before that day. The object seems to be, that the voyage should be commenced out of the port by that time. The language of the underwriter amounts to this, 'I will be answerable for all perils upon the high seas, but let the vessel be well out of Memel by the 15th of September.'"

In *Pittegrew v. Pringle* (2) Lord Tenterden said, "The general principle of the decisions is this, that if a ship quits her moorings, and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing (3); but it is otherwise, if at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage." (4)

"The word 'sailing' cannot be confined to the mere technical act of hoisting the sails, or any thing of that sort." (5)

A warranty to sail on or before a particular day is not complied with, by leaving the harbour on that day, without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail. (6)

Neither is a warranty to sail on or before a particular day fulfilled, if the ship do not completely unmoor on that day, though she then has her cargo and passengers on board, and is ready to sail, and is only prevented from doing so by stress of weather (7); "and no distinction can be drawn, between the necessity of taking in more ballast, and that of receiving part of the cargo." (8)

In the case of an insurance at and from London, the warranty does not require, that the ship shall absolutely leave her port of departure, but only that she shall get under weigh, with intent to proceed on the voyage insured. (9)

A policy of insurance contained a warranty, "not to sail for British North America after the 15th of August." The vessel on the morning of the 15th of August was cleared at the custom-house of Dublin, and ready for sea. She was then lying in the custom-house-dock, which opens into the river Liffey, which forms part of Dublin harbour. She was afterwards, on the same day, hauled out of dock, and warped down the river Liffey about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to Quebec in North America. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little further down the river; and on the 17th, when the wind changed, she got to sea. The jury having found that the master and crew fully intended to sail for Quebec on the 15th of August, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty:—It was held, that the vessel was in the prosecution of her voyage on the 15th of August, and that the warranty

(1) 3 M. & S. 462.

(2) 3 B. & Ad. 520.

(3) *Lang v. Anderson*, 3 B. & C. 495.

(4) Vide etiam *Thellusson v. Ferguson*,
cit. Cowp. 607. n.

(5) Per Lord Denman in *Cochrane v. Fisher*, 1 C. M. & R. 818.

(6) *Graham v. Barras*, 3 N. & M. 125.

5 B. & Ad. 1011.

(7) *Nelson v. Salvador*, M. & M. 309.

(8) Per Parke J. in *Pittegrew v. Pringle*,
3 B. & Ad. 520.

(9) Park on Insurance, 496.

not to sail for British North America after that day had been complied with. (1) WARRANTIES.

Where, on a warranty to sail from Jamaica, on or before a day certain, the ship departed from her port on that day, with all her cargo and clearances on board, and proceeded to the place of rendezvous in the island, expecting to find convoy and proceed immediately, but was detained there by an embargo till after the day:—It was held, that the departure was a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready. (2)

In effecting a policy of insurance from Russia to this country, while the ship was on the outward voyage, the broker represented to the underwriters that a cargo was ready for her, and she was sure to be an early ship:—It was held, that this amounted only to a representation of what was expected on the part of the insured, and that the underwriters were liable, although from the delay in beginning to load the cargo, the voyage home was changed from a summer to a winter risk. (3)

If it be said in a letter, that a ship will sail from St. Domingo in the month of October, it is generally understood that she will not sail till the 25th of that month. (4)

A representation that the ship is expected to sail from the coast of Africa on such a day is not material, so as to vitiate the policy, although it should turn out that she actually sailed six months before. (5)

A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship, as to the time of her sailing, being made *bona fide*, upon probable expectation, does not conclude him. (6)

But where the agents to the owners of a ship instructed their correspondents by a letter, stating "that the Brilliant will sail from Nassau for Clyde on the 1st of May, a running ship," to effect an insurance, which they accordingly did, at the same time shewing the letter to the underwriters; and the ship in fact sailed on the 23d of April, on account of a favourable opportunity of convoy, and was captured on the 11th of May:—It was held by the House of Lords, that the expression in the letter was positive, and not a mere statement of expectation; and that being a material representation, the fact of its being untrue vitiated the policy. (7)

A statement made by the broker at the time of effecting a policy, that the ship was ready to sail on a particular day, when in fact she had sailed on the day before, was held to be such a material misrepresentation, as to vitiate the policy. (8)

A., a merchant in London, having an order in 1810, from B., a merchant in Perth, for goods, to be shipped from London for Dundee, sends the goods to the wharf on Saturday, the 24th of February, the vessel then taking in goods being the K. (unarmed), which had been substituted by the shipping company for the D. (armed), the company announcing on the 23d

Representation as to the sailing of a vessel, but not a warranty.

When a misrepresentation respecting the time of sailing will vitiate the policy.

(1) *Cochrane v. Fisher* (in error), 1 C. M. & R. 809. S. C. nom. *Fisher v. Cochrane*, 5 Tyrw. 496, affirming S. C. 2 C. & M. 581. 4 Tyrw. 424.

(2) *Earle v. Harris*, Doug. 357. *Bond v. Nutt*, cit. *ibid.* 358. *Cowp.* 607. *Wright v. Shiffner*, 11 East, 515. *Thellusson v. Ferguson*, Doug. 361.

(3) *Hubbard v. Glover*, 3 Camp. 313.

(4) *Chaurand v. Angerstein*, Peake's N. P. C. 61.

(5) *Barber v. Fletcher*, Doug. 305.

(6) *Bowden v. Vaughan*, 10 East, 415.

(7) *Dennistown v. Lillie*, 3 Bligh, 202.

(8) *Ellis v. Brutton*, Park on Insurance. 292.

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and 24th of February to all that inquired, that the K. and not the D. was to sail on the 25th (Sundays and Thursdays being the regular sailing days); A. dispatches the invoice on the 27th of February, dated on that day, with advice, that the goods had been sent by the D., not naming the 24th as the day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice, that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st of March; the K. sails with the goods on the 25th of February, and is captured on the 2d of March by a privateer: in an action brought by A. against B. for the price of the goods, it was held in error, that if B. had insured upon the representation sent him, he could not have recovered from the underwriters. (1)

Licensed voyage to a hostile country.

But where a license is granted for a voyage to a hostile country, to continue in force till a given day, if the voyage be *bond fide* begun before that day, it continues to be protected by the license, though delayed beyond the day by stress of weather or other accident, over which the assured have no control. (2) So, where there is a policy "at and from," if the ship have her cargo on board, and is ready to sail before the day when the license expires, although she is detained in port till after the day by contrary winds, the policy remains valid. (3)

IV. *Safety of Ship on a given Day.*

**SAFETY OF SHIP
ON A GIVEN
DAY.**

If a ship be safe at any time of that day on which the insurance was effected, it will answer.

Judgment of Lord Kenyon in *Blackhurst v. Cockell*.

Effect of inferential and positive statements.

Construction

The insured sometimes warrants, that the ship or goods insured were safe on a given day.

In *Blackhurst v. Cockell* (4) it appeared, that goods were insured from the lading of them on board the ship, "lost or not lost," and warranted well on a particular day: the ship was lost on that day before the policy was underwritten; upon which Lord Kenyon observed, "The single question is, whether the warranty at the bottom of the policy, means warranted well at the time when the defendant subscribed it, or any time on that day; and we are all of opinion, that if the ship were well at any time of that day, it is sufficient, and the underwriter is consequently liable;" and Mr. Justice Buller stated, "The nature of a warranty goes a great way to determine this question; it is a matter of indifference whether the thing warranted be or be not material; but it must be literally complied with; and if it be so, that is sufficient."

If an insurance broker state by way of inference and computation, that a ship is at a certain place at the time of effecting a policy, it is not a ground of avoiding the policy, though the broker was utterly mistaken, the underwriter not taking the pains to inquire, what were the facts on which the broker formed his conclusion. (5) But in a representation, that a ship was seen safe on such a day, and had performed two-thirds of her voyage, if it turn out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, and makes the policy void. (6)

(1) *Arnot v. Stewart*, 5 Dow, 274.
(2) *Groning v. Crockett*, 3 Camp. 83.
(3) *Schroder v. Vaux*, *ibid.* 84. n.

(4) 3 T. R. 360.
(5) *Brine v. Featherstone*, 4 Taunt. 869.
(6) *Macdowall v. Fraser*, Doug. 260.

that the ship was "in port" on a previous day, Lord Tenterden observed, "The only construction I can put on the words 'in port' in this policy is, that they mean in the port of Hamburg, from which the voyage was to commence. If the underwriters had been satisfied with the more general warranty contended for, the usual warranty of 'safe on the 19th of October' would have been the sufficient and proper mode of expressing it." (1)

WARRANTIES.

of the words
"in port" by
Lord Tenterden in *Colby v. Hunter*.

V. *Sailing with Convoy.*

If a ship warranted to sail with convoy, sail without convoy, the policy becomes void *defectu conditionis*, whether this be imputable to any omission on the part of the insured, or the refusal of government to appoint a convoy.

SAILING WITH CONVOY.

Effect of sailing without convoy.

It makes no difference, that the vessel has been lost from the exclusive perils of the sea, because a merchant vessel will brave any danger to escape that of war; in fact, the fear of one danger often drives us into greater — *cum plus in metuendo mali sit, quam in ipso illo quod timetur*.

It is requisite, in order to "sail with convoy," that it be a convoy for the voyage — the vessel must not only depart with convoy, but continue with it unless detached by necessity — must be with the convoy appointed by government — departure must be from the place of rendezvous appointed by government — and the vessel must have sailing instructions.

"To sail with convoy" must be a convoy for the voyage.

In a policy of insurance, "sailing with convoy" means "sailing with convoy for the voyage" (2); and a sailing with convoy to the general rendezvous, is a sailing with convoy for the voyage. (3)

A bill of lading signed by the captain, stating the ship to be bound to the port of destination, with convoy, amounts to an undertaking binding on the owner, that the ship shall sail with convoy. (4)

And where there is an undertaking to sail with convoy, it is not a sufficient excuse, that the ship was prevented from joining the convoy by the state of the weather. (5)

It is not requisite, that the vessel should always sail with convoy bound precisely to the place of her destination: — thus, a policy of insurance was effected on a ship, on a voyage from A. to C., warranted to depart with convoy for the voyage. The convoy appointed was to B., a port in the course, and near to C. This was held to be a compliance with the warranty, and the underwriters were liable, the ship being captured in the passage from B. to C. (6)

Not requisite that the vessel should, in all cases, sail with convoy bound to the place of her destination.

Where there are no convoys appointed at the port from which a ship commences her homeward voyage, she is not bound to call for convoy at a port in the course of the voyage, from which convoys are appointed. (7)

On representation that a ship will sail with convoy, whereby the plaintiff was induced to put his goods on board, the promise is complied with, if

(1) *Colby v. Hunter*, M. & M. 81. 3 C. & P. 7.

(5) *Ibid.*

(2) *Lilly v. Ewer*, Doug. 72.

(6) *D'Eguino v. Bewicke*, 2 Hen. Black. 551.

(3) *Marshall on Insurance*, 373. *Audley v. Duff*, 2 B. & P. 111.

(7) *Park v. Hammond*, 4 Camp. 344. 6 Taunt. 495. *Holt's N. P. C.* 80.

(4) *Sanderson v. Busher*, 4 Camp. 54. n.

WARRANTIES.

she follow the convoy and join it, so as to prevent the plaintiff from maintaining an action against the owner for a loss arising from another cause after she has joined. But it is otherwise, if, by reason of this representation, the owner of the goods in an insurance made thereon, was induced to warrant that she would sail with convoy. (1)

A ship cannot legally proceed without convoy from port to port to join convoy, unless a bond has been given, that she shall not sail without convoy. (2)

A ship licensed to sail without convoy, provided she is armed with a certain force, must take that force on board before she breaks ground. (3)

A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy. (4)

Vessel neglecting to get under weigh in time, or by delay put in a worse position.

If a ship neglect to get under weigh in time, it is a breach of the warranty to sail with convoy. (5)

If a ship get under way with the convoy, but wait some time for the master to come on board, whereby she loses her position, or is put in a worse position in the convoy, it will be a breach of the warranty, and the underwriters will be discharged. (6)

Vessel must not only depart with convoy, but continue with it, unless detached by necessity.

When a ship is warranted to depart with convoy, it must not only depart, but continue until the end of the voyage with such convoy, unless prevented by absolute necessity; therefore, where a ship so circumstanced did depart, but, being driven back by a storm, put into and refitted at an English port, from whence convoy usually sailed, and again sailed without convoy:—It was held, that the warranty was not complied with, and that the loss was not within the policy. (7)

Where a ship sailed with a frigate to the rendezvous, with directions in a certain case to proceed on the voyage; but lost the convoy, and instead of proceeding to the rendezvous, bore away for the port of destination:—It was held, that this was a sailing with convoy, sufficient to satisfy a warranty. (8)

If a vessel put to sea with convoy, and be separated by stress of weather, she may proceed on her voyage without convoy, because the separation has been occasioned by no human default. (9)

A vessel which sails with convoy, and is driven back by weather into her port of clearance, may lawfully sail thence again with her cargo on the voyage, without waiting for the next convoy from the same port, or joining convoy from any other port. (10)

Must sail with the convoy appointed by government.

"A warranty to sail with convoy means with such a convoy as government pleases to appoint, and whether it consists of separate ships at dif-

(1) *Christin v. Ditchell*, Peake's Add. Cas. 141. *Quare*, Whether a ship, insured at and from Jamaica to London, warranted to sail with convoy, arriving too late at the place of rendezvous for the convoy, but follows and overtakes it,—has complied with the warranty? *Gale v. Machell*, Marshall on Insurance, 667

(2) *Hinchley v. Walton*, 3 Taunt. 131. *Cohen v. Hinchley*, 1 ibid. 249.

(3) *Ibid.*

(4) *Ibid.*

(5) *Taylor v. Woodness*, Park on Insurance, 510. Marshall on Insurance, 380.

(6) *Walsham v. Thompson*, Marshall on Insurance, 381.

(7) *Morrice v. Dillon*, Selw. N. P. 999.

(8) *Manning v. Gist*, Marshall on Insurance, 373. 3 Doug. 74.

(9) *Jefferies v. Legendra*, Holt, 466.

(10) *Laing v. Glover*, 5 Taunt. 49.

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ferent stations or not, it is a convoy for the voyage; therefore, on that point, there is no doubt" (1), because government must be supposed to be best acquainted with the plans and force of the enemy, and the strength necessary to repel their attempts.

If a ship do not sail with the convoy appointed by government, it is not a sailing with convoy. In *Hibbert v. Pigou* (2) it was held, that a sailing under the convoy of a single ship, which formed part of the government convoy fleet, but which had not in fact joined the fleet at the time, nor was immediately under the orders of the admiral, is not a sufficient compliance with a warranty to sail with convoy.

Ship not sailing with the convoy appointed by government.

It is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way. (3)

The sailing with convoy required by stat. 43 Geo. 3. c. 57. is a sailing with convoy for the voyage. (4)

If a convoy have sailed, a ship cannot legally endeavour to overtake it. (5)

In *Audley v. Duff* (6) Mr. Justice Heath said, "It has been always understood, that provisions for a departure with convoy have relation to the custom of trade and the orders of government, and ought therefore to receive a liberal construction. There are many instances in Park's Insurance, where ships have been warranted to depart with convoy from the port of London, but the convoy having been warranted to sail from the Downs, or from Spithead, reference has been had to the orders of government, and the warranties have been held to be fulfilled by joining convoy at those places." (7)

Departure must be from the place of rendezvous appointed by government. Judgment of Mr. Justice Heath in *Audley v. Duff*.

Where there is a warranty in a policy of insurance, that the ship shall sail with convoy, she may sail without convoy from her loading port to the place of rendezvous for convoy for the voyage, although there be convoy for ships on other destinations between the loading port and place of rendezvous. (8)

In *Anderson v. Pitcher* (9) Lord Eldon said, "It is clear that sailing instructions are not necessary in all cases, but the decisions authorise me in saying, that in general cases they are required." "Indeed, the reason of that rule, which requires that the convoy should be appointed by government, shews the necessity of having sailing instructions, since without them, the ship does not stand in that relation, or under those circumstances in which she can take the full benefit of the government convoy. If the fleet be dispersed by a storm, how is she to learn the place of rendezvous? If it be attacked by the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force?"

SAILING INSTRUCTIONS. Judgment of Lord Eldon in *Anderson v. Pitcher*.

A warranty to depart with convoy is not complied with unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained. (10)

(1) Per Lord Mansfield in *Smith v. Readshaw*, cit. Park on Insurance, 510. *De Garcey v. Claggett*, ibid. 511.

(2) Marshall on Insurance, 375. Park on Insurance, 499. 3 Doug. 224., vide etiam *Audley v. Duff*, 2 B. & P. 111.

(3) *Cohen v. Hinckley*, 1 Taunt. 249. S.C. not 8 P. 2 Camp. 51.

(4) Ibid.

(5) Ibid.

(6) 2 B. & P. 115.

(7) *Lethulier's case*, 2 Salk. 443. *Gordon v. Morley*, Str. 1265. Park on Insurance, 468.

(8) *Warwick v. Scott*, 4 Camp. 62.

(9) 2 B. & P. 164. 3 Esp. N. P. C. 124. 1 Stark. 262.

(10) Ibid.

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But although sailing orders are necessary to the performance of a warranty to depart with convoy, particular circumstances may exempt the insured from the general rule. (1)

Thus, a warranty to sail with convoy is complied with, if the master do all in his power to obtain sailing instructions, but is prevented from acquiring them by the badness of the weather, or by the commander of the convoy refusing to give them. (2)

NEUTRAL PROPERTY.

Vessel insured should belong to the subject of a neutral state.

Neutral property defined.

Effect of false warranty.

Where neutral ship may carry enemy's property from its own to the enemy's country.

WHAT AMOUNTS TO A FORFEITURE.

Wilful acts of the master, &c.

Owner's warranty of national character, not satisfied by his being a native of the country stated in the warranty.

VI. Neutral Property.

If the insured profess to be the subject of a neutral state, and mean to be insured as such, the insurer requires him to warrant the ship or goods to be neutral property. This is done by inserting in the policy, either the words "warranted neutral," or "neutral property;" and sometimes the thing insured is represented, as belonging to the subjects of some neutral state, which of itself, is equivalent to a warranty. (3)

Neutral property, in the sense in which that expression must be understood in this warranty, is that, which belongs to the subjects of a state, in amity with the belligerent powers. (4)

If the warranty be false at the time it is made, the policy will be void *ab initio*; but it will be sufficiently true, if the thing insured be neutral property at the time when the policy is effected, the chance of future war being always a risk within the policy: thus, where a ship warranted neutral on the 28th of November sailed on the 11th of December, and hostilities commenced on the 20th of December, and she was captured on the 25th, it was holden, that this did not falsify the warranty, and the insurer was liable. (5)

A neutral ship may carry enemy's property from its own to the enemy's country, without being guilty of a breach of neutrality (6), provided, that neither the voyage nor commerce be of a hostile description, nor otherwise expressly or impliedly forbidden by the law of this country, although such ship, in consequence of carrying enemy's property, be either liable to detention, or to be carried into British ports for the purpose of search.

Any forfeiture of the obligations of neutrality by the wilful act or omission of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty (7); nor can the assured recover upon it, for any loss happening afterwards, though it proceed from a cause wholly unconnected with the warranty. (8)

A warranty of national character is not satisfied by the owner's being a native of the country stated in the warranty, if he reside and carry on trade in the dominions of a foreign power: thus, a neutral by birth, who resides and carries on trade in the state of a belligerent, is considered for civil purposes as adhering to the enemy, and his property is liable to confiscation

(1) *Webb v. Thomson*, 1 B. & P. 5. S.P. *Hibbert v. Pigou*, 3 Doug. 224. *Marshall on Insurance*, 374. *Park on Insurance*, 499.

(2) *Verdon v. Wilmot*, *Park on Insurance*, 500. n. *Victoria v. Cleeve*, Str. 1250.

(3) *Lothian v. Henderson*, 9 B. & P. 499.

(4) *Marshall on Insurance*, 390.

(5) *Eden v. Parkison*, Doug. 732. *Tyson v. Gurney*, 3 T. R. 477. *Saloveci v. Johnson*, *Park on Insurance*, 558.

(6) *Barker v. Blakes*, 9 East, 283.

(7) *Garrels v. Kensington*, 8 T. R. 230.

(8) *Woolmer v. Muilman*, 3 Burr. 1419.

in a court of prize; nor can he in such case warrant his property as neutral, although he may intend to return to his own country, and his ship may have been built there, and regularly equipped as a neutral ought to be. (1)

A warranty of national character imports, that the ship shall be properly documented: thus, a warranty, that a ship is "American" means, that she is entitled to all the privileges of an American flag; and if she have no passport on board (as required by a treaty between France and America), the warranty is not complied with, and the assured cannot recover against the underwriters, though in fact the ship suffered no inconvenience in the voyage from the want of a passport. (2)

WARRANTIES.

SHIP MUST BE PROPERLY DOCUMENTED.

Where a ship was warranted American, and the existing treaty between France and America required an American vessel to be furnished in time of war with a passport, expressing, *inter alia*, the place of the commander's habitation, but the ship insured had obtained a passport, which merely described the commander, as "commander of the ship called Mount Vernon, of the town of Philadelphia, of the burthen of 400 tons," not specifying therefore as it ought to have specified, the town or place where the commander resided, but only the town to which the ship belonged:—It was held, that the ship was not properly documented, and that the insured could not recover. (3)

It is not sufficient under such a warranty, that the ship is American built; it is necessary, that she should be provided with all documents required by the general law of nations, or by particular treaties, so that she may not be liable to any impediment or inconvenience in the course of the voyage. (4)

Vessel should have all the documents required by the law of nations.

The extent to which the ship is required to be documented, must be considered with reference to the law of nations, and to those treaties which are binding on the neutral country; a warrant of neutrality does not oblige the neutral owner to comply with the peculiar laws and regulations of belligerent powers. (5)

But a ship warranted of a particular nation, may in some cases falsify that warranty by a non compliance with the municipal laws and ordinances of her own country. Thus, it seems, that a vessel warranted American, would not satisfy the warranty without a compliance with the regulations of the American Navigation Act, since a foreign nation might have a right to say, that they were only obliged to respect as vessels of the United States, those, which the legislature of that country had resolved, should exclusively be deemed and denominated as belonging to their own nation. (6)

Vessel not complying with the municipal laws of her own country.

(1) *Tabbs v. Bendelack*, 4 Esp. N. P. C. 108. *Baring v. Clagett*, 3 B. & P. 207. *Wilson v. Marryat*, 8 T. R. 31. *Albrecht v. Sussmann*, 2 Ves. & B. 323. *McConnell v. Hector*, 3 B. & P. 113.

(2) *Rich v. Parker*, 7 T. R. 705. *Kidd v. Walker*, 1 Dow, 331. *Bell v. Carstairs*, 14 East, 394. See the case of a warranty to carry British and French licenses (*Everth v. Tuxao*, 1 Stark. 508.); and the evidence in support thereof, *ibid.*, vide etiam *Anon. Skin. 404.*, *et post*, tit. SHIPPING.

(3) *Baring v. Christie*, 5 East, 398. 1 Smith, 462. *Baring v. Clagett*, 3 B. & P. 208. 212. N. B. the ship had been captured by the French and condemned as prize.

(4) *Rich v. Parker*, 7 T. R. 709, 710.

(5) *Pollard v. Bell*, 8 T. R. 434. 440. *Bird v. Appleton*, *ibid.* 562. *Price v. Bell*, 1 East, 663. *Meys v. Walter*, Park on Insurance, 306.

(6) *Baring v. Clagett*, 3 B. & P. 205, 206. 213, 214., vide *Christian v. Secretan*, 8

WARRANTIES.

There is not an implied warranty on the part of the owner of the goods insured, that the vessel shall be properly documented.'

Illegal and piratical acts of a foreign state.

There is not an implied warranty on the part of the owner of goods insured, that they shall be in all respects properly documented. Where, through the negligence of the captain, the goods had not been regularly entered in the ship's manifest, for exportation, as required by stats. 13 & 14 Car. 2. c. 11. s. 3. and other statutes, the loss not having been occasioned by this omission, it was holden, that the underwriters were liable. (1) In the case of an insurance upon goods in a certain ship, which ship is not represented as a neutral at the time when the insurance is effected, although she be in fact a neutral, it is not necessary, that she should be documented as such. (2)

The owners of a vessel, who by performing the legal stipulations of a charter-party, proved the confiscation by the illegal and piratical act of a foreign state, do not thereby avoid their assurance. (3)

DEVIATION.

VII. Deviation.

WHAT IS A
DEVIATION.

Principle upon which a deviation avoids a policy.

Immaterial whether the loss was consequential on the deviation.

The terms of the policy are to be strictly adhered to, for any variation from the risk insured, discharges the underwriter. Thus, if a ship from unnecessary delay do not proceed on her voyage within a reasonable time after signing the policy, the policy will be avoided. (4) The principle upon which a deviation avoids a policy is, that the risk is changed, for then more time is taken up in completing the voyage, than the underwriter contemplated on, and so his risk is protracted. Thus, where a vessel insured from Whitehaven to St. Michael's was forced into Dublin, where she broke bulk and discharged part of her cargo, it was ruled by Lord Kenyon, that the underwriter was discharged. (5)

As to what deviation shall avoid a policy, it is not material, whether the loss of the ship, be the consequence of the deviation or not, nor for what space of time it was made, nor how far out of the direct course, for every the smallest deviation changes the voyage intended to be insured, and discharges the underwriter. Thus, where the policy was on a ship bound from Dartmouth to Liverpool, she sailed from Dartmouth, but put into Looe; Looe was a place she must of necessity pass by on the course of her voyage, but it was not mentioned in the policy; and though it was proved, that no accident whatever happened in going in or coming out of Looe, and that she was lost after she had cleared it, and got to sea, yet Mr. Justice Yates ruled, this to be a deviation, and to avoid the policy. (6)

If a ship, having liberty to put into one port, puts into another equally in her way, this is fatal, though neither the risk nor the premium would have been greater, if this had been permitted by the policy. (7)

T. R. 197., and *Garrels v. Kensington*, *ibid.* 231., as to documents of neutral vessel.

(1) *Carruthers v. Gray*, 3 Camp. 142. 15 East, 35.

(2) *Dawson v. Atty*, 7 East, 367. *Bell v. Carstairs*, 14 *ibid.* 393.

(3) *Sewell v. Royal Exchange Assurance Comp.* 4 Taunt. 856.

(4) *Chitty v. Selwin*, 2 Atk. 359. *Valance v. Dewar*, 1 Camp. 505. *Ougier v. Jen-*

nings, *ibid.* n. *Mount v. Larkins*, 8 Bing. 108. recog. in *Freeman v. Taylor*, *ibid.* 139.

Palmer v. Marshall, *ibid.* 317., *sed vide Palmer v. Fenning*, 9 *ibid.* 460.

(5) *Stitt v. Wardell*, 2 Esp. N. P. C. 610.

(6) *Fox v. Black*, Exeter Sum. Ass. 1767, cit. 1 Esp. N. P. 90. *Townson v. Guyon*, cit. *Marshall on Insurance*, 179.

(7) *Elliot v. Wilson*, 7 Bro. P. C. 459. 1 *Phillips on Insurance*, 484.

WARRANTIES.

But where a vessel, sailing from London to Grenada, was insured on freight at and from Grenada to London, and arrived in safety, and proceeded to deliver her outward cargo in different bays of the island (where there is but one custom-house), and was lost in entering a bay to which she was going for the double purpose of delivering the remainder of her outward, and taking in a homeward cargo:—It was held, that this was not a deviation, and that the underwriters were liable for the loss of the homeward freight. (1)

A deviation does not avoid the contract *ab initio*, but only determines it from the time of the deviation, from which the underwriter is discharged from responsibility.

Effect of deviation.

The clause introduced into policies giving liberty to the insured "to touch, stay, trade, &c. at any ports or places" in the course of the voyage, is interpreted as subordinate to the voyage insured, which is the principal object of the contract; and, in cases of doubt, it must be understood with reference to the laws of commerce, and the usage of the particular trade. (2) If, therefore, there be in the policy a liberty to touch, stay, and trade at any ports and places in the voyage, such a liberty, however general the words may be, does not give the captain a power to change the regular course of the voyage insured, which he must keep constantly in view:—It only extends to the ports and places in the usual and ordinary course of the voyage. (3)

Liberty "to touch, stay, trade," &c. is subordinate to the voyage insured.

Where a ship, insured to Martinique and all or any of the Windward and Leeward Islands, landed the greatest part of her cargo at Martinique, and sailed with the rest to Antigua, where she was wrecked while stopping, partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo:—It was held, that the underwriters were not liable. (4)

On a policy at and from Para to New York, with leave to call at all or any of the Windward and Leeward Islands and colonies on her passage to New York, and to discharge, exchange, and take on board the whole or any part of any cargo or cargoes, at any ports or places she might call at or proceed to, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation:—It was held, that the ship having proceeded to two of the Leeward Islands for a purpose wholly unconnected with the voyage, it was a deviation. (5)

In *Bottomley v. Bovill* (6) it appeared, that a policy on a ship "from London to New South Wales, and from thence to all ports and places in the East Indies or South America, with liberty to take in and land goods and passengers, and to trade backwards and forwards, and forwards and backwards," had been effected. On the vessel arriving at New South Wales, the captain was ordered by his owners to proceed on a trading voyage to New Zealand, and from thence direct to South America. He proceeded to New Zealand with passengers, and was returning from thence to New South Wales, when the ship was totally lost:—It was held, that

(1) *Warre v. Miller*, 7 D. & R. 1. 4 B. 4 Taunt. 511. *Violet v. Allnutt*, 3 ibid. & C. 538. 1 C. & P. 237. 419.

(2) *Urquhart v. Barnard*, 1 Taunt. 450.

(4) *Inglis v. Fauz*, 3 Camp. 437.

(3) *Lavabre v. Wilson and Lavabre v.*

(5) *Hammond v. Reid*, 4 B. & A. 72.

Waller, Doug. 271. *Langhorn v. Allnutt*,

(6) 5 B. & C. 210. 7 D. & R. 702.

WARRANTIES.

Liberty to touch and stay does not justify trading or breaking bulk.

Liberty to touch and discharge goods will not warrant the taking in of a new cargo.

It is not an implied condition, that the ship shall not trade in the course of her voyage.

Vessel may take in merchandise during her allowed stay at her place.

the sailing from New South Wales to New Zealand and back was a deviation from the voyage insured, by which the insurers were discharged. (1)

If a ship have liberty to touch and stay at a place in the course of the voyage, she must confine herself strictly to the terms of the liberty so given; any attempt to trade, therefore, during her stay there, as by shipping or landing goods, will amount to a species of deviation, and discharge the underwriters, unless the ship have liberty to trade as well as to touch and stay at such place. (2)

A liberty to touch and discharge goods at a place, will not warrant the captain in taking in a new cargo there, even while the ship is detained by contrary winds, for this would be a new adventure not within the terms of the policy. (3)

It is not an implied condition in a common policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the insurers; and therefore, where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her lading ports; and during her justifiable stay in the port so entered for that purpose, she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage:—It was held not to avoid the policy. (4)

So, likewise, in *Urquhart v. Barnard* (5) it was held, that if a ship have liberty to touch at a port, it was no deviation to take in merchandise during her allowed stay there, if she did not by means thereof, exceed the period allowed for her remaining there, a communication having been made to the underwriter, that the ship was to touch for the purposes of trading.

On a policy at and from London to New South Wales, and from thence to the ship's loading port or ports in the East Indies, and elsewhere, and that she might proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, and for any purpose whatsoever: the ship sailed from London with convicts to New South Wales, where, having discharged them, she proceeded in ballast to Batavia, where she took on board a quantity of iron, and discharged the same at Sourabaya, and was there loaded with a full cargo of rice, with which she proceeded to the Mauritius, where it was discovered, that she had sustained an injury, and she was accordingly broken up:—It was held to be no deviation, although it was insisted, that, by the terms of the policy, the ship was only warranted to go to her loading ports, and not to trade or take in a fresh cargo. (6)

On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, "beginning the adventure from the loading the goods on board the ship, on the 'termination' of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched

(1) After the arrival of the ship at New South Wales, she was protected by the policy so long only, as she was sailing on a voyage either to South America or to the East Indies, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage, either to South America or to the East Indies. 5 B. & C. 210. 7 D. & R. 702.

(2) *Stitt v. Wardell*, 2 Esp. N. P. C. 610. *Solly v. Whitmore*, 5 B. & A. 45., et vide *Forshaw v. Chabert*, 3 B. & B. 158.

(3) *Sheriff v. Potts*, 5 Esp. N. P. C. 96.

(4) *Raine v. Bell*, 9 East, 195.

(5) 1 Taunt. 450.

(6) *Armet v. Innes*, 4 Moore, 150.

at Pernambuco; but failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither:—It was held, that the ship's proceeding for St. Salvador, was no deviation. (1)

If a ship be insured upon a trading voyage, it is incumbent on the insured to carry on that trade with usual and reasonable expedition, otherwise their conduct will amount to a deviation, and discharge the policy. (2)

A ship from Stockholm to New York was, by the course of the voyage, to touch at Elsinour for convoy, and to pay the Sound dues; and the owner of sheep on board took in a short stock of provender for them at Stockholm, and laid in the rest at Elsinour before the Sound dues could be paid:—It was held, that the voyage not being thereby delayed, though the occurrence was foreseen and intended, the policy was not avoided, but the underwriters were liable for a subsequent loss of the ship by the perils of the sea. (3)

Under a policy of insurance of goods at and from London to any port or ports, place or places, in the Baltic, backwards and forwards, with leave to touch and stay at any ports and places for all purposes whatsoever; the assured may wait at any port for information as to what port in the Baltic the ship might safely proceed to discharge her cargo, that being one of the objects of the adventure arising out of the troubled and shifting state of the different governments on the Baltic shore from the pressure of the French arms: and this liberty, it seems, is not abridged by a subsequent special leave given to wait for information, &c. off any ports and places. (4)

If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named. (5)

If the ship's ports of discharge are only mentioned generally, but not specifically named in the policy, the ship must go to them in the geographical order in which they occur; and taking them out of that order, unless this be warranted by usage or by necessity, will be a deviation. (6)

If there be several ports of discharge mentioned in the policy, the ship must not invert the order of these places as they stand in the policy, but must go to them in the order in which they are named, unless some usage or particular necessity intervene to vary the general rule. (7)

Under a policy from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose, the ship, in touching for orders before she had selected her port of discharge, is not confined to take the ports in the successive order in which they lie in the course of the voyage, but may return to a port she has quitted, for orders as to her port of discharge. (8)

After she has selected her port of discharge, she must touch at ports only in their successive order. (9)

Upon a policy on a ship "at and from Antigua to England with liberty to touch at all or any of the West India islands, Jamaica included:—"—It

WARRANTIES.

Trading must be carried on with reasonable expedition.

Ports of call named in successive order.

The ports must be taken in their geographical order, when not specifically mentioned.

If there be several ports of discharge, they must be visited in their order.

(1) *Lambert v. Liddard*, Marshall on Insurance, 135. 5 Taunt. 480.

(2) *Hartley v. Buggin*, Park on Insurance, 468. Marshall on Insurance, 194. 3 Doug. 39. *Parkinson v. Collier*, Park on Insurance, 470. recog. in *Mount v. Larkins*, 8 Bing. 121.

(3) *Cormack v. Gladstone*, 11 East, 347.

(4) *Rucher v. Alnutt*, 15 ibid. 278.

(5) *Gairdner v. Senhouse*, 3 Taunt. 16., et vide *Bragg v. Anderson*, 4 ibid. 229.

(6) *Glason v. Simmonds*, cit. 6 T. R. 533.

(7) *Beatson v. Haworth*, ibid. 531. *Marsden v. Reid*, 3 East, 572.

(8) *Andrews v. Mellish* (in error), 5 Taunt. 496. 2 M. & S. 27. 16 East, 312., et vide *Driscol v. Bovil*, 1 B. & P. 313.

(9) Ibid.

"At and from Antigua to England."

WARRANTIES.

"At and from London to Madras and Calcutta."

was held, that the ship under the protection of this policy might touch at any of the West India islands, although not in the direct course from Antigua to England, and stay at such as she visited, the time necessary to complete her homeward cargo. (1)

Policy "on goods, specie, and effects," at and from London to Madras and Calcutta, with liberty to touch, stay, and trade at any ports, &c. until the vessel shall arrive at her last loading port in the East Indies or China:—It was held, that, by the usage of the East India trade, this policy covers an intermediate voyage from Madras to Bengal, the vessel arriving at Madras too late to proceed that season to China. (2)

"At and from Lisbon, to call at any one port in Portugal."

Where a ship insured at and from Lisbon had liberty to call at any one port in Portugal for any purpose whatsoever, and after leaving Lisbon sailed to complete her cargo to Faro, a port to the southward:—It was held, that the permission must be restrained to the northward ports on her way to England, and that she had deviated by going southward. (3)

"At and from London to Seville, and thence to Barcelona."

Under a policy insuring a brigantine "at and from London to Seville, and thence to Barcelona, and at and from thence and two other ports in Spain to a port in Great Britain:—"It was held, that Salve, a place lying in a bay, having warehouses and a jetty, with a depth of water sufficient for feluccas but not for large ships, and a good roadstead anchorage where ships lie and are loaded by means of small craft, having also a custom-house and officers, is a "port" within the meaning of the policy. (4)

"At and from port of lading in North America to Liverpool."

An insurance was effected on a ship "at and from her port of lading in North America to Liverpool;" she took in part of her cargo at K. in New Brunswick, and then sailed from thence to B. in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to K. to receive provisions, &c., after which, she sailed for England, and was lost on the voyage. B. was not in the way from K. to Liverpool. B. and K. were situate on creeks opening into the bay, and were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of St. John, New Brunswick:—It was held, that, after the ship had begun to load at K., that was her port of lading; that the term of "port of lading" in the policy, did not allow of her afterwards going to B.; and that her doing so, was a deviation. (5)

The power given in the policy to a ship having letters of marque must be strictly pursued, and cannot be extended by construction beyond its plain and obvious meaning.

In the case of merchant ships with a letter of marque, it was resolved in *Jolly v. Walker* (6) that they might give chase to an enemy's ship without being guilty of a deviation, but that they could not cruise, for such might lengthen the risk to an immoderate length. (7)

MERCHANT
SHIP WITH
LETTERS OF
MARQUE.

(1) *Metcalfe v. Parry*, 4 Camp. 123.

(2) *Gregory v. Christie*, 3 Doug. 419. *Park on Insurance*, 14. 83.

(3) *Hogg v. Horner*, *Park on Insurance*, 444. *Marshall on Insurance*, 184. *Ranken v. Reeve*, *Park on Insurance*, 445., vide etiam *Hunter v. Leathley*, 10 B. & C. 858. S. C. (in error) confirmed *Leathley v. Hunter*, 5 M. & P. 457. 7 Bing. 517. 1 C. & J. 423. 1 Tyrw. 355.

(4) *Sea Insurance Company of Scotland v. Gavin*, 4 Bligh N. S. 578. 2 Dow & C. 129.

(5) *Brown v. Tayleur*, 4 A. & E. 241., vide etiam as to the definition of "port," *Kingston-upon-Hull Dock Comp. v. Brown*, 2 B. & Ad. 68.

(6) 1 Esp. N. P. 91.

(7) Vide etiam *Parr v. Anderson*, 6 East, 202.

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Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorise the ship to lie by nine days off a port, waiting for an enemy's ship to come out when she should have completed her cargo, although she lay in wait during that time, within the limits of her fishing ground. (1)

A liberty given in a letter of marque "to chase, capture, and man prizes" will not enable her to convoy a prize taken by her into port. (2)

Leave granted in a policy of insurance on a fishing voyage to see prizes into port, does not authorise the ship to remain in port till a prize receives necessary repairs, which she could not otherwise have had; and at most extends to seeing the prize moored safely, and giving the necessary orders for her final destination. (3)

Sometimes a policy on a ship of force, with letters of marque, contains a clause giving liberty to cruise for a certain term in the course of her voyage. If it be meant, that this term shall consist of different periods of time taken separately, it ought to be so expressed, otherwise the cruise will be taken to be for one continued period of time, and not for several periods amounting to that time. (4)

A deviation that will discharge the insurer must be a voluntary departure from the usual course of the voyage insured, and not warranted by any necessity; if a deviation can be justified by necessity, it will not affect the contract, and necessity will justify a deviation, though it proceed from a cause not insured against: thus, in *Scott v. Thompson* (5) Chief Justice Mansfield said, "A deviation never puts an end to the insurance, unless it be the voluntary act of those, who have the management of the ship;" as where the deviation is occasioned by force, which in such a case is necessity; and there is no ground for the distinction between a policy compared to sea risk and fire, and a general policy including all risks. (6)

In cases such as these it must appear, that such deviation was clearly through necessity, for if it was used for any trading or such like purposes, it is not an excusable deviation; and therefore, if the ship be compelled to leave her direct course by such necessity, she must proceed to such place of safety in direct course, and in the shortest possible time. (7)

One general principle pervades all the cases on this point, namely, that if the captain, in departing from the usual course of the voyage, act fairly and *bona fide*, and according to the best of his judgment, for the benefit of all parties concerned, and have no other view than to conduct the ship and cargo, by the safest and shortest course, to her point of destination, what he does, is within the spirit of the contract, and the voyage will still be protected by it. The ship may go out of the way to avoid danger, and, in that case, will be judged by necessity. But a necessity to justify a deviation must be a real, inevitable, and imperious necessity, not created by the insured himself, or any agent of his. The duration and extent of it must be warranted by the degree of the necessity; the ship must pursue the voyage of necessity, so as to get to her port of destination in the shortest and most expeditious manner; and any wilful departure

Liberty "to chase, capture, and man prizes," will not enable her to convoy prizes.

Liberty to cruise for a certain term in the voyage.

WHAT IS NOT A DEVIATION. GENERALLY.

The extent of the deviation must be justified by the degree of necessity.

(1) *Hibbert v. Halliday*, 2 Taunt. 428.

(2) *Lawrence v. Sydebotham*, 6 East, 45.

(3) *Jarratt v. Ward*, 1 Camp. 263.

(4) *Syers v. Bridge*, Doug. 527.

(5) 1 N. R. 181.

(6) *Ibid.*

(7) *Lasabre v. Wilson*, Doug. 284. *Harrington v. Halkeld*, Park on Insurance, 445.

WARRANTIES.

An intention to deviate will not avoid the policy.

Where the ship does not, in any respect, proceed on the voyage insured.

Judgment of Mr. Justice Bayley in *Hare v. Travis*.

WHERE THE KNOWN USAGE OF TRADE ADMITS A DEVIATION.

When policy attaches.

from the direct course of this new voyage, or any unnecessary delay therein, will be a new deviation, that will discharge the underwriters in the like manner, as if it had been a wilful deviation from the original voyage. (1) To determine therefore in any case, whether a departure from the direct course of the voyage insured amounts to such a deviation, as will discharge the insurer, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment. (2)

An intention to deviate will not avoid the policy, if a loss happen while the ship was in her direct course (3); therefore, if a partial loss happen in the case of an insurance, and in the same voyage a deviation be afterwards made, the insured will recover for such partial loss: for the policy is only discharged from the time of the deviation. (4)

But, if in fact the ship do not in any respect proceed on the voyage insured, though she may be in the track of it, yet will the policy be discharged. (5)

The foregoing principles will receive illustration in *Hare v. Travis* (6), in which Mr. Justice Bayley observed, "Where the insurance is on a voyage to a given place, and the captain when he sails, does not mean to go to that place at all, he never sails on the voyage insured. But where the ultimate termini of the intended voyage are the same, as those described in the policy, although an intermediate voyage be contemplated, the voyage is to be considered the same, until the vessel arrive at the dividing point of the two voyages. The departure from the course of the voyage insured, then becomes a deviation, but before the arrival at the dividing point, there is no more than an intention to deviate, which, if not carried into effect, will not vitiate the policy. In *Kewley v. Ryan* (7) the policy was at and from Grenada to Liverpool. The ship sailed for Liverpool; but the captain, before the commencement of the voyage, had formed a design to touch at Cork on her way. She was totally lost before she arrived at the dividing point, but the termini of the intended voyage being really the same, as those described in the policy, the court held it must be considered the same voyage; and that a design to deviate not effected, would not determine the policy, and they observed, that the ship was bound to Liverpool, although she had also clearances for Cork."

A deviation is permitted, where it is in accordance with the known usage of trade.

A ship insured from London to Nantz, touched at Ostend, all her clearances being to Ostend only; but it being proved to be the usage of the trade to clear for one port and go to another to avoid the French duties, the policy was held to be good against the underwriter. (8)

A policy at and from a place will attach on a ship while under repair, it not being necessary, that she should be seaworthy when a policy is effected. (9)

(1) *Lavabre v. Wilson*, Doug. 284.

(2) Per Lord Mansfield in *Enderby v. Fletcher*, at N. P. T. V. 1780, cit. Marshall on Insurance, 199. *Pelly v. Royal Exchange Assurance Comp.* 1 Burr. 347.

(3) *Foster v. Wilmer*, Str. 1249. *Middlewood v. Blakes*, 7 T. R. 163.

(4) *Green v. Young*, 2 Salk. 444. 2 Ld. Raym. 840.

(5) *Woodbridge v. Boydell*, Doug. 16.

Way v. Modigliani, 2 T. R. 30.

(6) 7 B. & C. 17.

(7) 2 Hen. Black. 343.

(8) *Planché v. Fletcher*, Doug. 250. *Band v. Gonzales*, 2 Salk. 445.

(9) *Smith v. Surridge*, 4 Esp. N. P. C.

But though unnecessary delay is equivalent to a deviation, and will discharge the underwriters, yet where a ship is insured at and from a place, the time spent before her departure in necessary repairs, will not be deemed an unnecessary delay. (1)

The want of necessary repairs is another excuse for departing from the direct course of the voyage. If the ship, from stress of weather, or any other cause, be reduced to such a state, that she cannot fairly proceed on her voyage without repairs, the captain will be justified in carrying her to some port the least out of his course, where such repairs can be had; and he must content himself with such repairs, as can be most expeditiously done, so as to enable the ship to perform the voyage insured. (2)

If the ship deviate for the purpose of repair, this, like every other voyage of necessity, must be pursued in the most expeditious manner; for if it appear to have been undertaken for any other object than repairs, it will not justify the deviation; or if there be any unnecessary delay in getting the repairs done, this will be equivalent to a new deviation (3); in fact, the deviation from necessity must be justified by the necessity, both as to the substance and manner of it, and nothing more must be done, than what the necessity requires.

Though a ship is not at liberty to break bulk during her voyage, yet if in the course of her voyage, she appear to be heavily laden, so that it be necessary to lighten her, she may, at the next convenient place, land, and sell a part of her cargo. So, if she be found to require ballast and cannot safely proceed on her voyage without it, she may, at the most convenient place, take ballast on board, or even goods to supply the place of goods. (4)

It is a principle, that what is occasioned by the act of God, shall be imputed to no man as a fault; consequently, if a ship be driven out of her course by stress of weather, or if she become leaky, she may go out of the direct course to another port to repair. (5)

If a ship be driven out of her course by a storm, she is not obliged to return back to the point from whence she was driven, but may make the best of her way to the port of destination. (6)

Where the captain, being delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions, it is not a deviation. (7)

"If, by sickness, or any other cause, so many of the officers or ship's company are disabled from performing their duty, as to render it impossible, or highly perilous, to proceed on the voyage, the ship may put into the nearest port where medical assistance, or other hands, can be procured; and the deviation in such case will be justified by the necessity.

"But to make out such a justification, it must clearly appear, that this necessity arose without any default of the master or owners; and that if a

WARRANTIES.

NECESSARY REPAIRS.

The voyage of necessity must be made in the most expeditious manner.

VESSEL TOO HEAVILY LADEN, OR IN WANT OF BALLAST.

STRESS OF WEATHER.

SICKNESS OF THE CAPTAIN OR CREW.

(1) *Smith v. Surridge*, 4 Esp. N. P. C. 25.

(2) *Mottoux v. London Assurance Comp.* 1 Atk. 547.

(3) *Lavabre v. Wilson*, Doug. 284.

(4) *Guibert v. Readshaw*, Park on Insurance, 444.

(5) *Guibert v. Readshaw*, 1 Esp. N. P.

92. *Mottoux v. London Assurance Comp.* 1 Atk. 547.

(6) *Harrington v. Halkeld*, Park on Insurance, 455. *Delaney v. Stoddart*, 1 T. R. 22.

(7) *Thomas v. Royal Exchange Assurance Comp.* 1 Price, 195.

WARRANTIES.

surgeon were necessary in the voyage insured, a surgeon of competent skill, and furnished with all necessary instruments and medicines was on board." (1)

SUCCOURING OF SHIPS IN DISTRESS.

The succouring of ships in distress is justifiable; it is a duty which policy as well as humanity imposes on every man who has the means of performing it. Thus, in *Lawrence v. Sydebotham* (2) Mr. Justice Lawrence said, "As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress."

MUTINY OF THE CREW.

If the captain be forced out of his course under the compulsion of a mutinous crew, such a deviation will be excused by the force put upon the captain.

The deviation must be voluntary to discharge the underwriter.

To make a deviation criminal, and so discharge the underwriter, it must be done voluntarily: thus, in *Elton v. Brogden* (3) the vessel sailed from Bristol with a letter of marque, insured from Bristol to Newfoundland, and took a prize. The sailors mutinied and compelled the captain to leave his course for Newfoundland and return to Bristol. In an action against the insurers, who set up a deviation in their defence, it was resolved, that it was excused by reason of the force used against the captain, which he could not resist, and so fell within the case of necessity, which had been always admitted as an excuse.

SEIZURE BY A KING'S SHIP.

So where the crew being alarmed by reports of an enemy, insisted on the captain bearing away for another port, it was held to be no deviation. (4) So where she was carried forcibly by a king's ship out of the course of the voyage. (5)

A policy was effected on goods on board a particular ship from A. to B. "against sea risk and fire only;" in the course of the voyage from A. to B. the ship was carried out of the course of the voyage by a king's ship; but being afterwards released, she proceeded on the voyage insured, and while so proceeding, the goods insured, sustained sea damage:—It was held, that the underwriters were liable for this loss. (6)

It is a deviation, if the master leave a port for a particular purpose, by the command of the captain of a king's ship lying there, without any remonstrance. (7)

TO JOIN CONVOY.

For the sake of greater security a deviation is excusable (8);—thus, if a ship deviate something from her course for the sake of meeting with a convoy, unless expressly prohibited by the terms of the policy, this will not be deemed a deviation sufficient to discharge the insurer. But a ship should not wait for a convoy; for the underwriter is supposed to estimate the time his risk continues in rating the premium, and therefore it must not be prolonged, unless through necessity. (9)

An insurance on goods shipped on a certain voyage is not avoided by the ship, while lying in a roadstead at anchor, under orders of the convoy, and

(1) *Per* Lord Eldon C. J. in *Woolf v. Claggett*, cit. Marshall on Insurance, 212.

(2) 6 East, 54.

(3) Str. 1264.

(4) 1 Esp. N. P. 92.

(5) *Scott v. Thompson*, 1 N. R. 118.

(6) *Ibid*.

(7) *Phelps v. Auldjo*, 2 Camp. 350.

(8) *D'Aguilar v. Tobin*, Holt's N. P. C. 185. *Parkin v. Tuenno*, 11 East, 29. *Hecklin v. Alburt*, 1 M. & S. 46.

(9) *Bond v. Nutt*, Cowp. 601. *Bond v. Gonsales*, 2 Salk. 445. *Campell v. Bordien*, Str. 1265. *Driscoll v. Bovil*, 1 B. & P. 313.

after a signal to prepare for sailing, and about the time when the signal for weighing was made, taking in other goods on board; by which it was found that no delay was occasioned, and that the ship got under weigh, as soon as she could otherwise have done. (1)

Where a ship was insured from London to Berbice, with an extensive liberty of touching and trading at all places, it was held, that, by putting into Madeira and staying there after the convoy with which she sailed had proceeded on the voyage, she was guilty of a deviation which discharged the underwriters. (2)

Where a policy of insurance contains no warranty against seizure in port, if the ship to avoid such seizure runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss. (3) But if it is otherwise, if the policy contain a warranty against seizure in port. (4)

If a ship with goods on board insured to a foreign port, learning in the course of her voyage, that an embargo is there laid on all ships of her nation, wait at some place as near thereto as she safely can, till the embargo be removed, the goods will in the mean time be protected by the policy. (5)

But, if upon such an occasion, instead of putting into a friendly port adjoining to her port of destination, she sail back for her port of outfit, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged. (6)

If a ship insured, on arriving off her port of destination, is prevented from entering it from its being in the hands of the enemy, or from being ordered away by the English commander there, the policy does not remain in force till she reaches a port of safety. (7)

A British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic, from an apprehension of hostilities, for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy till the king's officer received intelligence, that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull:—It was held, that this loss of the voyage was not attributable to the arrest or detainment of king's, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though, if the ship had not been detained in the first instance by the king's officers, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo. (8)

WARRANTIES.

EMBARGO.

Seizure in port

Waiting until embargo has been removed.

Abandonment of voyage.

Arriving off port of destination, but ordered off.

Loss of voyage from the fear of an hostile embargo.

(1) *Laroche v. Oswin*, 12 East, 131.

(2) *Williams v. Shee*, 3 Camp. 469.

(3) *O'Reilly v. Gonne*, 4 Ibid. 249.

(4) *O'Reilly v. Royal Exchange Assurance*
Comp. ibid. 246.

(5) *Blackenhagen v. London Assurance*
Comp. 1 ibid. 454. Anon. ibid. 456. n.

(6) Ibid.

(7) *Parkin v. Tanno*, 2 ibid. 59. 11
East, 22., et vide *Neilson v. De Lacour*, 2
Esp. N. P. C. 619.

(8) *Forster v. Christie*, 11 East, 205.

MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.
Representation defined.

Different kinds of representation.

Distinction between a warranty and a representation.

A misrepresentation made to the first underwriter is a misrepresentation to all.

Misrepresentation by agents.

Effect of a wilful misrepresentation.

"Belief" or "expectation" not a representation.

Computation by insured, stated as a fact.

WHERE A RE-

5. MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.

A representation, in insurance, is a collateral statement, either by writing, not inserted in the policy, or by parol, of such facts or circumstances relative to the proposed adventure, as are necessary to be communicated to the underwriters, to enable them to form a just estimate of the risk (1); and the question of materiality is not one of law but of fact. (2)

A representation, like a warranty, may be either affirmative, as where the insured avers the existence of some fact or circumstance which may affect the risk; or promissory, as where he engages for the performance of something executory.

In *Macdowall v. Fraser* (3) Lord Mansfield said, "The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true, as to all that the insured knows; and, if he represent facts to the underwriter, without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material."

If a false representation be made to the first underwriter in the policy in a material point, this shall be considered as a misrepresentation made to every underwriter, so as to infect the whole policy; otherwise it might be a contrivance to deceive many; for where a respectable underwriter stands first on the policy, the rest subscribe without asking a question; if the first underwriter be imposed upon, the rest are entrapped by the same fraud. (4)

But a representation made to any underwriter except the first, is not to be considered as made to subsequent underwriters. (5)

A misrepresentation in a material point equally vitiates the contract, whether it be the misrepresentation of the insured himself or of his agents, and whether it proceed from fraud, mistake, or negligence; for the insurer is thereby led into error, and computes the risk upon false grounds. (6)

A wilful misrepresentation, or *allegatio falsi*, in any fact or circumstance material to the risk, is a fraud, that will always avoid the contract—even for a loss arising from a cause unconnected with the fact or circumstance misrepresented.

But it seems, that if he only give the representation as his belief, without knowing the contrary, it will not affect the contract. (7) Neither does the word "expected" amount to a representation. (8)

If the insured state his computation as fact, instead of the information on which he founds his computation, and it prove untrue, it is a misrepresentation, and if material it will avoid the policy. (9)

A representation being only matter of collateral information, it is suffi-

(1) Marshall on Insurance, 452. 1 Phillips on Insurance, 213, *et seq.*

(2) *Lindeneau v. Desborough*, 8 B. & C. 586. *Abbott v. Howard*, 1 Hayes (Irish), 381. *Westbury v. Aberdeen*, 2 M. & W. 267.

(3) Doug. 261.

(4) *Pawson v. Watson*, Cowp. 787. *Marsden v. Reid*, 3 East, 573., vide etiam *Edwards v. Footner*, 1 Camp. 530.

(5) *Bell v. Carstairs*, 2 Camp. 543.

(6) *Fitzherbert v. Mather*, 1 T. R. 12.

(7) *Pawson v. Watson*, Cowp. 787.

(8) *Barber v. Fletcher*, Doug. 305. *Bowden v. Vaughan*, 10 East, 415. *Hubbard v. Glover*, 3 Camp. 313.

(9) *Macdowall v. Fraser*, Doug. 260. *Stewart v. Dunlop*, 4 Bro. P. C. 483.

cient if it be true in substance; and its not being inserted in the policy in the form of a warranty, is looked upon as a proof, that the insurer does not require it to be strictly and literally true. (1)

If a representation as to the course of the voyage be literally untrue, yet if it be made in conformity to an established usage of trade, and no person be deceived by it, and the voyage meant to be performed be within the policy, it will not avoid the contract. (2)

If an insurance be made before the commencement of hostilities, but when everybody expects a war immediately, the insured is not bound to give the underwriters notice, though the ship do not sail till after the war takes place, and the underwriter is liable in case of a capture. (3)

On a policy effected after a declaration of war by America, but before it was known in this country, where it was not stated in the policy, nor communicated to the underwriter, that the assured was an American subject, and the loss happened in consequence of a seizure by that government, for a breach of their Non-importation Act:—It was held, that the underwriters were not liable, and that no action could be maintained, even after the termination of the war. (4)

If a ship, insured at and from a port, sail on her voyage in an unseaworthy state, in consequence of having a greater cargo than she can safely carry, and the defect be discovered before any loss happen, and part of the cargo be discharged, and a loss, in no degree attributable to her having been overladen in the early part of her voyage, subsequently accrue, the underwriters will be liable for such loss (5): thus, in *Weir v. Aberdeen*, a vessel sailed, and then put back to the Downs; sailed again, but in consequence of being overloaded, put back a second time; and an application was then made to the underwriters for liberty for the ship to go into port to discharge part of the cargo, from being too deep in the water, and a loss subsequently accrued:—It was held, that as the subsequent loss had not in any degree arisen from her having been so overladen, the communication of that fact before sailing the first, or second time, was immaterial, and that the communication made was quite sufficient. (6)

Concealment, or *suppressio veri*, is nearly allied to misrepresentation, or *allegatio falsi*, and consists in the suppression of any fact or circumstance, material to the risk:—" *Dolus malus non tantum in eo est, qui fallendi causâ obscure loquitur; sed etiam qui insidiosè, obscure, dissimulat.*" (7) This, like every other fraud, avoids the contract, *ab initio*, upon principles of natural justice.

It is not merely on the ground of fraud, that concealment avoids the contract. Even a concealment, which is only the effect of accident, negligence, inadvertence, or mistake, will if material be equally fatal to the contract, as if it were intentional and fraudulent. (8)

Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy, or at what premium he will underwrite it, is material. (9)

MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.

REPRESENTATION DEEMED SUFFICIENTLY TRUE.

True in substance.

Representation untrue, but the insurer not deceived.

Commencement of hostilities.

Vessel surcharged and returning to port to unload.

CONCEALMENT. GENERALLY.

What is a concealment.

(1) *Pawson v. Watson*, Cowp. 785. *Bize v. Fletcher*, Doug. 284.

(2) *Planché v. Fletcher*, Doug. 250.

(3) *Ibid.* 251.

(4) *Campbell v. Innes*, 4 B. & A. 423.

(5) 2 *ibid.* 320

(6) *Ibid.*

(7) ff. l. xliiii. s. 2. *de dolo malo*.

(8) *Carter v. Boehm*, 1 W. Black. 594. Burr. 1909.

(9) *Marshall on Insurance*, 465. *Fillis v. Bruton*, Park on Insurance, 292.

MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.

A well founded suspicion of concealment.

Doubtful rumours.

Non communication of letters.

Broker effecting insurance on a vessel, the loss of which was detailed in an unopened letter.

Stowage of goods.

Concealment of port of loading.

Concealment respecting time of sailing.

A well founded suspicion of a concealment will amount to proof of fraud. (1)

Doubtful rumours respecting the safety of a ship, which is meant to be insured, "lost or not lost," how little credit soever the owner himself may give them, ought to be disclosed to every underwriter; and the withholding such information will avoid the contract. (2)

A letter containing facts, which, if communicated, would lead to an inquiry which would produce important information, ought to be shewn by the assured to the underwriter. (3)

If the owner of a ship receive a letter from the captain, written on her arrival in a foreign port, giving such an account of her, as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of insurance upon her at and from the foreign port to a port in England, unless information on the subject be particularly called for. (4)

Where a broker, in pursuance of instructions previously received from Sunderland, effected a policy at Lloyd's, at a time when a letter lay on his table at the coal exchange unopened, announcing the ship's loss:—It was holden, that the jury were warranted in finding this was no such want of diligence as avoided the policy (5), Mr. Justice Gibbs observing, "The question is, whether the broker had a right to presume, that he had possession of all the information on which he was to effect the policy, and the jury have found that he was entitled to presume, that he had such information."

Underwriters are not entitled to notice of the part of a ship where goods are stowed, whether on deck or otherwise. (6)

The concealment of the true port of loading will vitiate a policy. (7)

If it be stated, that a ship was ready to sail on a certain day, when in fact she had sailed the day before, this is both a misrepresentation and a concealment, and will avoid the policy. (8)

Where a ship had sailed from Elsineur on her voyage home six hours before the owner, who followed in another vessel on the same day, and having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship:—It was held, that these circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely, that the ship insured was "all well at Elsineur on the 26th July," the day of her sailing (9)

Where the plaintiffs effected a policy of assurance on wines from Oporto

(1) *Stewart v. Dunlop*, Dom. Proc. April 18, 1785. *M'Andrew v. Bell*, 1 Esp. N. P. C. 373. *Willes v. Glover*, 1 N. R. 14. *Richards v. Murdock*, 10 B. & C. 527.

(2) *De Costa v. Seandret*, 2 P. Wms. 170. *Seaman v. Fonereau*, Str. 1183. *Willes v. Glover*, 1 N. R. 14. *Hodgson v. Richardson*, 1 W. Black. 463. *Shirley v. Wilkinson*, Doug. 306. n. 3 *ibid.* 41. *Lynch v. Hamilton*, 3 Taunt. 37. The materiality of the intelligence or rumours which the assured is charged with having suppressed, is a question for the jury, under the circumstances of the case. *Ibid.* *Richards v. Murdock*,

10 B. & C. 527. *Durrell v. Bederley*, Holt's N. P. C. 283.

(3) *Elton v. Larkins*, 5 C. & P. 86. 385. 8 Bing. 198. 1 M. & Sc. 323. *Richards v. Murdock*, 10 B. & C. 527.

(4) *Beckwith v. Sydebotham*, 1 Camp. 116.

(5) *Wake v. Atty*, 4 Taunt. 493.

(6) *Da Costa v. Edmunds*, 2 Chitt. 227.

4 Camp. 142. *Hurley v. Milward*, 1 Jones & Carey (Irish), 224.

(7) *Hodgson v. Richardson*, 1 W. Black. 463.

(8) *Fillis v. Brutton*, Park on Insurance, 292.

(9) *Kirby v. Smith*, 1 B. & A. 672.

to London, on the 12th of November, at which time they were in possession of two letters from their correspondents at Oporto; the first of which, dated 11th of October, stated thus, "We are loading the wines on the Stag, captain Wheatley, who pretends to sail after to-morrow;" the other, dated the 19th of October, inclosed the bills of lading, which were filled up "with convoy;" which letters the plaintiffs did not communicate to the underwriters:—It was held, that this was a material concealment. (1)

The concealment of letters, stating that the vessel is about to sail next month, is a material concealment and avoids the policy. (2)

Where a vessel has been a long time at sea, it is a fraudulent concealment, if that circumstance be not communicated to the underwriter. (8)

So if it be not communicated to the broker employed, whereby he could not answer the inquiries of the underwriters on that point. (4)

If it appear, that a plaintiff did not intend to insure until he believed her to be missing, and then not until another ship which had sailed at the same time had arrived in safety, the concealment of this fact is fatal. (5)

The time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship. (6)

It is not necessary to disclose to the underwriters, on a policy at and from London, whether the ship has sailed or not. (7)

The foregoing cases receive authority and illustration from the judgment of Lord Mansfield in *Carter v. Boehm* (8), in which his lordship observed, "First, insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence, that he does not keep back any circumstances in his knowledge, to mislead the underwriter into a belief, that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

"The policy would be equally void, against the underwriter, if he concealed, as, if he insured a ship on her voyage, which he privately knew to be arrived, and an action would lie to recover the premium.

"The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open to both to exercise their judgment upon:—*Aliud est celare*;

MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.

Where a vessel has been a long time at sea.

Judgment of Lord Mansfield in *Carter v. Boehm*.

The keeping back material circumstances is a fraud, although the suppression be through mistake.

The policy is equally void against the underwriter who conceals a material fact.

(1) *Bridges v. Hunter*, 1 M. & S. 15. et vide *Friere v. Woodhouse*, Holt's N. P. C.

(2) *Shirley v. Wilkinson*, 3 Doug. 41. Ibid. 572.

306. n. (6) *Foley v. Moline*, 5 Taunt. 430.

(7) *Webster v. Foster*, 1 Esp. N. P. C. Marshall on Insurance, 117.

407. (7) *Fort v. Lee*, 3 Taunt. 381.

(4) Ibid. (8) 3 Burr. 1909.

(5) *McAndrew v. Bell*, 1 Esp. N. P. C. 373.

MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.

Either party may be silent as to the grounds open to both.

The insured need not mention what the underwriter ought to know. Underwriter bound to know every cause, which may occasion political perils.

aliud, tacere : neque enim id est celare quicquid reticeas ; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire."

"This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

"There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows — '*Scientia utrinque par pares contrahentes facit.*' (1) An underwriter cannot insist, that the policy is void, because the insured need not tell him what he actually knew, what way soever he came to the knowledge. The insured need not mention what the underwriter ought to know (2); what he takes upon himself the knowledge of (3), or what he waves being informed of.

"The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. (4) He needs not be told general topics of speculation. As for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage (5)—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.

"If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, any where—he needs not be told the secret enterprises they are destined upon, because he knows some expedition must be in view, and, from the nature of his contract, without being told, he waves the information. If he insures for three years, he needs not be told any circumstance to shew it may be over in two; or, if he insures a voyage with liberty of deviation, he needs not be told, what tends to shew, there will be no deviation.

"Men argue differently, from natural phenomena and political appearances. They have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both; each professes to act from his own skill and sagacity, and therefore neither needs to communicate to the other.

"The reason of the rule which obliges parties to disclose, is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the

(1) It will be presumed that the underwriter is acquainted with the usage and circumstances of the branch of trade to which the policy relates (*Grant v. Paxton*, 1 Taunt. 463.); and if the usage of the trade be general, it is immaterial that it be not uniform. *Vallance v. Dewar*, 1 Camp. 503. *Ougier v. Jennings*, *ibid.* 505. n. *Kingston v. Knibbs*, *ibid.* 508. n. *Moxon v. Atkins*, 3 *ibid.* 200.

(2) *Grant v. Paxton*, 1 Taunt. 463.

(3) Respecting intelligence known at Lloyd's, vide *Friere v. Woodhouse*, Holt's N. P. C. 572. *McAndrew v. Bell*, 1 Esp.

N. P. C. 373. *Sawtell v. London*, 5 Taunt. 359. *Elton v. Larkins*, 8 Bing. 198. 5 C. & P. 86. *Court v. Martineau*, 3 Doug. 161.

(4) *Noble v. Kennaway*, 2 Doug. 510. *De Costa v. Edmunds*, 2 Chitt. 227. 4 Camp. 142. *Stewart v. Bell*, 5 B. & A. 238. *Kingston v. Knibbs*, 1 Camp. 508. n.

(5) *Salvador v. Hopkins*, 3 Burr. 1707. *Gregory v. Christie*, 3 Doug. 419. *Park on Insurance*, 14. *Vallance v. Dewar*, 1 Camp. 503. *Freeland v. Glover*, 7 East. 457. 6 Esp. N. P. C. 14.

nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect.

"The question, therefore, must always be, 'Whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run?'" (1)

As fraud is never to be presumed, an underwriter who would impute fraud to the insured, must be prepared to prove it by evidence, according to the maxim — "*Incumbit onus probandi ei qui dicit.*"

MISREPRESENTATION — CONCEALMENT AND SUPPRESSION.

The general question to be solved in cases of fraud or concealment.

Onus probandi "fraud" cast upon the underwriter.

6. LOSS BY PERILS OF THE SEA.

Losses by the perils of the sea are restricted to such accidents or misfortunes only as proceed from mere sea damage, that is, such as arise *ex vi divina*, from stress of weather, winds and waves, from lightning and tempests, rocks, and sands, &c.

The underwriters on a policy are liable for a loss arising immediately from perils of the sea, such as the winds and waves, although remotely from the mismanagement and negligence of the master and mariners (2), the rule of law being, "*proxima causa non remota spectatur.*" (3)

It is the province of the jury to determine whether the cause of the loss be a peril of the sea or not.

On policy on a ship in the usual form, for twelve months, at sea and in port, the declaration averred a loss as follows—that the ship having arrived at the harbour of St. John, in the province of New Brunswick, and discharged her cargo there, it became necessary to place her, and she was accordingly placed in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock, and that whilst she was there, by the violence of the wind and weather, she was blown over on her side, whereby she struck the ground with great violence, and was bilged, and greatly injured and damaged:—It was held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the ship" for which the underwriters were liable (4); Chief Justice Abbott observing, "These general words are indeed restrained in construction to perils *ejusdem generis* with those more particularly enumerated in the policy; in this case, however, the loss was occasioned by the violence of the wind and weather in port; and it seems to me, therefore, to have been produced by a peril *ejusdem generis* with those specified, and to fall within the general words of the policy."

LOSS BY PERILS OF THE SEA.

Whether a loss be from the perils of the sea, is a question for the jury.

Vessel damaged while undergoing repairs.

A transport in government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and

Vessel striking against an uneven bed in a river.

(1) Vide etiam *Schoolbred v. Nutt*, Park on Insurance, 346. *Haywood v. Rodgers*, 4 East, 590.

(2) *Walker v. Maitland*, 5 B. & A. 171. *Bishop v. Pentland*, 7 B. & C. 219. 1 M. & R. 49., post, 2154.

(3) *Semble*, that if a declaration on a

policy of insurance lay the loss by the perils of the sea, the plaintiff may recover upon proof that the ship was wrecked, although this may have been occasioned by the bar-ratry of the master or mariners. *Heyman v. Parish*, 2 Camp. 149.

(4) *Phillips v. Barber*, 5 B. & A. 161.

**LOSS BY PERILS
OF THE SEA.**

Vessel going ashore in consequence of two of her men being impressed.

Ship hove down on the beach within the tideway.

Ship's bottom attacked by worms.

Master raising money on the proceeds to repair the vessel.

VESSEL RAN DOWN BY ANOTHER.

Judgment of Lord Kenyon in *Buller v. Fisher*.

Vessel sunk at sea by another vessel firing at her.

uneven, and on the tide having left her she received damage by taking the ground :—It was held, that this was a loss by a peril of the sea. (1)

In moving a ship from one part of a harbour to another, it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast; the two men were immediately impressed and carried away, and were not allowed by the press-gang to cast off the rope in question, and the ship in consequence went ashore and was lost :—This was decided, to be a loss by perils of the sea within the policy. (2)

But if a ship, hove down on a beach within the tideway to repair, be thereby bilged and damaged, it is not a loss occasioned by the perils of the sea (3); because the *immediate* damage was caused by falling on the ground.

Where a ship's bottom had, during the voyage insured, been taken by the worm, in consequence of which, she was incapable of proceeding on her voyage, and was condemned :—It was held, not to be a loss by perils of the sea within the meaning of the policy (4); but it was considered to be a question of fact, and not one of law.

Upon a policy of insurance on goods, the ship being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and in order to defray the expenses of such repairs, the master having no other means of raising the money, sold part of the goods, and applied the proceeds in payment of these expenses :—It was held, that the underwriter was not answerable for this loss, because the sale of the goods was rendered necessary, not by the perils of the sea, but by the inability of the captain to find money in any other way to repair the ship. (5)

A loss occasioned by another ship running down the ship insured, through gross negligence, is a loss by perils of the sea. (6)

Where there is an exception in a charter-party of "perils of the sea," a loss from the ship's running foul of another by misfortune, is within the exception, and is a loss by perils of the sea (7), Lord Kenyon observing, "If the defendants have been guilty of any degree of negligence, and it could have been proved that the accident could have been prevented, they would certainly have been liable; but they are exempt by the condition of the charter-party from misfortunes happening during the voyage, which human prudence could not guard against—against accidents happening without fault in either party."

On a policy upon goods in the common form, where the ship and goods were sunk at sea by another ship's firing upon her, in consequence of mistaking her for an enemy :—It was held, that the insured were entitled to recover on a special count, stating the particular circumstances, as it fell within the general words of the policy, "all other perils, losses," &c. But it seems, that such a loss is not a loss by a peril of the sea, though a peril upon the sea; one is the immediate act of God, and which cannot be prevented by human agency, the other is the voluntary act of man. (8)

(1) *Fletcher v. Inglis*, 2 B. & A. 315.

(2) *Hodgson v. Malcolm*, 2 N. R. 336.

(3) *Thompson v. Whitmore*, 3 Taunt. 227.

(4) *Rohl v. Parr*, 1 Esp. N. P. C. 445. Park on Insurance, 105.

(5) *Sarguy v. Hobson*, 2 B. & C. 7.

(6) *Smith v. Scott*, 4 Taunt. 126.

(7) *Buller v. Fisher*, 3 Esp. N. P. C. 67.

(8) *Cullen v. Butler*, 5 M. & S. 461.

Camp. 289. 1 Stark. 138. Park on Insurance, 105.

A ship which is missing, and of which no intelligence has been received within a reasonable time after sailing, will be presumed to be lost by foundering at sea. (1)

LOSS BY PERILS
OF THE SEA.

MISSING SHIP.

There is no fixed rule of law with regard to the time after which a missing ship shall be reputed to be lost. It is in all cases a question of presumption, to be governed by the circumstances of the particular case, and must have reference to the voyage and navigation. (2)

In an action on a policy of insurance, where a loss by the perils of the sea is to be inferred, from the ship not being heard of after her sailing, the plaintiff must prove, that, when she left the port of outfit, she was bound upon the voyage insured (3); and for this purpose, the convoy bond mentioning the port of destination in the common form, is *primd facie* evidence. (4)

Primd facie
evidence of
loss.

Where in *assumpsit* on a policy of insurance on goods by a certain ship, it was proved, that she sailed on the voyage insured with the goods on board, and never arrived at her port of destination; and that, a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved:—It was held, that this was sufficient *primd facie* evidence of a loss by perils of the seas, and that the plaintiff was not bound to call any of the crew, or to shew that he was unable to procure their attendance (5). Mr. Justice Bayley observing, "When it is said a ship has not been heard of, I take that to mean, that no intelligence has been received from persons, capable of giving an authentic account; and not that mere rumours have never been heard."

In an action on a policy from an English to a foreign port, to found a presumption that the ship was lost on the voyage, it is not enough to prove, that she was not heard of in this country after she sailed, without calling witnesses from her port of destination to shew, that she never arrived there. (6)

Witnesses
should be
called from the
port of des-
tination.

In an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove, that when the vessel left the port of outfit, she was bound upon the voyage insured. (7)

If a ship, for which the underwriters (when a demand is made upon the policy) have paid as for a lost ship, should chance to arrive in port, she is to be considered as abandoned, and will belong to the underwriters. (8)

Rights of in-
surer after pay-
ment of insur-
ance.

Where the ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding, and lost; but while she lay in the sand, she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him:—It was held to be a loss occasioned by the perils of the sea, upon the principle, that in all cases the loss must be referred to the *causa proxima*, and that, under the foregoing circumstances, the perils of the sea were the proximate cause. (9)

VESSEL CON-
FISCATED BY
MILITARY AU-
THORITIES.

(1) *Newby v. Read*, Park on Insurance, 106.

(2) *Houstman v. Thornton*, Holt's N. P. C. 242., et vide *Marshall v. Parker*, 2 Camp. 70.

(3) *Cohen v. Hinckley*, ibid. 51. 1 Taunt.

249. *Koster v. Jones*, R. & M. 333.

(4) Ibid.

(5) *Koster v. Reed*, 6 B. & C. 19. 9 D. & R. 2.

(6) *Twemlow v. Oswin*, 2 Camp. 85.

Quere, Whether the non arrival of a ship at the port of destination is evidence of her loss, where the crew have been heard of after the vessel sailed, and after she is said to have been lost. *Koster v. Jones*, R. & M. 333.

(7) *Koster v. Jones*, R. & M. 333.

(8) *Houstman v. Thornton*, Holt's N. P. C. 242.

(9) *Hahn v. Corbett*, 2 Bing. 205.

**LOSS BY PERILS
OF THE SEA.**

**EXTENT OF
LIABILITY.**

Underwriters responsible until the goods are actually landed, and for losses which occur during trans-shipment.

Destruction of property to prevent its falling into the hands of the enemy.

Judgment of Chief Justice Abbott in *Butler v. Wildman*.

And upon the same principle, where a vessel was wrecked, and a portion of the goods were saved, but never came into the possession of the owners, it was held to be a loss by the perils of the sea. (1)

In *Stewart v. Bell* (2) the goods were insured from London to Jamaica generally, and were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to trans-ship the cargo into shallops; but no information of this was given to the underwriters:— But it was held, notwithstanding, that they were liable for a loss occurring after such trans-shipment on board the shallops, the court observing, “The assured must shew, that the port to which the ship proceeds, is the usual port for goods destined to the particular place. That was so here, for Port Morant, was the place to which ships of the burden and draught of water of the Nesbitt usually proceed with goods destined for Plantain Garden, River Bay. The underwriter is presumed to be acquainted with the usual course of the voyage, and to take a premium for the risk accordingly. The policy is to cover the goods till they are landed, and the underwriter should inquire, therefore, what is the usual mode of landing the goods insured. Here, it appears to have been the usage to trans-ship the goods into shallops. The words ‘including risk in droghers’ have probably been added to policies for greater security; but where it is the usage of the trade, and in the ordinary course of the voyage, to trans-ship into droghers, the underwriters are liable, even though those words, are not found in the policy.”

Where the captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured, it was holden, that this was a loss by perils of the sea for which the underwriters were responsible (3); Chief Justice Abbott observing, “If, indeed, the dollars had been thrown overboard by the master, and the ship had been subsequently re-captured, it would be a question for the jury, under the circumstances, to say, whether he was justified in what he did. I think, therefore, that the loss is sufficiently stated. Then the question arises, whether this be a loss for which the underwriters are liable. I am of opinion, that this is a loss by jettison, or if not, strictly speaking by jettison, it is something *ejusdem generis*, and therefore falls within the general words, ‘all other losses or misfortunes,’ &c. Jettison in its largest sense, however, signifies any throwing overboard; but, in its ordinary sense, it means a throwing overboard for the preservation of the ship and cargo, and most of the jurists treat of it in this sense, under the head of general average. The present case is an extraordinary species of jettison. I cannot, however, distinguish it in principle, from the case where the captain sets fire to his ship to prevent her falling into the hands of the enemy. Now it is laid down by Emerigon and Pothier, that the underwriters are liable for such a loss; and I think, therefore, they are equally so, in the present case. It is said, however, that, in those cases, the assured and underwriters were all of the same nation; so long, however, as the insurance of the property of a foreigner is not contrary to the law of England, the underwriter who

(1) *Bondrett v. Hentigg*, Holt's N. P. C. 149.

(2) 5 B. & A. 238.

(3) *Butler v. Wildman*, 3 ibid. 398.

insures, must be considered as placing himself in the same situation as the foreigner; for he has undertaken to indemnify the assured against enemies, and that must mean enemies of the state of which the assured is a member. I am therefore of opinion, that the plaintiff is entitled to the judgment of the court."

LOSS BY PERILS
OF THE SEA.

The underwriter is liable for a robbery of the goods insured, when committed by thieves from without. (1) Thus, where on a policy of insurance on goods the vessel was wrecked, part of the goods were lost, and part got on shore, but (whilst on shore) were destroyed and plundered by the inhabitants of the coast, so that no portion of them came again into the possession of the assured:—It was held, that this was a loss by the perils of the sea, and no abandonment was necessary to make it a total loss. (2)

Goods lost by
robbery.

Where a policy was effected on mules and other living animals, warranted "free from mortality and jettison;" and in the course of the voyage some of them were killed, in consequence of the agitation of the ship in a storm; and others died before the termination of the voyage insured, in consequence of the injuries they had received:—It was held, that this was a loss by a peril of the sea, for which the underwriters were liable (3); Mr. Justice Holroyd observing, "The exception must be considered as engrafted upon these general words in the policy, and the whole should be read together as one sentence; and then it would stand thus, that the underwriters will be liable for losses by perils of the seas, and all other losses except losses by mortality and jettison. It seems to me, that as the injury which immediately preceded and caused the death of the animals, proceeded directly from the violence of the storm, the loss is to be considered a loss by the perils of the sea. Death may or may not have increased the amount of the actual loss to the assured." "Besides, this absurd consequence would follow—if we were to give to the words used in the exception the construction contended for by the defendant, that where the violence of the wind and waves was so great as to cause the death of the animals during the voyage, the underwriters would not be liable at all; but where the violence of the wind and waves was only such as to cause some injury to the animals short of death, then the underwriters would be responsible."

POLICY ON
ANIMALS.

Judgment of
Mr. Justice
Holroyd in
*Lawrence v.
Aberdeen*.

A policy was effected on horses "warranted free from mortality." The jury specially found, that on the voyage, in consequence of a storm, the horses broke down the partitions between them, and by kicking bruised each other so much that they died; that a particular usage with respect to policies on live stock prevailed at Lloyd's Coffee-house in London, and was adopted both by the underwriters subscribing and the merchants effecting policies there, and that this policy was effected there:—It was held, first, that this was a loss by perils of the sea, for which plaintiff might recover, notwithstanding the warranty; and second, that as it did not appear, that plaintiff knew of the usage prevailing at Lloyd's, or was in the habit of effecting policies there, such usage did not bind him. (4)

In *Nesbitt v. Lushington* (5) Lord Kenyon stated, "When a ship is stranded, the underwriters agree to ascribe the loss to the stranding, as being the

STRANDING.

(1) *Harford v. Maynard*, Park on Insurance, 33.

(3) *Lawrence v. Aberdeen*, 5 B. & A. 107.

(2) *Bondrett v. Hentigg*, Holt's N. P. C. 149.

(4) *Gaboy v. Lloyd*, 5 D. & R. 641. 3

B & C. 793.

(5) 4 T. R. 787.

LOSS BY PERILS
OF THE SEA.

most probable occasion of the damage, though that fact cannot always be ascertained."

In *Kingsford v. Marshall* (1) Chief Justice Tindal observed, "It has long been settled, that the words, 'if the ship be stranded,' are words of condition, and that if such condition happens, it destroys the exception, and lets in the general words of the policy." (2) And underwriters are liable for a stranding occasioned remotely by the negligence of the crew. (3)

"Stranding"
defined by
Mr. Justice
Littledale in
*Bishop v. Pen-
land*.

In *Bishop v. Penland* (4) Mr. Justice Littledale observed, "There seems to be some contrariety of opinion, as to the meaning of the term stranding. That term, in its ordinary sense, means taking the ground, or being on the strand; but that is not the meaning of the word, in a policy of insurance; for this vessel's taking the ground in the first instance, was not a stranding within the meaning of the policy. I think it immaterial, whether a vessel takes the ground when she is in the course of, or at the end of, a voyage. But when a vessel is on the ground, or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is stranding within the meaning of the policy. In *Hearne v. Edmunds* (5), the taking the ground was no more, than was usual with vessels of the same class, proceeding up the river to Cork. When the vessel was on the ground, she was in that situation in which such a vessel proceeding on that voyage usually is in the river, when the tide is low. So here, as long as the vessel lay on the ground fastened to the shore by the rope, she was not stranded; but when the rope broke, she fell over on her side, and lay on the ground; in that position I think she was stranded within the meaning of the policy, because she then ceased to be in a situation in which a vessel driven by stress of weather into the port of Peele usually is."

A ship having on board goods, which were insured on a voyage from London to Hull, but "warranted free from average, unless general, or the ship should be stranded," arrived in Hull harbour, which is a tide harbour, and proceeded to discharge her cargo at a quay on the side of it; this could be done at high water only, and could not be completed in one tide. At the first low tide, the vessel grounded on the mud; but on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel:—It was held, that this was a stranding within the meaning of that word in the policy (6), Lord Tenterden stating, "The rule of law with respect to stranding I conceive to be this. Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide, or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But where the ground is taken under any

"Stranding"
defined by
Lord Tenterden in *Wells v. Hopwood*.

(1) 8 Bing. 463.

(2) Vide *Burnett v. Kensington*, 7 T. R. 210.

(3) *Bishop v. Penland*, 7 B. & C. 219.

1 M. & R. 49. *Busk v. Royal Exchange*
Comp. 2 B. & A. 73. *Walker v. Mailland*,
5 ibid. 171.

(4) 7 B. & C. 225. recog. in *Wells v. Hopwood*, 3 B. & Ad. 36. Park J. dissent.

(5) 1 B. & B. 388.

(6) *Wells v. Hopwood*, 3 B. & Ad. 30.
Park J. dissent.

extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum. According to the construction that has been long put on the memorandum, the words, 'unless general, or the ship be stranded,' are to be considered as an exception out of the exception, as to the amount of an average or partial loss, provided for by the memorandum, and, consequently, to leave the matter at large according to the contents of the policy; and as every average loss becomes a charge upon the underwriters where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no, the true and legal sense of the word 'stranding' is a matter of great importance in policies upon goods. In policies on ship, the memorandum is not found. In such policies the inquiry is, whether a loss arose by perils of the sea; and the question is, consequently, unfettered by any technical phrase."

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OF THE SEA.

Where there is a warranty in a policy of insurance against average, "unless general, or the ship be stranded;" if, during the voyage, the ship is forced ashore by the wind, or driven on a bank, and remains fast for any time, this is a sufficient stranding to do away the effect of the warranty, although the ship is not proved to have thereby received any material damage. (1)

Vessel driven
on a bank;

Where a ship, being under conduct of a pilot in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and she took the ground, and when the tide left her fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged:—It was held, that this was a stranding to entitle the assured to recover for an average loss upon the goods. (2)

improperly
fastened to a
pier;

Where, during the course of a voyage on an inland canal it became necessary, in order to repair the canal, to draw off the water; and the ship in consequence having been placed in the most secure situation that could be found, when the water was drawn off took the ground by accident on some piles, which were not previously known, to be there:—It was holden, that this was a stranding within the usual memorandum in the policy, the accident not having happened in the ordinary course of the voyage. (3)

taking the
ground on
some piles

Running on some wooden piles four feet under water, erected in a river about nine feet from shore, for the purpose of keeping up the banks, and lying on such piles till they were cut away, was also held to be a stranding. (4)

If a vessel strike upon a rock, and remain fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury, this constitutes a stranding. (5)

striking upon
a rock;

Where, on a policy of insurance on goods, with a warranty against average, "unless general, or the ship be stranded;" it appeared that, on the voyage the ship was driven by stress of weather into a harbour, at the mouth of which she struck upon an anchor, and was in danger of sinking; to prevent which, she was warped higher up in the harbour, where she took the ground, and remained fast half an hour:—It was holden, that the ship was stranded, within the meaning of the policy. (6)

or an anchor.

(1) *Harman v. Vaux*, 3 Camp. 429.

Park on Insurance, 177. S. C. nom. *Dobson v. Bolton*, Marshall on Insurance, 231.

(2) *Carruthers v. Sydebotham*, 4 M. & S. 77.

(5) *Baker v. Towry*, 1 Stark. 436.

(3) *Rayner v. Godmond*, 5 B. & A. 225.

(6) *Barrow v. Bell*, 7 D. & R. 244. 4

(4) *Dobson v. London Assurance Comp.*

B. & C. 736.

LOSS BY PERILS
OF THE SEA.WHAT IS NOT A
STRANDING.

Judgment of
Chief Justice
Tindal in
Kingsford v.
Marshall.

In *Kingsford v. Marshall* (1) it appeared, that, upon the ebbing of the tide, a vessel took the ground in a tide harbour in the place where it was intended she should, but in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged:—upon which it was held, that this was not a stranding, for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded; Chief Justice Tindal observing, “‘If the ship be stranded’ are words of condition, and if such condition happens, it destroys the exception, and lets in the general words of the policy.” (2) “Now it is perfectly clear, and has been settled by various decided cases, that by the term ‘stranding’ neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say, that when a vessel, in the course of a voyage insured, is sailing in a tide river, or puts into a tide harbour, the taking the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding, within the meaning of the policy. Otherwise, at every ebb of the tide, there would be a stranding; and the memorandum intended for the security of the underwriter against partial losses upon perishable commodities would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason of the ship discharging her cargo in a tide harbour. The mere taking of the ground, therefore, in a tide harbour, in the place intended by the master and crew, or the proper officers of the harbour, cannot, upon any principle of construction, or common sense, be held to constitute a stranding. What more, then, is necessary?”

“We think a stranding cannot be better defined, than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, from some accidental or extraneous cause.”

Judgment of
Lord Ellen-
borough in
M^r Dougle v.
Royal Exchange
Assurance Comp.

The striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends, was held not to constitute a stranding within the meaning of that term in a policy of insurance (3), Lord Ellenborough observing, “*Ex vi termini* ‘stranding’ means lying on the shore, or something analogous to that. To use a vulgar phrase, which has been applied to this subject, if it is ‘touch and go’ with the ship, there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship’s motion. If by the force of the elements she is run aground, and becomes stationary, it is immaterial, whether this be on piles, on the muddy bank of a river, or on rocks on the seashore; but a mere striking will not do, wheresoever that may happen. I cannot look to the consequences without considering the *causa causans*.”

So, likewise, where a ship had struck upon a sunken rock, and received damage, was run on shore by the direction of the pilot, when she was repaired, and afterwards proceeded to her ports of delivery:—

(1) 8 Bing. 458., *antè*, 2154.

(2) Vide *Burnett v. Kensington*, 7 T. R. 210. (3) *M^r Dougle v. Royal Exchange Assurance Comp.* 4 M. & S. 503. 4 Camp. 283.

It was held not to be a stranding within the meaning of a policy of insurance. (1)

LOSS BY PERILS
OF THE SEA.

And where a vessel with a cargo on board took the ground on two successive days in going up Cork harbour, under the direction of a pilot, and being afterwards moored in the usual course, was thrown on her broadside by the receding of the tide, and received a considerable injury: — It was held, that this was not a stranding, within the meaning of that term in a memorandum at the bottom of a policy of insurance. (2)

In *Hoffman v. Marshall* (3), where a particular average loss was incurred by the stranding of a lighter conveying goods from ship to shore, the goods being insured free from average, unless general, or the ship should be stranded: — It was held, that the insurer was not liable.

Under the common memorandum the underwriter is liable for a partial loss if the ship be stranded, whether it arises from the stranding, or any other peril insured against. (4)

To render the underwriters liable for a loss by stranding, it must take place after the adventure has commenced, and before it has terminated. (5)

If the enumerated articles specifically remain, though by sea damage they are rendered of no value, and the ship has not been stranded, the insurer was in *Cocking v. Fraser* (6) held not to be liable, Lord Mansfield observing, "The clause relative to fruit and fish is now a very old one in policies of insurance. The insurer undertakes for all losses upon these articles, except particular damage, within a certain amount, unless the ship be stranded; he therefore engages against a total loss. Now a total loss of the thing insured is the absolute destruction of it, by the wreck of the ship. The fish may all come to port, though, from the nature of the commodity, it may be damaged — it may be stinking. Still, as the commodity specifically remains, the underwriter is discharged." (7) Mr. Justice Buller said, "That from the first introduction of the clause in 1749, to the present time, the underwriter never has been held answerable but where there has been a total loss of the articles mentioned in it."

Time of stranding.

Where the enumerated articles specifically remain, and the ship not stranded.

Judgment of Lord Mansfield in *Cocking v. Fraser*.

Where a ship is obliged to put back, and the damage she has sustained is of such a nature, that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, this is a total loss of ship, cargo, and freight, however inconsiderable the damage sustained may be, because, as observed by Lord Mansfield in *Manning v. Newnham* (8), "If the voyage in contemplation is lost, or is not worth pursuing, this is a total loss."

When a ship is unable to pursue her voyage.

In *Wilson v. Royal Exchange Assurance Comp.* (9) it was held, that the Royal Exchange Assurance Company were liable for a total loss upon a cargo of corn, where the ship from the perils insured against becomes incapable of pursuing the voyage, and another vessel cannot be procured to forward the corn to its port of destination.

(1) *Burnett v. Kensington*, 7 T. R. 210. 1 Esp. N. P. C. 416. Peake's Add. Cas. 71. recog. in *Kingsford v. Marshall*, 8 Bing. 463.

(2) *Hearne v. Edmunds*, 4 Moore, 15. 1 B. & B. 388.

(3) 2 Bing. N. C. 383.

(4) *Cantillon v. London Assurance Comp.* cit. 3 Burr. 1553.

(5) *Rous v. Salvador*, 1 Bing. N. C. 526.,

sed vide S. C. reversed, 3 ibid. 281., vide post, 2167. *Hoffman v. Marshall*, 2 Bing. N. C. 383.

(6) Vide Marshall on Insurance, 219, et seq. Park on Insurance, 181, et seq., vide etiam *Mason v. Skurray*, ibid. 191.

(7) Pothier, 59.

(8) 2 Camp. 624. n.

(9) Ibid. 623.

**LOSS BY PERILS
OF THE SEA.**

A general policy of insurance covers the risk of fire at sea in a steam-boat, as in any other vessel. (1)

LOSS BY FIRE.

Vessel set on fire to prevent her being captured by the enemy.

Judgment of Lord Ellenborough in *Gordon v. Rimmington*.

In *Gordon v. Rimmington* (2) Lord Ellenborough said, "Fire is expressly mentioned in the policy as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state. Nor can it make any difference, whether the ship is thus destroyed by third persons, subjects to the king, or by the captain and crew acting with loyalty and good faith. Fire is still the *causa causans*, and the loss is covered by the policy."

At Canton an East India ship stayed to clean and refit, for which purpose all the sails and furniture were taken out of the ship and put into a warehouse built for them on a sand-bank in the river there, where they were accidentally burnt: this was held to be a loss within the words and meaning of a policy of insurance of the ship on its body, tackle, apparel, &c. and other furniture, &c. against perils of the seas, men-of-war, and fire, to any ports and places beyond the Cape of Good Hope and back again to London. (3)

Fire occasioned by negligence of the crew.

In an action on a policy on ship, by which, amongst other risks, the underwriters insured against fire and barratry of the master and mariners:—It was holden, that they were liable for a loss by fire occasioned by the negligence of the master and mariners (4), because, as observed by Mr. Justice Bayley, "The loss is occasioned by fire, against which the assured is protected by the terms of the policy, and, in our law at least, there is no authority which says, that the underwriters are not liable for a loss, the proximate cause of which, is one of the enumerated risks, but the remote cause of which, may be traced to the misconduct of the master and mariners."

Fire from the damaged quality of goods on board.

The assured cannot recover for a loss, which he himself has occasioned: therefore, if a fire arise on board a ship from the damaged quality of goods on board, which are insured, the underwriters are not liable; but if the loss be not occasioned by the damaged state of the goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters, that the goods were damaged, though they might have a tendency to increase the risk. (5)

SALVAGE.

Salvage means the compensation made to those, by whose means the ship or goods have been saved from the effects of shipwreck, fire, pirates, enemies, or any other loss or misfortune, and the underwriters are liable for the amount. The civil regulations respecting this subject are to be found in stats. 12 Anne, st. ii. c. 18., 26 Geo. 2. c. 19., 43 Geo. 3. c. 160., 1 & 2 Geo. 4. cc. 75 & 76., and 6 Geo. 4. c. 107.

7. BARRATRY.**BARRATRY**
Barratry de-

"Fraud" and "barratry" are, in effect, words of co-extensive import.

In *Lockyer v. Offley* (6) Mr. Justice Willes observed, "Many definitions

(1) *Pattison v. Mills*, 1 Dow & C. 342. 2 Bligh, N. S. 519.

(2) 1 Camp. 123. 1 Phillips on Insurance, 630.

(3) *Pelly v. Royal Exchange Assurance Comp.* 1 Burr. 341.

(4) *Bush v. Royal Exchange Assurance*

Comp. 2 B. & A. 73., et vide *Bishop v. Pentland*, 7 B. & C. 219. 1 M. & R. 49.

(5) *Boyd v. Dubois*, 3 Camp. 133., et vide *Bufe v. Turner*, Marshall on Insurance, 791. 6 Taunt. 338.

(6) 1 T. R. 259.

of barratry are to be found in the books, but perhaps this general one, may comprehend almost all the cases:—Barratry is every species of fraud or knavery in the master of the ship, by which the freighters or owners are injured; and in this light a criminal deviation is barratry, if the deviation be without their consent.” (1)

In *Earle v. Rowcroft* (2) Lord Ellenborough stated, “In a MS. note of the case of *Stamma v. Brown*, which was read to us by my brother Lawrence, Lord Chief Justice Lee defines barratry in being ‘some breach of trust in the captain *ex maleficio*.’ And in the note of the same case, with which I have been furnished from Mr. Ford’s manuscripts, Chief Justice Lee says, ‘Barratry must be *ex maleficio* with intent to destroy, waste, or embezzle the goods’ (that, it must be remembered, was a policy on goods); ‘and therefore, although this might be a deviation, yet I do not see, how it can be considered as barratry. I make no question, that there may be such a deviation, as will amount to barratry; as where the master deviates to burn, sink, destroy, or throw the ship into the enemy’s hands; or, where he has benefit by the deviation, as if he himself had insured the goods: and therefore it was a material part of the case, whether the master had any benefit by this alteration of the voyage; for that might have been evidence of fraud in him,’ &c. Of course he did not consider the benefit of the master, as a necessary ingredient in the constitution of barratry in all cases, but only as a pregnant circumstance to prove the existence of such a fraud in point of fact, in a particular case.”

“We are certainly warranted in pronouncing, that a fraudulent breach of duty by the master, in respect to his owners; or in other words, a breach of duty, in respect to his owners, with a criminal intent, or *ex maleficio*, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers, be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master’s duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were in his opinion likely to advance his owner’s interest, and intended by him to do so, it will not be barratry. But to this we cannot assent.” (3)

Barratry can only be committed against the owner of the ship, and without his consent. (4)

The underwriter of an insurance made by and in favour of the shipowner is not discharged by barratry committed with the privity of the freighter, unless he can shew, that the shipowner was also privy. (5)

BARRATRY.

defined by Mr. Justice Willes in *Lockyer v. Offley*.

Judgment of Lord Ellenborough in *Earle v. Rowcroft*.

Barratry can only be committed against the owner of the ship, and without his consent.

(1) *Vide etiam per* Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 134. *Knight v. Cambridge*, Str. 481.

(2) 8 East, 136.

(3) It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance; and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudu-

lent and secret contrivance and understanding between themselves, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters. So, however, it is, that this description of loss has, from the earliest times, held its place as a subject of indemnity in British policies of insurance. 8 East, 134.

(4) *Nutt v. Bourdieu*, 1 T. R. 323.

(5) *Boutflower v. Wilner*, Selw. N. P. 962.

BARRATRY.

Term "ship-owner," does not exclusively apply to "absolute owners."

But the term "shipowner" does not exclusively apply to "absolute owners," but extends to owners *pro hac vice* as general freighters. Thus, where the owner of a ship let it to another as a freighter, who insured it for the voyage, and a barratrous act was committed with the knowledge of the owner, but unknown to the freighter, it was held to be barratry, and the insurers liable. (1)

And the circumstance, that by the terms of a charter-party entered into between such owner and the freighters the former was entitled to put goods on board during a previous part of the voyage, would make no difference. (2)

A person uniting in himself the character of captain and supercargo can be guilty of barratry. (3)

Fraudulent deviation.

A deviation, if fraudulent, is barratry, whether the loss happen during such fraudulent voyage or after. (4) But it is otherwise, if the deviation be with the privity or consent of the owners or freighters. (5)

Master disobeying instructions, by not making his purchases with dispatch.

Where a ship and cargo were carried barratrously by the master out of the course of the voyage, and the ship and part of the cargo were sold, and the remainder sent home by a strange ship:—It was held, that this was a total loss of the cargo from the time of committing the act of barratry, and that the underwriters were liable for such loss, with the benefit of salvage only. (6)

Evading port duties.

"If the master sail out of the port without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry," and the insurers will be liable. (7)

Cruising for prizes.

In *Moss v. Byrom* (8), where a master, under letters of marque, defective in point of validity for want of a certificate, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purposes of cruising, had cruised for and taken a prize, and had afterwards libelled such prize for condemnation in the name of himself and his owners in a port in the West Indies, and during his stay there on that occasion, was lost:—this was holden by Lord Kenyon and the rest of the court, as barratry.

Smuggling.

If a ship be insured by the terms of the policy in any lawful trade, and the barratry of the master be mentioned as one of the risks to be borne by the insurer, the underwriters will be liable for a loss which happens by the barratry of the master by smuggling (9); because "the master of a vessel who does an act in contravention of the laws of his country is guilty of a breach of the implied orders of his owners." (10)

Absence of captain from vessel on a fraudulent purpose of his own.

Where the voyage insured was from Jamaica to New Orleans, which lies up the river Mississippi, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own:—It was held, that the dropping of his anchor with such fraudulent intention was an act of barratry, and not merely a deviation. (11)

(1) *Vallejo v. Wheeler*, Cowp. 143., sed vide *Hobbs v. Hannam*, 5 Camp. 94.

(2) *Soares v. Thornton*, 1 Moore, 373.

(3) *Earle v. Rowcroft*, 8 East, 140. *Vallejo v. Wheeler*, Cowp. 143. *Loofft*, 631.

(4) *Ibid.*

(5) *Ibid.*

(6) *Dixon v. Reid*, 1 D. & R. 207. 5 B. & A. 597.

(7) *Knight v. Cambridge*, cit. in *Earle v. Rowcroft*, 8 East, 135.

(8) 6 T. R. 379.

(9) *Havelock v. Hancill*, 3 *ibid.* 277.

(10) *Per* Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 133.

(11) *Ross v. Hunter*, 4 T. R. 33. 1 Phillips on Insurance, 604.

Where the captain, in the due course of his voyage, put into port for the purpose of repairing damage; and whilst the repairs were proceeding, was absent, and continued so, for a much longer time than was necessary to finish such repairs; and during his absence procured forged papers, and afterwards returned to the vessel; and, instead of proceeding on the voyage, carried her to a foreign port; and the jury found, that an act of barratry was committed during the absence of the captain, and whilst the vessel was being repaired:—It was held, that they were warranted in so doing, and that their verdict could not be disturbed. (1)

A vessel, with liberty to chase and capture prizes, had some Spanish prisoners on board; and who, by means which did not appear, broke loose, rose upon and imprisoned the crew, with the exception of one sailor, who was heard upon the deck in conversation with them. The captain and crew, with the exception of this sailor, were put on shore, and the Spaniards ran away with the ship. Upon a loss alleged to be by barratry of the mariners, this was left as evidence to the jury, that barratry was committed. (2)

If the loss be not complete during the voyage or time insured for, the insurer is discharged: thus, if a barratrous act be committed on the 1st of January, the policy expire on the 2d of January, and the vessel be confiscated for the act committed on the 1st of January, the insurer would be released, because the barratrous act was only the inception of the loss, not the loss itself, the consummation of the loss not being until the 3d of January; if this were not law, the insurer at any distance of time would be answerable for the loss under a limited undertaking. (3)

"Barratry means an act of the master, in fraud of his duty to his owners. A mere mistake by the captain as to the meaning of the instructions, or a misapprehension of the best mode of acting under the instructions, and carrying them into effect, will not amount to barratry." (4)

If the master of the ship be owner, he cannot commit barratry, because he cannot commit fraud against himself (5); and the same principle applies, where the (6) owner, having mortgaged the ship, acts as master.

If through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized as forfeited, the underwriters are not liable for the loss. (7)

Where the master of a vessel, condemned for a breach of blockade, swore he was bound for another destination:—It was held, that this did not so disaffirm his owner's privity and consent to the breach of the blockade, as to enable the plaintiff to recover as for a loss by barratry. (8)

The insurer of a ship is not liable for the expenses incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process. And the circumstances causing the detainer, must be positively shewn to have originated in the fraud of the master, in order to support an averment of loss by his barratry. (9)

BARRATRY.

Prisoners overpowering the master and crew.

To render insurer liable, loss must be complete during the voyage insured.

WHAT IS NOT BARRATRY.

Negligence of owner.

Breach of blockade.

When insurer not liable for the expenses of the detention of the vessel.

(1) *Roscow v. Corson*, 8 Taunt. 684.

(2) *Hucks v. Thornton*, Holt's N.P.C. 30.

(3) Vide *Lockyer v. Offley*, 1 T. R. 261.

(4) *Phyn v. Royal Exchange Assurance Corp.* 7 T. R. 505. Per Abbott C. J. in *Bottomley v. Bovill*, 5 B. & C. 212.

(5) *Recog.* in *Ross v. Hunter*, 4 T. R. 33.

(6) *Lewin v. Suasso*, 1 Postleth. Dict. 147.

(7) *Pipon v. Cope*, 1 Camp. 434.

(8) *Everth v. Hannam*, 6 Taunt. 375. Marshall on Insurance, 527.

(9) *Bradford v. Levy*, R. & M. 331. 2 C. & P. 137.

LOSS BY CAP-
TURE.

Defined.

Effect of cap-
ture.Judgment of
Lord Mans-
field in *Goss v.*
*Withers.*Judgment of
Mr. Justice
Bayley in
Brotherston v.
*Barber.*When vessel
has received
damage from
an interrup-
tion.Insurers re-
sponsible for a
bond fide com-
promise.

8. LOSS BY CAPTURE.

Capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.

Capture may be with intent to possess the ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. (1)

In *Goss v. Withers* (2) Lord Mansfield said, "The ship is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy, and the insurer must pay the value. If, after condemnation, the owner recovers or retakes her, the insurer can be in no other condition, than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract: the insurer runs the risk of the insured, and undertakes to indemnify; he must therefore bear the loss actually sustained, and can be liable to no more; so that, if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must bear the loss so actually sustained."

In *Brotherston v. Barber* (3) Mr. Justice Bayley said, "Capture is an event, which may or may not terminate in a total loss: if it continue and terminate in a total loss, the assured will be entitled to his full indemnity; but, if the capture be only temporary and the loss partial, it would be against the spirit, as well as letter of the contract to hold the underwriter bound to take the subject-matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription, while the subject-matter insured, subsists in perfect safety."

In *assumpsit* upon a policy of insurance (4), interest or no interest, against all enemies, pirates, takings at sea, &c., it appeared, that the ship was taken by a Swedish pirate, and remained in his possession nine days, and was then retaken by an English man-of-war, and, after the suit commenced, brought into Harwich:—It was holden, that the plaintiff was entitled to recover; for though the ship was retaken, yet the plaintiff had received a damage by the interruption of his voyage; and the question was, not whether the plaintiff had his ship, and did not lose his property, but what damage he had sustained.

Insurers are liable to pay the charge of a compromise *bond fide* made, to prevent the ship from being condemned as lawful prize, or to avoid a greater expense. (5)

But when, after a capture and an illegal condemnation by a French consul at Bergen, the owner repurchased the ship at Bergen:—It was held, that he could not recover the money so paid, from the underwriter. (6)

So likewise in *Kulen v. Kemp* (7), where it appeared, that money had

(1) Marshall on Insurance, 497. 1 Phillips on Insurance, 650.

(2) 2 Burr. 694.

(3) 5 M. & S. 423.

(4) *Depaba v. Ludlow*, Com. 360.

(5) *Berens v. Rucker*, 1 W. Black. 313.

(6) *Havelock v. Rockwood*, 8 T. R. 277.

(7) 1 *ibid.* 304., post, 2169.

been expended in reclaiming a cargo on board a ship captured, insured by the owners, upon the event of the ship's arrival at Marseilles; and the ship having been captured and restored upon appeal, relinquished her voyage, and was afterwards lost, but, pending the appeal, the goods were ordered to be sold, and the expenses of the appeal were afterwards defrayed therewith: it was decided, that an averment of a loss by capture was bad, because the ship might, notwithstanding the capture, have afterwards arrived at Marseilles.

LOSS BY CAP-
TURE.

It was the practice to agree with the captors for the ransom of the vessel, and the insurers were responsible for the amount; but this usage has been prohibited by statutable enactments. (1)

Payment of
ransom.

The indemnity of the underwriters to the assured, against all captures and detentions of princes, does not extend to the acts of the British government. Thus, an insurance effected in Great Britain on a French ship, previous to the commencement of hostilities between Great Britain and France, was held not to cover a loss by British capture. (2)

British cap-
ture.

An insurance on goods from London to Bayonne in France, shipped on board a neutral ship on account and at the risk of Frenchmen, before the declaration of hostilities between Great Britain and France, but exported afterwards, cannot be enforced against the underwriters, even after the restoration of peace, to recover a loss by capture of a co-belligerent (though not stated to be an ally) during the war. Every insurance on alien property by a British subject, must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer. (3)

If a policy be on a ship bound to a foreign port, "until she is twenty-four hours moored in safety there;" and, previous to such ship's arrival at her destined port, an embargo be laid on all English vessels in that port, and she on entering it, be also detained, and her crew made prisoners of war, the assured is entitled to recover. (4)

Vessel seized
under an em-
bargo.

Where a ship was insured, "interest or no interest, free from average, and without benefit of salvage," for a voyage or cruise of three months, and taken by the enemy within that time, but, before she was carried *infra presidia hostis*, was retaken by an Englishman, and was at the time of the action a living ship:—It was held to be a total loss to the insured. (5)

English cruiser
captured, but
re-captured by
an English
cruiser.

If a ship be driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture and not by the perils of the seas. (6)

Driven by
stress of
weather on an
enemy's coast.

If goods be purchased in England on account of Frenchmen and shipped and insured before, but exported after, hostilities commenced between Great Britain or France, and are captured by a co-belligerent, the insured cannot

(1) *Stats.* 22 Geo. 3. c. 25. 33 Geo. 3. c. 66. ss. 37, 38. 43 Geo. 3. c. 160. ss. 34, 35., vide *Havelock v. Rockwood*, 8 T. R. 268. *Parsons v. Scott*, 2 Taunt. 363.

(4) *Minett v. Anderson*, Peake's N. P. C. 277.

(2) *Furtado v. Rogers*, 3 B. & P. 191. *Gamba v. Le Mesurier*, 4 East, 407. 1 Smith, 81.

(5) *Pond v. King*, 1 Wils. 191., vide etiam *Whitehead v. Bance*, Park on Insurance, 122. *Dean v. Dicker*, Str. 1250.

(6) *Green v. Elmslie*, Peake's N. P. C. 278.

(3) *Brandon v. Curling*, 4 East, 410. *Kellner v. Le Mesurier*, *ibid.* 396.

LOSS BY CAPTURE.

French or other property insured and purchased in time of peace, but captured in time of war.

recover for this loss (1); because, the general terms of insurance against capture in our policies, are to be understood as virtually containing an exception of such captures, as might eventually be made by his majesty and his subjects, and against which a British subject could not, consistently with his public duty, insure in direct terms; and consequently, that wherever the generality of the terms of insurance might produce a similar contravention of public interest, they must be so construed, as to exclude the particular event or peril, which could not be made the subject of legal insurance in direct terms; and, therefore, that an insurance on goods *generally*, must be understood with a proviso, that it shall not extend to cover any loss happening during the existence of hostilities, between the respective countries of the insured and insurer. (2)

FREE OF CAPTURE IN PORT.

Question of fact for the jury, whether a vessel be in port or not, at the time of the capture.

Vessel taken at her moorings.

Place which is not within the limits of any port.

Whether a vessel, warranted free of capture in port, be in a port or not at the time of her capture, is purely a question of fact for the jury. (3)

If a vessel be taken at her moorings, being neither within the *caput portus*, nor within that part of a haven where ships unload, the underwriter is not discharged by a warranty against "capture in the ship's port of destination." (4)

A warranty in a policy of insurance against capture in port, does not protect the underwriters from a loss happening by capture in a place, which is not within the limits of any port, although it may be within the headlands at the mouth of a river; therefore, where a ship insured from Rotterdam to London, and "warranted free from capture in port," was captured while lying at anchor near Ghoree, in the river Maes, the underwriters were held liable. (5)

Capture in the roads of a port.

A policy was effected on goods which were warranted free from seizure in the port of discharge. The captain, when he arrived within about two miles and a half from the harbour of the place to which he was destined, cast anchor, and made a signal for a pilot; a pilot boat in consequence came out with *douanniers* on board, who carried him into the harbour, where the cargo was seized and condemned:—It was held, that this was a seizure in her port of discharge within the meaning of the warranty. (6)

Where goods insured were warranted free from capture and seizure in the port of discharge, and the goods, being destined to Pillau, were seized while the ship was lying at anchor in Pillau Roads; this was holden to be a seizure in the port of discharge, within the meaning of the warranty. (7)

But a warranty against capture in the ship's port of discharge, does not include capture in the open sea on the outside of the port by a force issuing from the port of discharge. (8)

If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship, while the vessel insured is lying in an open road outside of a harbour, is not within the warranty. (9)

JUDGMENT OF CONDEMNATION.
Warrant of neutrality.

In *Lothian v. Henderson* (10) Mr. Justice Lawrence said, "A warrant of neutrality must, I conceive, now be understood as containing in itself, amongst other things, a stipulation, that the contract of assurance shall be void, if the

(1) *Brandon v. Curling*, 4 East, 410.

(2) *Marshall on Insurance*, 39.

(3) *Reyner v. Pearson*, 4 Taunt. 662.

Levin v. Newnham, *ibid.* 722.

(4) *Keyser v. Scott*, *ibid.* 660.

(5) *Baring v. Faux*, 2 Camp. 541.

(6) *Oom v. Taylor*, 3 *ibid.* 204.

(7) *Maydew v. Scott*, *ibid.* 205.

(8) *Mellish v. Staniforth*, 3 Taunt. 493.

(9) *Brown v. Tierney*, 1 *ibid.* 517.

(10) 3 B. & P. 524.

subject-matter warranted neutral be condemned as enemies' property; and, if a warrant of neutrality contains this stipulation, the sentence of a court of competent jurisdiction, condemning a ship on account of its want of neutrality, is the proper evidence, according to every principle and rule of our law, to determine that fact." (1)

In *Bird v. Appleton* (2) Lord Kenyon said, "Courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular states; such treaties do not alter the *jus gentium* with respect to the rest of the world, but as between those particular states, they are considered as engrafted on the *jus gentium*."

LOSS BY CAPTURE.

Judgment of Mr. Justice Lawrence in *Lothian v. Henderson*.

Courts of admiralty proceed on the *jus gentium*.

Judgment of Lord Kenyon in *Bird v. Appleton*.

9. "ARRESTS, RESTRAINTS, AND DETAINMENTS OF ALL KINGS, PRINCES, AND PEOPLE, OF WHAT NATION, CONDITION, OR QUALITY SOEVER."

The distinction between arrest of princes and capture is, that the object of the latter is a prize, and that of the former detention, with a design to restore the ship or goods detained, or pay the value to the owner.

All commerce with a town or place besieged, invested, or blockaded, is prohibited.

An insurance on any trade in opposition to an embargo by the king is void (3); and an insurance for the benefit of a foreigner, against such an embargo, would be illegal.

One British subject can, however, insure another British subject against the consequences of an embargo by the British government (4); but whether an embargo by the British government, would have the effect of rendering an insurance effected in England invalid, is not settled.

A policy of assurance on a ship and stores, "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c., extends to an embargo laid on by the government of that country in the loading port. (5) And if the embargo continue, the assured may abandon and recover as for a total loss. (6)

Where ships were seized and unladen by a military force acting under the orders of a foreign government, then at peace with this country, but without the fault of the insured, it was held to be a loss by detention. (7)

A policy was effected on a ship from London to her lading port in Virginia and back. On her arrival at that port in January, 1808, an embargo was laid on all shipping in American ports by an act of Congress, which contained a proviso, that all foreign ships, either in ballast, or with goods on board, might depart when notified of that act. The captain had covenanted by charter-party to take in a cargo of timber at that port, and return therewith to London. It was proved, that the embargo was taken off in March, 1809, and that the ship did not sail until the August following, and that she was lost on her way home:—It was held, that the captain was justified in remaining in port, and that he was not bound to return with the

"ARRESTS, RESTRAINTS, AND DETAINMENTS OF ALL KINGS, PRINCES, AND PEOPLE, OF WHAT NATION, CONDITION, OR QUALITY SOEVER."

Defined.

EMBARGO.

(1) *Vide antè*, 1635, 1636. tit. ADMIRALTY (COURTS OF).

(2) 8 T. R. 567.

(3) *Delmada v. Motteaux*, Park on Insurance, 357. 388.

(4) *Green v. Young*, 2 Ld. Raym. 840.

(5) *Rotch v. Edie*, 6 T. R. 413.

(6) *Ibid*.

(7) *Mellish v. Andrews*, 15 East, 12.

ARRESTS, RESTRAINTS, AND DETAINMENTS OF ALL KINDS, &c.

cargo, or sail in ballast, and that consequently the underwriters on the ship were liable at the time of the loss. (1)

In case of a detention of a neutral ship by a foreign power, all the charges consequent thereon must be borne by the underwriter, though such detention may be wrongful. (2)

WHEN UNDERWRITER NOT LIABLE.

If, by some mistake of a ship's manifest, a suit is commenced in a foreign port against the captain, for a supposed surreptitious landing of a part of his cargo, by which he is delayed in prosecuting his voyage, there being no suit against the ship—this is not a loss for which the underwriters on the ship are liable. (3)

Goods detained by a foreign power being afterwards restored, as between the assurer and assured, a yielding up of the goods *quasi in integro*, is to be considered as a restoration, notwithstanding some spoliation during the detention. (4)

Underwriter discharged when goods are landed, although they never came into the possession of the consignees.

In an action on a policy of insurance on goods, at and from London to Archangel. The duration of the risk was described in the words of the common printed form, "until the goods should be there discharged and safely landed:"—It was held, that underwriters are discharged, if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this be the usual mode in which goods are landed at such port, although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees; Lord Ellenborough observing, "If the goods are once landed in the usual course of business, the underwriters on such a policy as the present, are not liable for any subsequent loss. It was meant to indemnify against marine, not terrene perils. If persons would be secured against the cupidity of foreign governments, or the enforcement of fiscal regulations, when the goods are once ashore at the port of destination, the instrument must be differently framed. This policy cannot receive the extension contended for, without the greatest injustice to the underwriters, and that useful body of men must abandon the practice of insuring altogether, if new risks are thrown upon them, for which they never became responsible." (5)

Judgment of Lord Ellenborough in *Brown v. Carstairs*.

ABANDONMENT.

10. ABANDONMENT.

I. When the Insured can and cannot abandon.

WHEN THE INSURED CAN AND CANNOT ABANDON.

DEFINED.
Judgment of Lord Mansfield in *Milles v. Fletcher*.

In *Milles v. Fletcher* (6) Lord Mansfield said, "In *Hamilton v. Mendez* (7) it is laid down, that if the voyage is lost, or not worth pursuing, if the salvage is high, if further expense is necessary, if the insurer will not at all events undertake to pay that expense, &c. the insured may abandon, notwithstanding a recapture." (8)

(1) *Schroeder v. Thompson*, 1 Moore, 163. 7 Taunt. 462.

(2) *Saloucci v. Johnson*, Park on Insurance, 125.

(3) *Bradford v. Levy*, 2 C. & P. 137. R. & M. 331.

(4) *Jordaine v. Cornwall*, 1 Stark. 6.

(5) *Brown v. Carstairs*, 3 Camp. 161., vide etiam 1 Phillips on Insurance, 650, et seq.

(6) Doug. 233.

(7) 1 W. Black. 276.

(8) The ordonnance of the marine of Louis XIV. h. t. art. 46. confines aban-

In *Cologan v. London Assurance Comp.* (1) Lord Ellenborough said, "There is a total loss of the thing, if, by any of the perils insured against, it is rendered of no use whatever, although it may not be entirely annihilated."

In *Roux v. Salvador* (2) Lord Abinger observed, "The object of the policy is to obtain an indemnity for any loss, that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel: whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature; if the assured become possessed, or can have the control of them; if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at the original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance."

The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or from any other insuperable obstacle. (3) Thus, upon a policy of insurance on flax, valued at so much, and warranted free of particular average, if the vessel be wrecked, and the assured do not abandon, but labour to save the cargo, and in fact saves a part (one-sixteenth), though much damaged, he is entitled to recover as for a total loss of that part, which was in fact totally lost, but not for the rest which was saved to him in specie, though deteriorated. (4)

A ship was placed in such danger by the perils of the sea, that the crew

ABANDONMENT.

Judgment of Lord Ellenborough in *Cologan v. London Ass. Comp.*

Judgment of Lord Abinger in *Roux v. Salvador*.

LOSS, IS IN ITS NATURE TOTAL TO HIM, WHO HAS NO MEANS OF RECOVERING HIS GOODS.

donment to capture, shipwreck, stranding, arrest of princes, or "*Perte entière des effets assurés.*" Valin thinks the latter words mean "*Perte generique des effets assurés, sans être absolue.*" Valin, 61. Pothier interprets them as being, "*Perte totale, ou presque totale, des effets assurés.*" Pothier, 119.

By the French law, the right to abandon seemingly depends on the species of misfor-

tune; but in England it seemingly depends on the degree of loss sustained in consequence of it.

(1) 5 M. & S. 455.

(2) 3 Bing. N. C. 278, 279.

(3) Vide *Holdsworth v. Wise*, 7 B. & C. 798.

(4) *Davy v. Milford*, 15 East, 559.

ABANDONMENT. to preserve their lives abandoned her. The owners of the goods upon receiving this intelligence abandoned to the underwriters. She was afterwards towed into port, but the goods were so much damaged as not to be worth sending to their place of destination :—This was held to be a total loss, Lord Tenterden observing, “Can any person say that the goods, although remaining in specie, were not as effectually lost to the assured when the ship was deserted, as if they had then gone to the bottom of the sea; or that the subsequent events produced a restoration of them to the owners? This, therefore, is not a mere loss of the voyage and adventure, but in reality a loss of the thing insured.” (1)

Judgment of
Lord Tenterden
in *Parry*
v. *Aberdeen*.

Ship so damaged,
as not to be worth
repairing.

Where a ship was so much damaged by perils of the sea, that in order to render her seaworthy it would cost more to repair her than she would be afterwards worth, and the captain sold her to a purchaser who partially repaired her, and sent her upon a voyage, which she never completed in consequence of her infirmity :—It was held, that the assured were entitled to recover as for total loss without giving notice of abandonment. (2)

Where a ship was insured in a valued policy for 2000*l.* and was damaged by the perils of the sea; but might have been repaired for 1400*l.* :—It was held to be a total loss, as she was not worth repairing. (3)

Vessel sold for
salvage and
costs.

A vessel was insured from Liverpool to Callao for twelve months. On her passage she sustained great injury, having been driven on rocks, but, by the aid received from another vessel was enabled to complete the voyage. Before she was moored in harbour, and before the expiration of the policy, she was seized and detained on an ascertained claim for salvage, of which seizure, the supercargo immediately gave notice to the owner, and upon the receipt of which, the owner gave notice of abandonment to the insurers. The amount of salvage was ascertained by arbitration, but the supercargo being unable to raise the sum awarded, proceedings were taken in the marine court at Callao; and by which court, after the expiration of the policy, a decree was made for the sale of the vessel. The sale took place, and the whole produce of it was expended in the payment of salvage and costs :—It was held, that a total loss had taken place at the time of the seizure, so as to justify an abandonment, and that such abandonment was properly made. (4)

BARRATRY.

Barratry of the master is a ground of abandonment as for a total loss, though the goods ultimately reach their destination, through the agency of strangers to the assured. (5)

MUTINY.

If a vessel or goods be lost by mutiny, it will be grounds for abandonment. But, in *Falkner v. Ritchie* (6), where the insurance was effected on a ship, which during her voyage, while loading her homeward cargo, was seized by the crew and carried away to a distant country, and her cargo plundered, and the ship deserted, but was afterwards retaken by another ship, and was brought with a small remaining part of her cargo to an English port (not the port of her destination), and part of her rigging was gone, and she could not be made fit for a voyage again, without considerable expense in

(1) *Parry v. Aberdeen*, 4 M. & R. 343. 9 B. & C. 411.

(2) *Cambridge v. Anderton*, 2 B. & C. 691. 4 D. & R. 203. R. & M. 60. 1 C. & P. 213.

(3) *Allen v. Sugrue*, 3 M. & R. 9. 8 B. & C. 561.

(4) *Smith v. Robinson*, 1 Hayes (Irish), 125.

(5) *Dixon v. Reid*, 1 D. & R. 207. 5 B. & A. 597. After an act of barratry, by which the vessel is forfeited, *quare*, How far the assured may abandon? *Lockyer v. Offley*, 1 T. R. 252.

(6) 2 M. & S. 290.

providing a crew and stores :— It was held, that this was not a total loss, so as to entitle the assured to abandon after notice of the re-capture.

ABANDONMENT.

In *Goss v. Withers* (1) Lord Mansfield observed, "The better opinion of the books says, '*Sufficit semel extitisse conditionem, ad beneficium assecurati de amissione navis; etiam quod postea sequeretur recuperatio: nam per talem recuperationem, non poterit præjudicari assecurato.*' I cannot find a single book, ancient or modern, which does not say, 'that in case of the ship being taken, the insured may demand as for a total loss, and abandon;' and what proves the proposition most strongly, is, that, by the general law, he may abandon in the case merely of an arrest, or an embargo, by a prince, not an enemy. Positive regulations in different countries, have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle."

CAPTURE.

Judgment of Lord Mansfield in *Goss v. Withers*.

Immediately upon receiving intelligence of a capture, the insured can abandon, and he is not bound to make any claim or appeal to the enemy's courts of admiralty, or to litigate there the validity of the capture, but may wholly leave that to the underwriters.

The insured can abandon upon receiving intelligence of the capture.

But the insured is in no case bound to abandon; and no capture of the enemy can be so total a loss, as to leave no possibility of recovery, for the *jus postliminii* continues for ever, except where a captured ship is converted into a ship of war.

The insured is in no case bound to abandon.

The chance of the owner's recovering his property does not, however, suspend his right to demand as for a total loss; but in the case of a re-capture, justice is considered to be done to the insurer by putting him in the place of the insured. (2)

A capture or arrest does not necessarily, and at all events, terminate in a total loss, so as to entitle the assured to abandon at any time; for as he cannot abandon till he has received advice of the loss, if at the time he receives such advice, or before he has selected to abandon, he receives advice that the ship or goods insured are recovered, or are in safety, he cannot then abandon; because he can only abandon while it is a total loss, and he knows it to be so, not after he knows of the recovery. Therefore, if a captured ship be retaken and permitted to proceed on her voyage, so that she suffer but a small temporary inconvenience, this is only a partial and not a total loss. (3)

Capture does not necessarily terminate in a total loss.

An abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated so as to become an average loss only by the mere restitution and return of the ship's hull before action brought, if the restitution be under such condition as to make it uncertain, whether the assured may not have to pay more than its worth: as where a ship insured from Liverpool to Sierra Leone was captured, plundered, her guns, stores, papers, and instruments taken away, and the voyage lost, and was carried to Fayal, where proceedings were instituted in the admiralty court, and sentence was pronounced in favour of the assured; but appeal was made against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept; and afterwards the remainder of her cargo was sold at Fayal, and the law expenses paid thereout, and the rest left as a deposit to answer the

When a total loss by capture.

(1) 2 Burr. 696.

(2) Marshall on Insurance, 568.

(3) *Kulen Kemp v. Vigne*, 1 T. R. 304., ante, 2162.

ABANDONMENT. event of the appeal, in order to obtain the release of the ship; and afterwards the ship returned to Liverpool:—It was held, that the assured might recover, as for a total loss, in an action brought after the ship's return to Liverpool. (1)

When a partial loss by capture.

A ship insured from Jamaica to Liverpool was captured in the course of her voyage, and recaptured in a few days; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment; and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in Ireland, but without any further knowledge of her state and condition, he persisted in his notice of abandonment; but the ship was afterwards restored to his possession without damage, and arrived at Liverpool, and earned her freight, the salvage and charges of the recapture amounting only to 15*l.* 14*s.* 8*d.* per cent.:—It was held, that he was not entitled to abandon, it appearing in the result that, at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed, and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. (2)

Abandonment must be viewed with regard to the ultimate state of facts at the time, when the offer to abandon was made.

Goods were insured at and from Liverpool to any port in the river Plate: the policy was effected, and the ship sailed, after notification that those ports were blockaded: the ship was captured by the blockading squadron in the river Plate, but was rescued by her own crew, and brought back with the goods undamaged to Liverpool; notice of abandonment was given in the interval between intelligence of the capture and of the rescue; but after the rescue, in fact, there was no intention to violate the blockade:—It was held, that the voyage as insured was not illegal, but that the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state of facts at the time, when the offer to abandon was made. (3)

A vessel chartered to Oporto, St. Ubes, and Gottenburgh, being taken at Oporto by the enemy, was liberated on payment by the master of a sum of money, and on condition of his bringing home in her to England, English prisoners, to be exchanged for an equal number of French: upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers: upon her arrival at Portsmouth, the captain refused to deliver her, unless on repayment of the ransom, which the owner refused:—It was held, that the owner being entitled to retake his ship, which was safe at Portsmouth, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss, nor could he recover, as for an average loss, the sum which had been paid by the master for the

(1) *M' Iver v. Henderson*, 4 M. & S. 576., vide etiam *Cologan v. London Assurance Comp.* 5 M. & S. 447.

(2) And *quære*, Whether, in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss? *Bainbridge v. Neilson*, 10 East, 329. 1 Camp. 237.

The like point was ruled on a freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent. *Ibid.*

But at any rate, if the underwriters accept the offer of abandonment made upon such temporary total loss, both parties are bound by it. *Ibid.*

(3) *Naylor v. Taylor*, 9 B. & C. 718. 4 M. & R. 526., vide etiam *Brotherston v. Barber*, 5 M. & S. 418.

ship's ransom, that being an illegal payment, which the plaintiff was not bound to repay to the master. (1)

ABANDONMENT.

If a ship be insured for part of her value, and be captured, and the insured demand as for a total loss, which the underwriters are willing to pay on having an assignment of one-fourth part of the ship from the owner by way of abandonment; but the insured refuse this assignment, because the one-fourth of the ship is of greater value than the sum insured, and instead of abandoning, repurchase the ship from the enemy; he will not be entitled to recover, as for a total loss, not having abandoned; nor can he recover the sum paid for the repurchase of the ship, because that is an illegal contract, being, not only a trading with an enemy, but also a ransom, within the meaning of the Ransom Act. (2)

WHERE THERE HAS BEEN NO ABANDONMENT, THE INSURED HAVING RANSOMED.

If the thing insured be recovered before any loss be paid, the insured is entitled to claim as for a total or a partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim. (3) There is no vested right to a total loss, till the insured, having a right to abandon, elects to do so; for he is only entitled to an indemnity for his loss as it stands at the time of the action brought, or offer to abandon. (4)

If the thing insured be recovered before the loss is paid, the loss will be total or partial, according to the event.

Where a ship insured had been captured, and brought into a neutral port, and sold by the captors, and the captain bought her for the benefit of the owners:—It was held, that they were only entitled to recover on a policy the sum paid by the captain, and what may be expended on her outfit, and could not recover for a total loss. (5) But Lord Kenyon admitted, that where the ship had been captured and was carried into port, in the enemy's possession, the insured might at that period have abandoned; but that not having abandoned until after the ship was recovered, he could only then go for a partial loss.

A foreigner, insuring in this country his ship or goods on a voyage, is not obliged to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act; and where goods had been consigned by such foreigner, on his own account and risk, to British merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance upon the goods on his account, debiting him with the premiums, and the goods were afterwards abandoned in consequence of such embargo:—It was held, that, as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names; but that they might have insured their separate interests by a policy made on their own account. (6)

Foreigner insuring in this country, not obliged to abandon upon an embargo laid on the property in the ports of his own country.

Shipwreck is generally a total loss. What may be saved of the ship or goods is so uncertain, and depends so much on accident, that the law cannot distinguish this from the absolute destruction of the whole. The wreck of the ship may remain, and may be saved, but the ship is lost. A thing is

SHIPWRECK.

(1) *Parsons v. Scott*, 2 Taunt. 363.

(2) *Havlock v. Rookwood*, 8 T. R. 268.

(3) *Goss v. Withers*, 2 Burr. 683. *Pringle v. Hartley*, 3 Atk. 195.

(4) *Hamilton v. Mendez*, 2 Burr. 1198. 1 W. Black. 276.

(5) *M^r Masters v. Shoolbred*, 1 Esp. N.P.C. 237.

(6) *Conway v. Gray*, 10 East, 536., et vide *Conway v. Forbes*, *ibid.* 589. et *Munry v. Shedden*, *ibid.* 540.

ABANDONMENT.

said to be destroyed when it is so broken, disjointed, or otherwise injured, that it no longer exists in its general nature and essence. So, the goods may remain; but if no ship can be procured in a reasonable time to carry them to their place of destination, the voyage is lost, and the adventure frustrated.

Where abandonment must be made, before underwriters can be called upon for a total loss.

A vessel was driven into a port where there was no dock to receive her: it appeared, that she had suffered so much by sea perils, that, upon examination and survey, it was judged expedient to break her up, and to sell her for old timber: — It was held, in an action on the policy, that the assured was bound to abandon her, before he could call upon the underwriters for a total loss, the ship not being a wreck, but, however maimed and damaged, existing in *specie* as a ship. (1)

Where vessel sold for salvage under the decree of the admiralty court.

A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port. The ship having been sold under the decree of the admiralty court to pay the salvage, and it not appearing, that the assured had taken any means to prevent such sale: — It was held, that they had no right to abandon, and that there was no more than a partial loss. (2)

POLICY ON GOODS.

A loss of voyage for the season by perils of the seas, is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, &c. where the cargo is in safety, and not of such a perishable nature, as to make the loss of voyage, a loss of the commodity, although the ship be rendered incapable of proceeding in the voyage. (3)

Where the cargo is in safety, and not of a perishable nature.

Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured: — It was decided, that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment. (4)

In *Anderson v. Wallis* (5), which was an action on a policy of assurance on goods (copper and iron) at and from London to Quebec, warranted free of particular average, and the ship, owing to sea damage in the course of her voyage, was obliged to run into port and undergo repair, and some part of the goods were damaged; and the repairs detained her so long, as to prevent her reaching Quebec that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage: — It was held, that this was not a total loss of the goods, and that the assured could not abandon.

Cargo of wines impregnated with salt water.

But, where a ship was wrecked on the 21st of December, and three-fourths of her cargo, consisting of wines, were either lost or impregnated with salt water; and the assured gave notice of abandonment as for a total loss on the 23d (being the day on which they heard of the loss), and before the remains of the cargo were brought on shore: — It was held, that it amounted to such a loss as warranted the notice of abandonment. (6)

(1) *Bell v. Nixon*, Holt's N. P. C. 423.

(2) *Thornely v. Hobson*, 2 B. & A. 513.

(3) *Hunt v. Royal Exchange Assurance Comp.* 5 M. & S. 47.

(4) *Thompson v. Royal Exchange Assurance Comp.* 16 East, 214. 1 M. & S. 30.

(5) 2 M. & S. 240. 3 Camp. 440.

(6) *Hudson v. Harrison*, 6 Moore, 288. 3 B. & B. 97., *post*, 2177.

To entitle the insured to abandon, there must have been at some period of the voyage insured, or during the continuance of the risk, a total loss; and no partial loss, however great, occasioned by the perils of the sea, can be treated as a total loss.

The mere stranding of a ship is not *per se* such a total loss as to entitle the assured immediately to abandon. If by some fortunate accident, by the exertions of the crew, or by any borrowed assistance the ship be got off, and rendered capable of continuing her voyage, it is not a total loss, and the insurers are only liable for the expenses occasioned by the stranding. It is only, where the stranding is followed by shipwreck, or in any other way the ship is rendered incapable of prosecuting her voyage, that the insured is entitled to abandon.

Where a ship performed her voyage, but was so damaged as not to be worth repairing, yet, as the damage was only estimated at 48 *per cent.*, this was holden to be, not a total loss, and that the insured could not abandon. (1)

Where a ship, insured for six months, receives an injury within the time, and the captain, being unable to get her repaired, sells her after the time, this is only a partial loss. (2)

If by any accident or misfortune the ship be prevented from proceeding on her voyage, and the voyage be thereby lost; this is a total loss, not only of the ship and freight, but also of the cargo, if no other ship can be procured to carry it to its port of destination. (3)

Where a neutral ship, bound from America to Havre, was detained and brought into a British port; and, pending proceedings in the admiralty, the king declared Havre in a state of blockade; by which the further prosecution of the voyage was prohibited—this, was held to be a total loss of the voyage, and that the neutral assured could abandon. (4)

An insurance was effected, on a slave ship and cargo “at and from Liverpool to the coast of Africa, &c., and from thence to the West Indies and America.” Immediately on her arrival on the coast the crew met, and, whilst the master was ashore, took possession of her, and set sail for an enemy’s port; but the boatswain, to whom the management of the ship was confided, steered for Barbadoes, where the ringleaders were seized and some of them executed. Part of the stores and outward cargo had been embezzled by the crew, and the remainder was sold by the government agent at Barbadoes for the benefit of all concerned:—It was held, that, under these circumstances of utter dilapidation, and loss of the voyage, the assured were entitled to abandon, and recover as for a total loss. (5)

The plaintiff, having shipped goods on an adventure to St. Petersburg, on board a vessel chartered for the purpose, made an insurance on ship and goods in the common printed form in blank; and by a written memorandum in the policy “the underwriters agreed to pay a total loss in case the ship Ann should not be allowed by the Russian government to discharge her cargo at St. Petersburg, on which voyage the vessel had then sailed, chartered by the plaintiff:”—It was held, that the insured were entitled to

ABANDONMENT.

STRANDING.

No partial loss can be treated as a total loss.

Mere stranding will not justify an immediate abandonment.

When damage estimated at 48 *per cent.*

VOYAGE LOST.

(1) *Cazalet v. St. Barbe*, 1 T. R. 187.

(2) *Furneaux v. Bradley*, Park on Insurance, 257., vide etiam *Pole v. Fitzgerald* (in error), Willes, 641.

(3) *Manning v. Newnham*, cit. Marshall on Insurance, 595.

(4) *Barker v. Blakes*, 9 East, 283., vide etiam *Mullett v. Shedden*, 13 ibid. 304.

(5) *Brown v. Smith*, 1 Dow, 349.

ABANDONMENT. recover upon this policy, on an allegation, that the vessel, on her arrival at St. Petersburg, was not allowed by the Russian government to discharge her cargo, but was obliged to return back with it, by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premiums of insurance. &c. (1)

The voyage must be lost, from perils, expressly within the policy.

But though the voyage be lost, yet, if this have not been occasioned by the happening of any of the perils insured against, it will not be a loss within the policy: thus, if in a case of insurance upon goods consigned to a particular port, and on the arrival of the ship, it be found to be in the hands of an enemy, that circumstance will not warrant an abandonment by the assured. (2)

If a cargo of a perishable nature be insured from A. to B., with the usual memorandum, and in the course of the voyage information be received by the master that the port of B. is shut against the ships of his nation, in consequence of which, the commander of the convoy orders the ship to proceed to another port, and the cargo be there sold by orders of the vice-admiralty court for a very small sum of money, the assured cannot abandon as for a total loss. It seems, that if the voyage be lost in consequence of the port of destination being shut against the ship insured, the assured cannot declare upon this, as a loss within the policy. (3)

Cargo reduced in value to less than the freight, will be a total loss.

If a cargo be damaged in the course of the voyage, and it appear, that what has been saved is less in value, than the amount of the freight, this is clearly a total loss. (4)

FREIGHT.

Abandonment is not necessary upon a loss in an insurance on freight. (5)

In an action against an underwriter on a policy of assurance on freight, where the vessel, whilst taking in cargo at the Cape of Good Hope for her voyage from thence to the port of London, was forced, through stress of weather, from her moorings, driven on shore, and sunk on the sands; and her cargo being taken out, she was found to be so much damaged and shattered, that it was deemed advisable to sell her, and she was accordingly sold by public auction as a mere wreck; but, being subsequently repaired by the purchaser, she had made two or three voyages to this country:—It was held, that an abandonment of the freight was unnecessary. (6)

There need be no abandonment of freight where the goods specifically exist, although the ship be incapable of prosecuting the voyage. (7)

II. Time within which the Insured may abandon.

TIME WITHIN WHICH THE INSURED MAY ABANDON.

The insured must not, by treating the accident for a time as a partial loss, take the chance of making the best of it for himself, and when he finds that it will not answer, attempt, by abandoning, to turn it into a total loss. (8)

In *Mitchell v. Edie* (9) Mr. Justice Ashhurst said, in a case respecting

(1) *Fuller v. Glover*, 12 East, 124.
(2) *Lubbock v. Rowcroft*, 5 Esp. N. P. C. 50.

(3) *Hadkinson v. Robinson*, 3 B. & P. 388.

(4) *Goss v. Withers*, 2 Burr. 683., *anté*, 2169. *Boyfield v. Brown*, Str. 1067.

(5) *Mount v. Harrison*, 4 Bing. 388. 1 M. & P. 14.

(6) *Ibid.*

(7) *Idle v. Royal Exchange Assurance Comp.* 3 Moore, 115. *Green v. Ibid.* Marshall on Insurance, 590. 599. 6 Taunt. 68. overruling *Parneter v. Todhunter*, 1 Camp. 541. Park on Insurance, 281.

(8) *Post*, 2176.

(9) 1 T. R. 613.

the time at which an abandonment should be made, "I think that the assured are bound to decide, and signify their election to the underwriters, whether they will abandon or not the first opportunity; and for this reason, that though the person who takes upon him to act on the occasion for the benefit of all concerned, is not the agent of the assured, yet, if upon receiving notice of the loss, they do not elect to abandon to the underwriters, then they adopt the acts of such person, and make him their agent. This is something like the notice which is necessary to be given to the drawer of a bill of exchange in case of non payment, which, if the holder omit to do, he is considered as giving credit to the acceptor, and therefore the loss, if any, must fall on him." Mr. Justice Buller said, "A contrary decision would be productive of infinite uncertainty; for it would leave open a very vague question, namely, what time the assured should be allowed to abandon. If it can extend to three years, there is no reason why it should not to a much longer period." (1)

Where the captain of a vessel, which had been damaged by stormy weather, arrived in London on the 25th April, where his owners resided, and the latter received the ship's papers on the 3d May following, and the broker who effected the policy gave verbal notice of abandonment to the underwriters on the 5th: — It was held, that such notice was given in due time. (2)

The insured is entitled to a reasonable time for examining into the state of a damaged cargo before he makes his election on the question of abandonment. A ship bound from Liverpool to Calais put back to Liverpool on the 20th of December, when the cargo, consisting of sugar, was immediately re-landed and surveyed; the owners in London received a letter from their agents at Liverpool, dated 29th December, stating, that part of the cargo was much damaged, but that it was still in contemplation to send on the remainder; and on 7th January, another letter, stating that, on further examination, the whole cargo was found to be damaged: — It was decided, that the owners, on the receipt of the latter letter, were still in time to abandon. (3)

The assured of goods having received intelligence on the 8th of January, 1811, that the ship's papers were taken away on the 7th of December preceding by the Swedish government, within whose port she was, did not give notice of abandonment to the defendant underwriter till the 17th of January; but though such notice was too late, supposing an abandonment to be necessary, yet, as the goods were finally seized and unladen by orders of that government on the 30th of April following, it was held, that the ineffectual notice of abandonment before given, did not preclude the assured from recovering as for a total loss without any abandonment. (4)

In *Hunt v. Royal Exchange Assurance Comp.* (5) it was held, that the assured were bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence of the loss was held too late.

When an insured vessel arrived at the port of Kinsale on the 24th of

ABANDONMENT.

Judgments of
Mr. Justice
Ashurst and
Mr. Justice
Buller in
Mitchell v.
Eddie.

Where broker
received the
ship's papers
on May. 3. and
gave notice on
May 5.

Insured en-
titled to rea-
sonable time
for examining
into the state
of the cargo.

INSUFFICIENT
TIME.

(1) Vide etiam *Abel v. Potts*, 3 Esp. N. P. C. 242. *Allwood v. Henckell*, Park on Insurance, 280.

(2) *Read v. Bonham*, 6 Moore, 397. 3 B. & B. 147.

(3) *Gernon v. Royal Exchange Assurance Comp.* Marshall on Insurance, 606. 6 Taunt. 383. Holt's N. P. C. 49.

(4) *Mellish v. Andrews*, 15 East, 13.

(5) 5 M. & S. 47

ABANDONMENT. November; on the 14th of December a second survey was had, when it was found, that the expenses of the repairs would exceed the value of the ship; notice of abandonment to the insurers in London on the 6th of January, was held to be too late. (1)

Assured cannot take the chance of endeavouring to save on their own account, and afterwards abandoning when disadvantageous.

A vessel sailing with corn, insured from Waterford to Liverpool, by a policy with a memorandum to be free from all but general average, was stranded near Waterford on the 28th of January, and the vessel continued at high tide under water for near a month, during which time, from the 31st, the assured, at low water, were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried; but no notice of abandonment was given to the underwriters in London till the 18th of February, though there was a constant regular intercourse between Waterford and Liverpool, where some of the assured lived:—this was holden to be an invalid notice to fix the underwriters—because, whether or not, there was an opportunity of sending on the corn which was saved to the place of its destination within two months after the accident in another vessel—the assured might have abandoned on the 28th of January, as in case of a total loss, and ought then to have made their election to abandon within a reasonable time (on which it seems, that the judge ought to instruct the jury, under the circumstances of the case); and that they could not take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon, when they could not turn it to their advantage. (2)

Detention from embargo.

The owner of a cargo of flax seed, insured “at and from America to Limerick,” himself residing at that place, on the 11th of February, 1808, received information that the ship, with the flax seed on board, had been detained at Philadelphia by the American embargo; but did not give notice of abandonment till the 11th of June following. The flax seed was intended for sowing, and might have been employed for that purpose, had it arrived before the 10th of May, but afterwards would have been scarcely of any value:—It was held, that however the plaintiff might have waited till the 10th of May before abandoning; the abandonment on the 11th of June was out of time. (3)

The blockade of Havre having been publicly notified on the 6th of September, and no notice of abandonment given till the 14th of October, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any new authority shewn for giving it then:—It was held, that the notice was out of time; and this, though the plaintiff's agents in this country had no notice till the 17th of October of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of October. (4)

INSURERS INTENDING TO RESIST AN ABANDONMENT, ARE BOUND TO DO SO WITHIN A REASONABLE TIME.

Underwriters intending to resist an abandonment are bound to do so within a reasonable time: where therefore the assured, four days after a notice of abandonment had been given, called a meeting of the underwriters at Lloyd's, three of whom attended, and authorised the assured to act as if no insurance had been effected (the ship having been wrecked, and three-fourths of her cargo, consisting of wines, either lost or impregnated with

(1) *Aldridge v. Bell*, 1 Stark. 498.

(2) *Anderson v. Royal Exchange Assurance Comp.* 7 East, 38. 3 Smith, 48.

(3) *Kelly v. Walton*, 2 Camp. 155.

(4) *Barber v. Blakes*, 9 East, 283., vide *etiam* 2 Phillips on Insurance, 382—394.

salt water), and the damaged wines were accordingly advertised for sale; **ABANDONMENT.** but previous to its taking place, some of the underwriters forbade it, and rejected the notice of abandonment after more than two months had elapsed, during which time they had not interposed:—It was held, that their silence for so long a time was such an acquiescence by them, as to amount to an acceptance of the abandonment; and that they could not afterwards prevent the sale. (1)

III. *Where Insurers prevent the Assured from abandoning.*

If by any interference of the underwriters, the insured be actually prevented from abandoning, the underwriters are liable for the loss sustained by the insured to the extent of the sum insured. (2)

If a ship be not heard of within a reasonable time after her departure, the insurers cannot prevent the insured from abandoning. (3)

WHERE INSURERS PREVENT THE INSURED FROM ABANDONING.
Missing ship.

IV. *Form of Abandonment.*

There is no particular form of abandonment; nor is it essentially requisite, that it should be by deed.

The abandonment must be positive and unconditional, because, it is essential, in order to constitute an abandonment, that the entire property of the insurers should be transferred.

Where a ship sustains a partial loss, the insured cannot abandon, nor would an answer from the underwriters, desiring them "to do the best they can with the damaged property," be evidence of their assent, so as to make it a total loss (4); because, it is the interest of the underwriters to make a partial loss as light as possible; and it is the duty of the assured to do so, which would be the meaning and import of such an answer.

In general, the abandonment ought to be made for the whole of the effects insured, and not for a particular part, as, if part be rotten, the insured cannot abandon that part only and retain the rest, but must abandon the whole or nothing; for the contract being entire cannot be severed.

But if the articles be insured by different policies, or if in the same policy they be separately valued, the assured can abandon any one article and retain the rest, because they are in effect distinct insurances though in the same policy.

FORM OF ABANDONMENT.

When abandonment cannot be made of a part.

V. *By whom and to whom Notice must be given.*

The party directly interested should give notice of the abandonment; but if one of several, jointly interested in a cargo, effect an insurance for the benefit of all, he may give notice of abandonment for all. (5)

BY WHOM AND TO WHOM NOTICE MUST BE GIVEN.

(1) *Hudson v. Harrison*, 6 Moore, 288. 3 B. & B. 97., *antè*, 2172. An insured who abandons, can only recover for the actual loss at the time of his abandonment. *Hamilton v. Mendez*, 1 W. Black. 276. 2 Burr. 1198.
(2) *Da Costa v. Newnham*, 2 T. R. 407.
(3) *Vide antè*, 2151. tit. MISSING SHIP.
(4) *Thelluson v. Fletcher*, 1 Esp. N. P. C. 73. Doug. 315.
(5) *Hunt v. Royal Exchange Assurance Comp.* 5 M. & S. 47.

ABANDONMENT.

The notice of abandonment may be given, either to the underwriter himself, or to the agent who has subscribed for him. And this is requisite, though the ship and cargo may have been sold and converted into money when the notice of the loss was received. (1)

EFFECT OF AN ABANDONMENT.

By abandonment the insurer becomes the legal assignee, and his rights have a retrospective relation in reference to the insurers.

VI. Effect of an Abandonment.

By the abandonment of a ship, the insurer becomes the legal assignee and owner, and from that time, he is liable for all her future outgoings, and consequently entitled to all her future earnings.

While any profit can be derived to the insured, from the future use of the ship, it cannot be deemed a total loss; and he can only exercise the right of abandoning, upon the presumption in law, that the existing circumstances are equivalent to a total loss. Under such circumstances, the owner compels the insurer to purchase the hope of salvage for the full value insured, and thereby puts him into his place for all chances favourable or otherwise.

An abandonment of the ship to the underwriters, transfers freight earned subsequently to such abandonment, as incident to the ship: therefore, where there had been two separate insurances on a general seeking ship, the one on ship, the other on freight; and the ship and freight were abandoned to the respective underwriters, who each paid a total loss; and the vessel was captured and recaptured, and ultimately performed her voyage and earned freight:—It was held, that the underwriters on the ship, under the abandonment of the ship to them, were entitled to such freight. (2)

This transfer has a sort of retrospective relation in reference to the insurers, who, to the extent of the sum insured, are presumed to have been, from the beginning, owners of the things insured, according to the rule of the Roman law, "*quod repudiatur, retro nostrum non fuisse palam est*." (3)

The underwriters are not bound by the contracts of the assured respecting freight, or the insurance of it.

Upon a hostile embargo in a foreign port, the owner, who had separately insured ship and freight, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight:—It was held, that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such abandonment. (4)

A policy on freight, at and from the ship's port of loading at Jamaica to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of the goods loaded at

Underwriters not bound by the contracts of the assured respecting freight.

Where the assured cannot recover as for a total loss of freight.

(1) *Hodgson v. Blackiston*, Park on Insurance, 281. M. & S. 79., vide 2 Phillips on Insurance, 417—464.

(2) *Davidson v. Case* (in error), 5 Moore, 116. 8 Price, 542. 2 B. & B. 379. 5

(3) ff. lib. xxxviii. tit. 5.

(4) *McCarthy v. Abel*, 5 East, 388. 1 Sm. 524.

an intermediate port; and therefore, where a ship, having sailed with a cargo loaded at Jamaica, was during the voyage cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight:—It was held, that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo landed at the intermediate port, after deducting the expenses attendant upon procuring the said freight. (1)

A shipowner having first insured his ship with A., &c. and his freight with B., &c. for a certain voyage, and having notice of an embargo laid on the ship in a foreign port abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the freight policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured:—It was held, that however the question of priority as to the title to the freight might have been, as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship; yet, that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight; and that, without deducting the expenses of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on ship afterwards. (2)

Where vessel abandoned to the underwriters, and subsequently earning freight.

While a ship was forcibly detained in a foreign port, the owner abandoned first the ship, and then the freight, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo which had been taken out, and returned home earning freight, which was received by the assured. Upon such facts it is doubtful, whether the assured, after an abandonment of the ship (which was a seeking and not a chartered ship, on which a distinction may arise), could abandon the freight to another set of underwriters? but assuming that he might, the ship and freight are salvage to the different underwriters after deducting the following expenses, which must be apportioned between them according to their several interests:—1. The expenses of the ship and crew in the foreign port including port-charges, besides the expense of shipping the cargo, which exclusively belongs to the underwriters on freight. 2. Insurance thereon. 3. Wages and provisions of crew, from their liberation in the foreign port till their discharge here. 4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But the assured cannot deduct out of the freight received, payable to the underwriter on freight:—charges paid at the port of discharge on ship and cargo—

Apportionment of expenses of a vessel abandoned, and subsequently earning freight.

(1) *Barclay v. Stirling*, 5 M. & S. 6.

(2) *Thompson v. Rowcroft*, 4 East, 34.
Leatham v. Terry, 3 B. & P. 479.

ABANDONMENT. insurance on ship — or the diminution in value of the ship and tackle by wear and tear on the voyage home. (1)

Where the insurance is for less than the value.

Where the interest of the assured is not entirely covered by the insurance, he may abandon to the extent of the sum insured, for he is his own insurer for the residue. Thus, if goods to the value of 5000*l.* be insured only to the amount of 4000*l.* and a total loss happen, the insured can only abandon four-fifths of what is saved, the remaining fifth will belong to himself, and he will be tenant in common for that fifth with the insurers. The same rule holds, where the cargo, by a new purchase during the voyage, is augmented in quantity. (2)

When goods partly insured, and money borrowed on *respondentia* for the remainder.

Where goods are only partly insured, and the owner has borrowed money on *respondentia*, to the value of the residue; if he abandon, the insurer and the lender have a joint claim to what is saved, in proportion to their respective interests. But, by the abandonment, the insurer is put in the place of the insured, and has the legal title to the effects saved, and the lender only an equitable claim to his proportion. (3)

Underwriters entitled to a share of reprisals.

Judgment of Lord Hardwicke in *Randal v. Cockran*.

Reprisals being made on the Spaniards to indemnify the sufferers by unjust captures, the insurers who have paid the owners the losses sustained by those captures, have a right to stand in their places and receive their proportions. Thus, in *Randal v. Cockran* (4) Lord Hardwicke said, "The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid, although the commissioners did right in avoiding being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they see who was owner; nor was it material to them, to whom he assigned his interest, as it was in effect, after satisfaction made."

Same principles apply to partial or total loss given on a valued or open policy.

AN ABANDONMENT LEGALLY MADE AND ACCEPTED IS ABSOLUTE.

The question, whether the loss be partial or total, is precisely the same whether the policy be valued or open. (5)

An abandonment legally made and accepted is absolute, and cannot be rescinded except by mutual consent: thus, if upon a total loss happening, the ship be abandoned, but she afterwards arrive safe, this will not avoid the abandonment. (6)

Where there was a loss by capture, intelligence of which was received, and an abandonment made, and a recapture took place before the notice of abandonment was given, but there was no intelligence received of such recapture, until after some steps had been taken by the underwriters:—It was held to amount to an acceptance of the abandonment by them. (7)

An abandonment offered to be made by the assured to the underwriters, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, was held not to entitle the assured to recover as for a total loss, where, before action brought, the goods were recaptured,

(1) *Sharp v. Gladstone*, 7 East, 24. 3 Smith, 39.

(2) *Marshall on Insurance*, 621.

(3) *Ibid.*

(4) 1 Ves. sen. 98.

(5) *Allen v. Sugrue*, 8 B. & C. 561.

(6) *Da Costa v. Firth*, 4 Burr. 1966.

(7) But *quære*, Whether they would not

have been bound, on the principle, that the moment an abandonment is made, on intelligence of a total loss having actually happened, without any contrary intelligence, the transaction is closed, and not to be affected by subsequent events or intelligence? *Smith v. Robertson*, 2 Dow, 474.

and arrived at the place of destination, by which a partial loss only was sustained; for the assured can only recover an indemnity for such loss as he has sustained, at the time of action brought. (1)

If however the abandonment be made upon illegal grounds, as upon willfully false information, it will be void *ipso jure*—" *Nam recte revocari, rescindi, et retrahi dicitur, quod ipso jure nullum est.*"

ABANDONMENT.

Abandonment made on illegal grounds.

VII. Ordering and Disposal of the Effects abandoned.

In case of loss, the insured is bound to use his utmost endeavours to make the most of what may be rescued from destruction. To enable him to do this, without prejudice to his right of abandonment, our policies provide, that, "in case of any loss or misfortune, the insured, their factors, servants, and assigns, shall be at liberty to sue, and labour about the defence, safeguard, and recovery of the goods and merchandises, and ship, &c. without prejudice to the insurance; to the charges whereof, the insurers agree to contribute, each according to the rate and quantity of his subscription." "The meaning of that clause is, that, till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment." (2)

ORDERING AND DISPOSAL OF THE EFFECTS ABANDONED.

From the nature of his situation the captain has an implied authority, not only from the assured, but also from the insurers and all others interested in the ship or cargo, in case of misfortune, to do whatever he thinks most conducive to the general interests of all concerned; and they are all bound by his acts. (3)

If a ship be obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea peril, and if the owner do not abandon, but merely apply to the underwriters for directions how to proceed upon an estimate of the expenses of repair, who decline interfering, he cannot afterwards convert it into a total loss, on account of the expenses of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place, into which she had been driven by distress, though the sale was directed by the assured to be made on account of all concerned. (4)

Where goods are shipped under a bill of lading in a general ship, which is prevented from completing the voyage in consequence of damage occasioned by tempest, it is doubtful, whether the master is bound, if he have an opportunity to forward the goods by some other conveyance to the place of destination?

At any rate he is at liberty to do so, by a conveyance equally cheap, if he think fit; and, if the goods arrive at the place of destination by such other conveyance, he is entitled, on the freighter obtaining the goods, to the whole freight originally contracted for; though the freighter was named as consignee in the original bill of lading, and the bill of lading under which the goods are shipped by the second conveyance makes another.

(1) *Patterson v. Ritchie*, 4 M. & S. 393.

(3) *Miles v. Fletcher*, Doug. 234.

(2) *Per Ashhurst J. in Mitchell v. Edie*, 1 T. R. 613.

(4) *Martin v. Crokatt*, 14 East, 465.

ABANDONMENT. party consignee; and though, by the second conveyance, the goods are carried for less, than the freight originally contracted for. (1)

**RETURN OF
PREMIUM.**
Generally.

11. RETURN OF PREMIUM.

The premium paid by the insured, and the risk which the insurer takes upon himself, are considerations, each for the other: they are co-relatives, whose mutual operation constitutes the essence of the contract of insurance.

In *Stevenson v. Snow* (2) Lord Mansfield said, "If the risk is not run, though it is by the neglect or even the fault of the party insuring, yet the insurer shall not retain the premium;" and Mr. Justice Wilmot observed (3), "If the risk was once begun, the insured shall not deviate or return back, and then say, 'I will go no farther under this contract, but will have my premium returned.'"

Judgment of
Lord Mans-
field in *Tyrie*
v. Fletcher.

In *Tyrie v. Fletcher* (4) Lord Mansfield said, "I take it, there are two general rules established applicable to this question: the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured; and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. 2. Another rule is, that if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned; and yet, it is as easy to apportion for the length of the voyage, as it is for the time."

A want of interest may be either total or partial.

Insurance
made without
interest, or for
more than the
real interest.

If through mistake, misinformation, or any other innocent cause, an insurance in a single policy be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value; in the one case, the insurer shall return the whole premium, in the other, he shall return in the proportion, which the true value bears to the sum insured. (5)

Where there is an insurance on ship and freight, and the ship has arrived in safety and earned freight, the assured cannot afterwards claim a return of premium on the ground, that he had no insurable interest, on account of a defect in his title to the ship. (6)

An over-assur-
ance by several
policies.

If by several policies, made without fraud, the sum insured exceed the value of the effects, these several policies will, in effect, make but one insurance, and will be good, to the extent of the true interest of the insured; and, in case of loss, all the underwriters, on the several policies, shall pay

(1) *Shipton v. Thornton*, 9 A. & E. 514.

(2) 3 Burr. 1240.

(3) *Ibid.* 1241.

(4) Cowp. 668. 2 Phillips on Insurance, 526. 537.

(5) Marshall on Insurance, 649.

(6) *Mc Culloch v. Royal Exchange Assur-
ance Comp.* 3 Camp. 406.

RETURN OF
PREMIUM.

according to their respective subscriptions, without regard to the priority of their dates. And it follows from thence, that all the underwriters, on the several policies, would be equally bound to make a return of premium, for the sum insured above the value of the effects, in proportion to their respective subscriptions. (1)

An insurance on an East India ship and goods, valued at 26,000*l.*, being the amount of the captain's bond to the insured, is a wager and void; but the insured cannot, after the risk is run, have a return of premium; because *in pari delicto, melior est conditio possidentis*; and, after the risk is run, it is too late to attempt to rescind the contract. (2)

Wager policy.

If under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the premium is earned, and he cannot be obliged to return any part of it. Therefore, in the case of a valued policy, though the sum in the policy be twice the value of the effects insured, there shall be no return of premium. (3)

If the insurer be once liable, there can be no return.

If the insured have a contingent insurable interest in the thing insured at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured. (4) Thus, where the captors of a ship insure their interest therein, they are not entitled to a return of premium, though it be afterwards adjudged to be no prize, and restitution be awarded.

When captors insure before condemnation, they cannot have a return, on its being adjudged no prize.

An insurance having been made on goods at and from a port in Russia to London, by an agent residing here, for a Russian subject abroad, which insurance was in fact made, after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed and been seized and confiscated:—It was held, that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. (5)

Where a license was obtained, and insurance effected from Riga to Hull, on goods the produce of Russia on board a Swedish ship, but the ship sailed three days before the letter directing the license to be obtained reached the agent; the letter having been delayed by contrary winds beyond the usual time, and the license was obtained two days afterwards, and the insurance effected subsequently to that:—It was held, that though the voyage was in its inception illegal, being contrary to stat. 12 Car. 2. c. 18. s. 8., nevertheless the assured might recover back the premium. (6)

If an insurance be to protect an illegal trading, as a trading with the enemy (7), there can be no return of premium (8), because there is no distinguishing such a case in principle from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover the goods or the value of them. (9)

Where the insurance is upon an illegal trading.

WHERE THE CONTRACT IS VOID AB INITIO.

An assured, upon a policy effected in terms sufficiently large to compre-

(1) Marshall on Insurance, 648.

(2) *Lowry v. Bourdieu*, Doug. 468. *Andre v. Fletcher*, 3 T. R. 266.

(3) 2 Magens, 137.

(4) *Boehm v. Bell*, 8 T. R. 154.(5) *Oom v. Bruce*, 12 East, 225., vide etiam *Routh v. Thompson*, 11 East, 428.(6) *Hentig v. Staniforth*, 5 M. & S. 122.(7) *Morck v. Abel*, 3 B. & P. 35.(8) *Vandych v. Hewitt*, 1 East, 96.(9) *Ante*, 260—278. tit. ASSURANCE. *Biggs v. Lawrence*, 3 T. R. 455. *Clugas v. Penaluna*, 4 ibid. 466. *Waymell v. Reed*, 5 ibid. 599.

**ВЕРНУТІЕ
ПРЕМІИ.**

hend an illegal adventure, and who intends thereby to cover an illegal adventure, cannot recover back the premium without some formal renunciation of the contract, made known to the underwriter before the bringing of the action, although the adventure is never entered upon: therefore, on a policy on goods on board the Audaz, a Spanish ship, or any other ship or ships, at and from New Orleans and Pensacola to a port in the United Kingdom, Pensacola at the time of effecting the policy belonging to Spain and New Orleans to America, which latter country was at war with this country, but Spain was neutral; and the assured intending by policy to cover an importation of cotton wool from New Orleans to Liverpool:—It was held, that supposing this to be the case, in which the assured was at liberty to rescind the contract, yet, as he had not given any notice to the underwriter of his intention to do so, he could not maintain an action to recover back the premium, although no cargo was loaded on board the ship named, or any other ship covered by the policy. (1)

Insured un-
aware of the
illegality.

Misrepresent-
ation without
fraud.

The fact of the insured being unaware, that the voyage was illegal is unimportant; because *ignorantia legis non excusat*. (2)

In *Feise v. Parkinson* (3) Mr. Justice Gibbs said, "Where there is fraud, there is no return of premium; but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium."

If a policy from H. to V. contain a warranty, that a ship was "in port" on a previous day, it means, the port of H., and not any other port; and the policy will not attach, if she be not in the port of H.; but the insured will be entitled to a return of the premium. (4)

Where there is
fraud on the
one side or the
other.

If the policy be void in consequence of fraud committed by the insurer, there can be no doubt but that an action will lie to recover back the premium. (5)

If the language of the policy be large enough to comprise an illegal adventure, and the assured contemplated an illegal adventure, the underwriter is not entitled (6) to sue for the premium.

In all cases of actual fraud on the part of the insured, committed either by himself or his agent, the underwriter shall retain the premium. (7)

Where the risk
has not been
commenced.

It has been previously stated (8), that, where the risk has not been run, whether this be owing to the fault, pleasure, or will of the insured, or to any other cause except fraud, the premium shall be returned; because a policy of insurance is a contract of indemnity. (9)

(1) *Palyart v. Leckie*, 6 M. & S. 290.

(2) *Lubbock v. Potts*, 7 East, 449.

(3) 4 Taunt. 640.

(4) *Colby v. Hunter*, M. & M. 81. 3 C. & P. 7.

(5) *Carter v. Boehm*, 3 Burr. 1909.

(6) *Jenkins v. Power*, 6 M. & S. 232.

(7) *Tyler v. Horne*, Park on Insurance, 329. *Chapman v. Kennet*, *ibid.* S. C. nom. *Chapman v. Fraser*, Marshall on Insurance, 661. 2 Phillips on Insurance, 548.

(8) *Anté*, 2182.

(9) *Tyrie v. Fletcher*, Cowp. 668. It may be here observed, that frauds in contracts of insurances have not as yet had any punishment affixed to them by the laws of England. Park on Insurance, 330.

But by several of the foreign ordinances, the punishment of fraud, in matters of insurance, is exceedingly severe. By those of

Amsterdam it is declared, "that as contracts of insurance are contracts of good faith, wherein no fraud or deceit ought to take place, in case it be found, that the insured or insurers, captains, shippers, pilots, or others, used fraud, deceit, or craft, they shall not only forfeit by their deceit and craft, but shall also be liable to the loss and damage occasioned thereby, and be corporally punished for a terror and example to others, even with death, as pirates and manifest thieves, if it be found, that they have used notorious malversation or craft." The ordinances of Middleburg contain a provision exactly in the same words. At Stockholm also it has been declared, that such an offender, besides restitution to the party injured, shall, according to the circumstances of every particular affair, be punished in his estate, honour, and life.

If the contract be void, on account of a non compliance with any warranty, express or implied, as, if the ship do not sail on the day prescribed, or do not depart with convoy, or be not seaworthy, and there be no fraud imputable to the insured, he will be entitled to a return of premium, because the contract never attached, and the risk, therefore, never commenced. (1)

It may be here observed, that the plaintiff's counsel frequently abstains from any mention of the premium, where he means to claim a loss; because, by setting up a demand for the premium, he confesses a doubt, at least, of his being able to sustain his principal claim; and throwing out such a doubt, in a case already, perhaps, doubtful, may raise a prejudice, very injurious to his client's interest. And it may be said, moreover, in favour of this practice, that the defendant may come prepared to dispute the plaintiff's claim to a return of premium, and may prove fraud, which will not be inconsistent with any other defence he may have to make; whereas, it often happens, that the plaintiff's claim to a return of premium, rests on the very case made by the defendant. (2) But the court will not, on setting aside a verdict for a loss, substitute a verdict for the premium. (3)

The following cases will illustrate the position, that where the voyage and premium are divisible, and any part not begun, the premium for that part shall be returned (4), — *i. e.* if there be two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties, and only one of the two voyages be made, and the other not entered upon, nor the risk begun, a return of premium for such uncommenced voyage can be claimed. (5)

Upon a policy at and from London to Halifax, warranted to depart with convoy from Portsmouth, the contract and risk are divisible at Portsmouth, as two independent contracts and risks. (6)

But upon a policy "at and from such a port to any other port or place whatsoever for twelve months, at 9*l.* *per cent.*, warranted free from capture," the risk is entire; and therefore, if once begun, there shall be no return of premium. (7)

In an insurance on a ship at and from Hull to Bilboa, warranted to depart from England with convoy, the voyages from Hull to Portsmouth, where she meets the convoy, and from thence to Bilboa, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and return of premium may be demanded. (8)

In an insurance "at and from" the port of departure, the risk is entire, unless there be an usage to the contrary; therefore, where a ship was insured "at and from Jamaica to Liverpool," warranted to sail by the 1st of August, at 20 guineas *per cent.*, to return 8 if she sailed with convoy; and she did not sail until September:—It was held, that the insured was only entitled to a return of 8 guineas *per cent.* for convoy, and not to an apportionment of the rest of the premium. (9)

RETURN OF PREMIUM.

Policy void, but no fraud.

When the plaintiff is entitled to a return of premium, he may claim a verdict for it, even after the jury have delivered their verdict for the defendant on the principal question.

Substitution of verdict.

Where voyage and premium divisible.

Insurance "at and from" a place.

(1) Marshall on Insurance, 663.

(2) Ibid. *Penson v. Lee*, 2 B. & P. 330.

(3) *Neabitt v. Whitmore*, 1 East, 97. n.

(4) *Stevenson v. Snow*, 3 Burr. 1237.

(5) *Rothwell v. Cooke*, 1 B. & P. 172.

(6) *Tyrie v. Fletcher*, Cowp. 668.

(7) Ibid.

(8) *Rothwell v. Cooke*, 1 B. & P. 172.

(9) 3 Doug. 402. *Meyer v. Gregson*, Marshall on Insurance, 666.

RETURN OF PREMIUM.

An insurance on a ship and goods at and from A. to B., during her stay and trade there, at and from her port or ports of discharge in C., and at and from thence back to A., is an entire contract; and if the loss happen at any time after the commencement of the risk, there can be no return of premium. (1)

If a ship, seaworthy to lie in port, sails without being rendered seaworthy for the voyage, upon a policy "at and from" there can be no return of premium. (2)

Where the insurance is for a term.

It has been previously observed, that where there is a contingency in the voyage, the risk may be divided; but where the insurance is for a term, and the premium is entire, if the risk be begun, there can be no return. (3)

By a policy of insurance on a ship for a year, the underwriter stipulated to return a part of the premium if sold or laid up for every uncommenced month:—It was held, that the words, "laying up," meant a laying up for the season, without being employed for the current year; and therefore, that where a vessel insured for one year had been laid up for several months during the year, but was employed again within the year, that was not such laying up, as entitled the assured to a return of the premium. (4)

Where the premium is computed monthly.

Where a ship is insured for twelve months, at the rate of so much per month, though the risk cease at the end of two months, there shall be no apportionment nor return of premium. (5)

PERFORMANCE OF SOME STIPULATION.

It is frequently agreed between the parties that, upon the happening of a certain event, or the performance of some stipulation, the insured shall return a part of the premium, and clauses to this effect are then inserted in the policy.

If, in such cases, the event do happen, or the thing stipulated be performed, the insured will be entitled to the return of premium agreed upon. (6)

In time of war it is frequently stipulated, that a part of the premium shall be returned "if the ship sail with convoy and arrive."

Stipulation for a mere sailing with convoy, without specifying to any particular place.

If the stipulation be for a mere sailing with convoy, without specifying to any particular place, a sailing with convoy from one port to another in the same country, for the purpose of there joining convoy for the voyage, will be a sailing with convoy within the meaning of the stipulation. Thus, in *Audley v. Duff* (7), which was a policy on the *Ceres* "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy, particularly at Lisbon, at 12 guineas *per cent.*, to return 6*l.* if she sail with convoy from the coast of Portugal, and arrive;" the *Ceres* sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence she was to proceed with the Lisbon trade under a larger convoy for England; in the way from Oporto to Lisbon the fleet was dispersed by a storm, and the *Ceres*, judging for the best, ran for England and arrived:—It was held, that the assured, was entitled to a return of premium. (8)

"And arrives."

In *Simond v. Boydell* (9) Lord Mansfield said, "The words 'and arrives' do not mean that the ship shall arrive in the company of the

(1) *Bermon v. Woodbridge*, Doug. 781.

(2) *Annen v. Woodman*, 3 Taunt. 299.

(3) *Tyrie v. Fletcher*, Cowp. 666., *anté*, 2182.

(4) *Hunter v. Wright*, 10 B. & C. 714.

(5) *Loraine v. Thomlinson*, Doug. 585.

(6) *Marshall on Insurance*, 676.

(7) 2 B. & P. 111.

(8) *Et vide Everard v. Hollingsworth*, *ibid.* n.

(9) Doug. 268.

convoy, but only that she herself shall arrive. If she do, that shews, either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ship."

Therefore, where a ship sails with convoy and arrives, but the goods insured are afterwards lost, the insured is entitled to the stipulated return of premium, as well as to a total loss in respect of the goods. (1)

The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived:" — It was held, that the assured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured, and the assured had been obliged to pay for salvage. (2)

Under a policy of insurance on goods from London to any ports or places in the Baltic, backwards and forwards, &c. with leave to touch, stay, and trade at all places for all purposes, and to take in and discharge goods wheresoever the ship might touch at; and in case it should be found dangerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, &c. until he found a port which he could enter with safety; the insurance to continue until the ship and goods arrived at as above, upon the ship until moored at anchor twenty-four hours in safety, and upon the goods until the same should be there discharged and safely landed, at a premium of 14 guineas, to return 7l. *per cent.* for arrival, with warranty of the goods free from capture or seizure in the ship's port or ports of discharge: — It was held, that the assured were entitled to a return of 7l. *per cent.* premium "for arrival" under circumstances, which discharged the underwriters from any loss. (3)

If it be agreed to return different portions of the premium in case the ship sail with convoy for different portions of the voyage and arrive, this means an arrival at the ship's ultimate port of destination. (4)

As the insurer can never, by his own act, discharge himself from the contract, it seems but reasonable, that, where the insured thinks proper to put a stop to the adventure, and prevent the risk from ever commencing, he should make some compensation to the insurer, for his trouble and disappointment; it is therefore the general custom, in all the maritime countries of Europe, to allow him to retain one-half *per cent.* (5)

In *Long v. Allen* (6) goods were insured "at and from Jamaica to London, warranted to depart with convoy before the 1st of August," but the ship sailed before the day, but without the convoy. It appeared there was an usage, that in such cases the premium shall be returned deducting one-half *per cent.* for the risk at. Upon which Mr. Justice Buller said, "By usage, places come within the policy which are not within the words. Usage explains and even controls the policy. The usage here found by the jury is universal; and though, in some cases, one-half *per cent.* is a small premium for the risk at; yet the underwriters are aware, that it is so, and no inconvenience can result from it. In *Meyer v. Gregson* (7) no usage was found."

RETURN OF
PREMIUM.

DEDUCTION OF
ONE-HALF
PER CENT. UPON
A RETURN OF
PREMIUM.

Judgment of
Mr. Justice
Buller in *Long
v. Allen.*

(1) *Horncastle v. Haworth*, Marshall on Insurance, 681.

(2) *Aguilar v. Rodgers*, 7 T. R. 421.

(3) *Dalglish v. Brooke*, 15 East, 295.

(4) *Kelner v. Le Mesurier*, 4 East, 396.

(5) *Molloy*, b. ii. c. 7. s. 12.

(6) *Marshall on Insurance*, 668.

(7) *Ante*, 2185.

RETURN OF
PREMIUM.

But if the risk be entire, and be once commenced, there shall be no return (1), and the premium being entire is a proof, that the risk is entire.

Although in all European maritime countries, the insurer is allowed to retain one half *per cent.*, where the contract is void for some radical defect, provided this were unknown to him when he entered into the contract (2);—yet if he were informed of the fault, or must have known it, before he subscribed the policy, as, if he were to insure a ship or goods, when he knew of their safe arrival, or seamen's wages, or contraband goods, knowing them to be such, he has no claim to this allowance. (3)

Policy broker
is the agent of
the assured,
and under-
writer.

A policy broker is the agent of both the assured and underwriter, and is the trustee for the assured as long as the policy remains in his hands, to adjust and receive returns of premium for him, when the events have happened, on which they are to be made. Hence the broker, having notice that the events have happened, which entitled the assured to such returns, is authorised to deduct so much from the gross amount of the premiums, and to pay over the difference only to the underwriter. (4)

EFFECT OF RE-
TURN OF PRE-
MIUM.

Where the assured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure. (5)

Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price. (6)

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.
Defined.12. GENERAL AVERAGE — PARTIAL LOSS — PARTICULAR AVERAGE.

Average is a term used in commerce to signify a contribution made by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expense, sustained for the general safety of the ship and cargo; in order that the particular sufferer may not be a greater loser, than the other persons interested in the ship and goods on board.

The insurers are liable to pay the insured for all expenses arising from general average, in proportion to the sums they have underwritten. Roccus says (7), "*Jactu facto, ob maris tempestatem, pro sublevandâ navi, antenantur assecuratores ad solvendam æstimationem rerum jactarum domino ipsarum? Diceos non teneri, quia pro rebus jactis sit contributio, inter omnes merces habentes in illâ navi pro solvendo pretio domino ipsarum, et ideo si assecuratus recuperat pretium rerum jactarum, non potest agere contra assecuratores: tamen tenentur assecuratores ad reficiendam illam ratem et portionem, quam solvit assecuratus illam contributionem faciendo inter omnes, habentes merces in illâ navi, quæ portio, cum non recuperetur ab*

(1) *Bermon v. Woodbridge*, Doug. 781.

(2) Ord. of Antwerp, art. 14. 2 Magens, 27.

(3) Valin, 10. 16, 17. Pothier, 183. 2 Emerigon, 169.

(4) *Shee v. Clarkson*, 12 East, 507.

(5) *May v. Christie*, Holt's N. P. C. 67.

(6) *Langhorn v. Allnutt*, 4 Taunt. 511.

(7) Roccus, 62.

aliis, habetur pro deperditâ, et proinde ad illam portionem tenentur assecutores."

In *Birkley v. Presgrave* (1) Mr. Justice Lawrence said, "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested. Natural justice requires this."

In *Nesbitt v. Lushington* (2), where, after a seizure, the vessel stranded, and part of the cargo (consisting of corn) was taken by the mob at their own price:—It was held, that the loss could not be recovered as for a general average; but that for such part, as in consequence of the stranding was damaged and thrown overboard, the insured might recover on a count stating the loss to be by stranding, Lord Kenyon observing, "I think this loss falls within a capture by pirates; and if a particular average could have been recovered upon this policy, the plaintiffs might have recovered upon the count, stating the loss to have happened by piracy. But, this being a policy upon corn, the memorandum states, that the underwriter will not be liable for any average, unless general, or the ship be stranded. And I am of opinion that this is not a general average; because the whole adventure was never in jeopardy. There is no pretence to say, that the persons who took the corn intended any injury to the ship, or to any other part of the cargo but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion as upon a general average."

In *Brown v. Stapleton* (3) Chief Justice Best observed, "It is not every object of value, which has been held liable to a contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce; and the practice shews, that this has been the understanding of all times. Magens, Molloy, Beawes, Stevens, and other writers, all expound the word *merces* in this way; all in terms exclude provisions. They concur in saying, that things of light weight, but of considerable value, must contribute, if they belong to the cargo, but not if they belong to the passengers. Provisions are laid in for the passengers, and must be esteemed to belong to them. Further than this, the ship is always brought into average according to her reduced value at the end of the voyage, when the provisions have mostly been consumed. As to the argument, that the convicts must be esteemed the *merces* upon this voyage, and so the stores laid in for them be chargeable as parcel of the *merces*, it is clear that, whether cargo or not, they cannot be brought into contribution, because human life is not the subject of average. If, therefore, the convicts themselves cannot be brought into contribution, much less can the provisions, which are merely accidental to their passage."

Gold, silver, and jewels contribute to a general average (4), but the wages of sailors do not contribute to the general loss. (5)

In *Power v. Whitmore* (6) the wages and provisions of the crew, while the

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.

Judgment of
Lord Kenyon
in *Nesbitt v.*
Lushington.

Provisions held
an exception
from the gene-
ral rule re-
specting con-
tribution.

Judgment of
Chief Justice
Best in *Brown*
v. Stapleton.

Merces defined.

What is and is
not the subject
of average.

Gold, silver,
and jewels.

Wages and

(1) 1 East, 228.

(2) 4 T. R. 783.

(3) 4 Bing. 121., vide etiam *Power v. Whitmore*, 4 M. & S. 141.

(4) Park on Insurance, 211.

(5) Ibid. 209. 2 Phillips on Insurance,

(6) 4 M. & S. 141.

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.

provisions of
the crew.

Repairs of ves-
sel.

Liability of
underwriter
not restricted
to the single
amount of his
subscription.

Mode by which
a loss by gene-
ral average is
to be calcu-
lated.

PARTIAL LOSS
— PARTICULAR
AVERAGE.

Captain's duty
to arrange the
contribution.

When the
value in the
policy exceeds
the interest.

ship remained in port, whither she was compelled to go for the safety of ship and cargo in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during her detention in port to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose in order to avoid an impending peril of being driven on shore and stranded.

But where a ship in the course of her voyage was run foul of by another ship and damaged, and the captain was in consequence obliged to cut away part of the rigging, and to return to port to repair the damage and cutting away, without which, the ship could not have prosecuted her voyage, or safely kept the sea:—It was held, that the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no farther, and of unloading the goods for the purpose of making the repairs, were a general average. But it seems, allowance cannot be made for the master's expenses during the unloading, repairing, and re-loading, and crimpage to replace deserters during the repairs. (1)

The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended and labour bestowed about the defence, safeguard, and recovery of the ship to a much greater amount than the subscription, and it will be recoverable, as an average loss. (2)

A loss by general average is to be calculated according to the law of the port of discharge. Therefore, an action will not lie in this country to recover back money paid upon an average loss adjusted at St. Petersburg, according to the law of Russia (the consignor and consignee of the goods and the owner of the vessel being British subjects), although by the law of England an average loss would not be payable under the circumstances. (3)

A partial loss is any loss or damage not amounting to a total loss; and this is sometimes termed a particular average.

If the ship escape the dangers which made the sacrifice necessary, and arrive at her port of destination, the captain, regularly, should make his protests, and he, with some of the crew, must swear, that the goods were thrown overboard, money paid, or other loss sustained, for the safety of the ship and goods, and for the preservation of the lives of those on board, and for no other cause. (4)

The average, if not settled before, should then be adjusted, and should be paid before the cargo is landed, for the owners of the ship have a lien on the goods on board, not only for the freight, but also to answer all averages and contributions that may be due.

Where there is a partial loss upon a valued policy, but the value on the policy exceeds the interest of the insured, it is the constant usage to adjust a partial loss in the same manner, as if the policy were an open one, and the

(1) *Plummer v. Wildman*, 3 *ibid.* 482.

(2) *Le Cheminant v. Pearson*, and *Same v. Allnutt*, 4 Taunt. 367.

(3) *Simonds v. White*, 4 D. & R. 375. 2

B. & C. 805., et vide *Smith v. Macneil*, 2 Dow, 538.

(4) *Marshall on Insurance*, 550.

computation must therefore be by the real interest on board, and not by the value in the policy. (1)

The rule by which to calculate a partial loss on a policy on goods by reason of sea damage, is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds. (2)

To take the net proceeds to calculate by, there are several objections; one is, that by taking the net proceeds, as the basis of the calculation, instead of the gross proceeds, it will happen, where equal charges are to be paid on the sound and damaged commodity, that the underwriter will be affected by the fluctuation of the market, which he ought not to be. This is obvious from considering, that if you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between the remainders: *e. g.* suppose sound goods, including all charges, to sell for 600*l.*, damaged for 300*l.*; let the charges on each be 100*l.*; the difference after they are deducted will be 300*l.*, or three-fifths. But let the goods come to a fallen market with the same degree of deterioration, and let the sound sell for 300*l.* and the damaged for 150*l.*, and deduct from each the charges, the net proceeds of the sound will be 200*l.*, and of the damaged 50*l.*, and the difference will be three-fourths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market; which he will do, if the gross produce be taken *scil.* half the valued or invoice price. Another consequence of taking the net produce will be, that you will make the underwriter responsible for a loss not arising from the deterioration of the commodity by sea damage, but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity.

In *Levis v. Rucker* (3) it was decided, that the underwriter was not subjected to the fluctuation of the market, but that the loss for which the underwriter was responsible, was that, which arises from the deterioration of the commodity by sea damage; and that he was not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. (4)

In *Usher v. Noble* (5) Lord Ellenborough stated, "In the case of a valued policy, the valuation in the policy is the agreed standard; in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. The selling or market price at the port of delivery cannot be alone the standard, as that does not include premiums of insurance and commission, which must be brought into the account, in order to constitute an indemnity to an owner of goods, who has increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity, with the damaged part of the same commodity at the port of delivery. The difference be-

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.

Rule by which
to calculate a
partial loss.

600—100=500
300—100=200
Difference 300

300—100=200
150—100= 50
Difference 150

Underwriter
not subjected
to the fluctu-
ations of the
market.

Judgment of
Lord Ellen-
borough in
Usher v. Noble.

(1) Marshall on Insurance, 641.

(2) *Johnson v. Shaddon*, 2 East, 581.

(3) 2 Burr. 1170. recog. *ibid.* 582.

(4) Vide etiam *Hurry v. Royal Exchange Assurance Comp.* 3 B. & P. 308.

(5) 12 East, 646.

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.

Judgment of
Lord Abinger
in *Hills v. Lon-*
don Assurance
Comp.

"Free from
average under
3l. per cent."

That the as-
sured shall re-
cover no more
than an in-
demnity in
case of loss,
may be con-
trolled by mer-
cantile usage.
Policy on
freight.

tween these two subjects of comparison affords the proportion of loss in any given case, *i. e.* it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, *i. e.* to the invoice price, being itself calculated as before stated; and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money."

An insurance was effected on wheat shipped in bulk, and valued at 1600*l.*, warranted free from average except general, or the ship were stranded. On the voyage the ship met with tempestuous weather, and made considerable water; and in pumping it out, wheat to the value of about 75*l.* was pumped out with the water and lost:—It was held, that the plaintiffs could not recover as for a total loss of the part so lost, Lord Abinger observing (1), "We are clearly of opinion, that this is no more than an average loss, and therefore that the defendants are not liable to make it good. The case of *Davy v. Milford* (2) was cited for the plaintiffs, as an authority in point. But that was the case of a loss on a policy of insurance upon sugar, where each hogshead was separately valued and insured; and therefore a loss of one, was properly held to be a total loss upon that hogshead. But, on the other hand, in the case of *Heiburg v. Pearson* (3), where a part of each hogshead was saved, the jury having stated their opinion, that the loss was an average one, and found accordingly, the court held, that they were right in so doing. The law had been settled in many cases before, that where the insurance is upon each package separately, it is to be treated as a total loss upon each package lost; but when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no average loss; and there cannot in such case be any total loss of a portion only of the cargo. The judgment in the present case must therefore be for the defendants."

On the memorandum, "free from average under 3*l.* per cent.," the underwriter is liable for the amount of the aggregate of several partial losses each less than 3*l.* per cent., but amounting together to more. (4)

A cargo insured by a valued policy was confiscated and sold; but the enemy permitted the foreign consignee to retain from the proceeds the amount of his acceptances; the assured not having abandoned, the loss became partial only, and the assured was entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss ultimately sustained bore to the whole value in the policy. (5)

The general principle, that the assured shall recover no more than an indemnity in case of loss, may be controlled by a mercantile usage clearly established to the contrary. Therefore an usage, that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage. (6)

On a policy on freight, the ship having actually earned full freight,

(1) *Hills v. London Assurance Comp.* 5 M. & W. 576.

(2) 15 East, 559.

(3) 7 Taunt. 154. *Marshall on Insurance*, 231.

(4) *Blackett v. Royal Exchange Assurance Comp.* 2 C. & J. 244. 2 Tyrw. 266.

(5) *Goldsmid v. Gillies*, 4 Taunt. 803.

(6) *Palmer v. Blackburn*, 1 Bing. 61. Moore, 339.

though not that intended for her, the owner cannot recover for the delay and expense as a partial loss. (1)

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.

A shipowner having effected a policy on freight may, in the event of loss, recover from the underwriter the value of the benefit he, the shipowner, would have derived (if there had been no loss) by carrying his own goods on the voyage insured. (2)

Where for the safety of a ship it becomes necessary, during the voyage, to put into a port to refit, the expense of refitting is not a general average. (3)

Where a ship partially damaged has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the cost of repair, unless circumstances be shewn to take the case out of the ordinary rule of deduction of one-third for the benefit to the owners from the repairs. (4)

Repairs of ship
partially dam-
aged.

Where a ship had been repaired, the underwriters were held not entitled to the usual deduction of one-third, new for old, the ship not having been put into the free possession of the owner again. (5)

A ship being unable to escape from a privateer, resists the attack, beats off the privateer, reaches her port, and delivers her cargo in safety:—It was held, that neither the expense of repairing the ship, nor of curing the wounds of the sailors, nor of the ammunition, was the subject of general average. (6)

Ship disabled
by privateers.

If a ship, in order to escape from a privateer, carry an unusual press of sail, and succeed in getting away, but sustain damage in so doing, this is a particular, not a general average. (7)

Where a ship was stranded, and the cargo, consisting of hogsheads of sugar, was got ashore, each hogshead containing some sugar, though but little, and nearly all damaged:—It was held, that the jury were warranted in finding this to have been an average loss only. (8)

Vessel stranded
but cargo
landed in a
damaged state.

In *Glennie v. London Assurance Comp.* (9), an insurance was effected at and from Charleston to Liverpool upon goods, in the ship *Herschell*, until the same should be there safely discharged and landed, "on goods, rice, free from particular average." The ship arrived within the limits of the port of Liverpool, but before she could be brought to her moorings, or be unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at Liverpool, and sold, and produced upon the whole little more than sufficient to pay freight and salvage, but the *rice* did not produce sufficient to pay the freight:—It was held, that this was a case of particular average only, and therefore, as to the rice, the underwriter was exempted by the warranty; Lord Ellenborough observing, "I think it quite clear, that this is a case of particular average, and not of total loss. There has been an arrival of the ship with the goods at their destination; the voyage has been performed, and the goods have come to the

Judgment of
Lord Ellen-
borough in
Glennie v.
London Assur-
ance Comp.

- (1) *Brocklebank v. Sugrue*, 1 M. & Rob. 102. 1 B. & Ad. 81. 5 C. & P. 21.
(2) *Flinn v. Fleming*, 1 B. & Ad. 45.
(3) *Jackson v. Charnock*, 8 T. R. 509.
(4) *Poingdestre v. Royal Exchange Assurance Comp.* R. & M. 378.
(5) *Da Costa v. Newnham*, 2 T. R. 407.
(6) *Taylor v. Curtis*, Marshall on Insurance, 548. 6 Taunt. 608. Holt's N.P.C. 192. 4 Camp. 337.
(7) *Covington v. Roberts*, 2 N. R. 378. Marshall on Insurance, 547.
(8) *Hedbergh v. Pearson*, Marshall on Insurance, 231. 7 Taunt. 154. Holt's N.P.C. 349.
(9) 2 M. & S. 371.

GENERAL
AVERAGE —
PARTIAL LOSS
— PARTICULAR
AVERAGE.

Ship deserted
by the crew,
and subse-
quently sold
for salvage.

hands of the consignees. The argument is built upon facts, which are not in the case; it assumes, that the ship did not arrive in port, whereas there seems to be little doubt, that she was within the port when she took the pilot on board. Therefore, this is not a case of total loss of the goods on account of the non arrival of the ship; the ship had got within the practicable limits for her discharge: it is only a case of particular average."

A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port:—It was held, that such desertion of the crew did not of itself amount to a total loss; and 2dly, that the ship having been sold under the decree of the admiralty court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and that there was no more than a partial loss. (1)

Ship seized and
condemned by
a foreign state.

If a ship be seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss; for the property in the ship is not divested out of him. (2)

Policy on ship
and goods war-
ranted free
from American
condemnation.

In *Livie v. Janson* (3), which, was an action on a policy on ship and goods, warranted free from American condemnation. It appeared, that the ship and goods were damaged by the perils of the seas, and were afterwards seized by the American government and condemned; and the question was, Whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect to the previous partial loss by sea damage? and it was held, that it did, Lord Ellenborough observing, "In the present case, as the immediately operating cause of total loss was one from which, and its consequences, the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time, prior to the total loss, in which the assured could have practicably called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion, that such prior partial injury forms in this case no claim upon the underwriters of this policy; and consequently, that the *postea* must be delivered to the defendant."

Judgment of
Lord Ellen-
borough in
Livie v. Janson.

THE ADJUST-
MENT.

DEFINED.

13. THE ADJUSTMENT.

Where the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss, at so much *per cent.*," or other language to the same effect, which is called an adjustment. (4)

(1) *Thorneley v. Hobson*, 2 B. & A. 513.

(2) *Wilson v. Forster*, Marshall on Insurance, 592. 6 Taunt. 25.

(3) 12 East, 652.

(4) A new ship was chartered and insured from London to New South Wales, and the freight made payable on her arrival there. Being unable to procure homeward

freight, she went to Madras and there took in freight to England, and a fresh policy was entered into. The ship was lost on the homeward voyage; the route being a common one for ships chartered to New South Wales:—It was held, that the ship was on her first voyage, and that consequently the underwriters were not entitled to a new-for-

In *Hog v. Gouldney* (1) Chief Justice Lee compared an adjustment to a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss.

Mr. Serjeant Marshall (2) also considers, that the adjustment admits the whole case, and, like a note of hand, is *prima facie* evidence of a debt; — it is not, however, conclusive, but may be impeached by evidence.

It has been contended, that this rule by Chief Justice Lee is too large; when money has been actually paid with a full knowledge of all the circumstances of the case, the convenience of mankind requires, that the party paying it should be estopped from contesting his liability; — yet the dictates both of law and public policy seem to forbid, that the real merits of the question should be shut out by the mere gratuitous promise or acknowledgment of either of the parties (3); besides which, *ex nudo pacto non oritur actio*.

In *Rogers v. Maylor* (4) Lord Kenyon observed, “If there had been any misconception of the law or fact upon which the adjustment had been made, the underwriter would not have been absolutely concluded by it.”

In *Garron v. Galbraith* (5), which was *assumpsit* on a policy of insurance on silks from Genoa to Lisbon, for an average loss by the perils of the seas. It appeared, that the defendant had been applied to, to adjust the average, and then signed an acknowledgment in the following words, viz. “agreed to pay 44l. 6s. 6d. for particular average on this policy, payable in one month;” upon which Lord Kenyon said, “I shall consider this adjustment as an admission of the policy, but nothing further. It is still incumbent on the plaintiff to prove the rest of his case. One may put cases without end, where many inconveniences and much injustice would happen were the law otherwise.”

In *Shepherd v. Chewter* (6) Lord Ellenborough said, “The adjustment was *prima facie* evidence against the defendant, but it certainly did not bind him, unless there was a full disclosure of the circumstances of the case, unless they were all blazoned to him, as they really existed. Therefore, if it should be thought, that the defendant, by reading the notice stuck up at Lloyd's, had his attention drawn only to the manner in which the ship was captured, and was not roused to the previous deviation with which he afterwards became acquainted, his liability to the assured would be discharged, notwithstanding the adjustment.”

In *Herbert v. Champion* (7) Lord Ellenborough said, “What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case after admitting his liability, but until he has paid the money, he is at liberty to avail himself of any defence, which the facts or the law of the case will furnish.”

THE ADJUSTMENT.

Judgment of Chief Justice Lee in *Hog v. Gouldney*.

Judgment of Lord Kenyon in *Rogers v. Maylor*.

An adjustment of policy does not admit the loss.

Judgment of Lord Ellenborough in *Shepherd v. Chewter*.

Judgment of Lord Ellenborough in *Herbert v. Champion*.

add deduction of one-third. *Pirie v. Steele*, Camp. 190. *Shepherd v. Chewter*, *ibid.* 276. n.

(1) *Beawes*, 310.

(2) *On Insurance*, 642.

(3) *Rams v. Hughes*, 7 T. R. 350. n.

Marriott v. Hampton, *ibid.* 269. *Bilbie v.*

Lumley, 2 East, 469. *Fisher v. Samuda*, 1

(4) *Park on Insurance*, 194. *Christian v. Coombe*, 2 Esp. N. P. C. 489.

(5) *Peake's Add. Cas.* 37.

(6) 1 Camp. 275.

(7) *Ibid.* 137.

**THE ADJUST-
MENT.**

Does not re-
quire a stamp.
Payment of
the insurance.

Insurance
must be paid in
money.

Action can be
maintained for
amount of in-
surance, not-
withstanding
there has been
no adjustment.

If an insurer pay money for a total loss, and in fact it be so at the time of adjustment, if it afterwards turn out to be only a partial loss, he cannot recover back the money so paid to the insured. But substantial justice is done by putting him in the place of the insured, and giving him all the advantages, that may arise from the salvage. (1)

An adjustment does not require a stamp. (2)

As soon as an insurance broker has received credit in account with an underwriter for a loss upon a policy, his principal may maintain money had and received against him to recover the amount; and in such action, if the underwriter's name be erased from the policy, the defendant can neither dispute the liability of the underwriter for the loss, nor his own receipt of the sum subscribed. (3)

An insurance broker, as agent of the assured, is only entitled to receive payment for them from the underwriters in money; and a custom to set-off the general balance due from such broker to the underwriters in the settlement of a particular loss is illegal, as it in fact amounts to an attempt to pay the debt of one person with the money of another. (4)

If an insurance broker debit the underwriter with a loss, and take his acceptance for the balance of account between broker and underwriter, payable at a later date than the time when the loss would be payable in cash, the assured may maintain an action against the broker for money had and received, though the acceptance was dishonoured, and the broker never received any money. (5)

An assured residing at Glasgow employed an insurance broker in London to recover a loss from the underwriter. The loss was settled in part by the underwriter setting off in account against it, a debt due to him from the broker for premiums, and as to the residue, by his paying the broker in cash, and the underwriter then erased his name from the policy. The broker became bankrupt, and never paid the loss to the assured. Evidence was given of an usage, that an adjustment payment was generally in a month, and that the practice between the broker and the underwriter was to set-off in account between them the amount of premiums due to the underwriter against the loss:—It was held, first, that the underwriter was not entitled to treat the set-off in account between him and the broker as payment to the assured, the latter not being bound by an usage of which he was not shewn cognisant; and secondly, that the assured was not entitled to recover the sum which the underwriter had paid in money to the broker within the month, that being a payment made to the broker pursuant to the general authority given to him by the assured. (6)

Where, by the terms of a policy, losses were to be paid in three months after an adjustment by a committee of the insurers, and the committee refused to adjust upon the request of the insured:—It was held, he might sue on the policy, notwithstanding there had been no adjustment. (7)

(1) *Park on Insurance*, 198. *Du Costa v. Firth*, 4 Burr. 1966.

(2) *Per Kenyon C. J. in Wiebe v. Simpson*, cit. Selw. N. P. 10th ed. 979., *sed quare*, If a promise be added to pay at some future period?

(3) *Andrew v. Robinson*, 3 Camp. 199., vide *Stewart v. Aberdeen*, 4 M. & W. 211.

(4) *Todd v. Reid*, 4 B. & A. 210., vide *Stewart v. Aberdeen*, 4 M. & W. 211.

(5) *Wilkinson v. Clay*, 6 Taunt. 110. 4 Camp. 171.

(6) *Scott v. Irving*, 1 B. & Ad. 605., vide etiam *Bartlett v. Pentland*, 10 B. & C. 760.

(7) *Strong v. Harvey*, 3 Bing. 304. 11 Moore, 72.

THE ADJUSTMENT.

A trustee suing as a plaintiff in a court of law must be treated in all respects as a party to the cause, and any defence against him, is a defence in that action against the *cestui que trust*, who uses his name; and therefore, where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy; and the proof was, that, after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them:—It was held, that although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action. (1)

If a policy of insurance be produced by the agent of the plaintiff, through whom it was effected, and the defendant's name be struck out, and have written against it, "adjusted the general and particular averages at 30*l.* 9*s.* per cent.," this is proof, that the policy had been adjusted, but not that it had been satisfied; but the plaintiff will not be allowed to go into evidence to shew, that some of the sums allowed at the time of the adjustment were too small. If the plaintiff could shew, that the loss was settled without his authority, or perhaps if he could shew, that some sum was entirely omitted, he might go beyond the amount of the adjustment. (2)

After a total loss and adjustment, and whilst the policy remained in the hands of the broker, the initials of the insurer were struck out of the adjustment to indicate payment, and the broker debited the insurer with the loss:—It was held, that the insurer was still liable to the assured, as the principal was never estopped from recovering the amount, unless there was actual payment to the broker, or a credit given. (3)

A ship was insured warranted free from capture in port. A letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted, the former returned, and the latter received back the premium; but it afterwards appeared, that the capture was not in port:—It was held, that the assured was not precluded by the adjustment and repayment from recovering on the policy, whether the underwriter's name had been struck off the adjustment only, or off the policy also. (4)

NAME OF THE INSURER STRUCK OUT OF THE ADJUSTMENT.

Insurer's name being struck out of a policy, is proof of its having been adjusted but not satisfied.

There must be an actual payment.

Adjustment and repayment.

14. BOTTOMRY AND RESPONDENTIA.

BOTTOMRY AND RESPONDENTIA.

Bottomry is a contract, in nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and he pledges the keel or bottom of the ship, *pars pro toto*, as a security for the repayment. And it is stipulated, that if the ship should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but, if the ship arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called the marine interest; however this may exceed the legal rate of interest. Not only the

Bottomry defined.

(1) *Gibson v. Winter*, 5 B. & Ad. 96.

(3) *Jell v. Pratt*, 2 Stark. 67.

(2) *Adams v. Saunders*, 4 C. & P. 25.

(4) *Reynor v. Hall*, 4 Taunt. 725.

M. & M. 373.

**BOTTOMRY AND
RESPONDENTIA.***Respondentia*
defined.Where the
lender has no
lien.How bottomry
differs from a
simple loan.**FORM OF CON-
TRACT.**Judgment of
Lord Tenterden
in *Simonds*
v. *Hodgson*.

ship and tackle, if they arrive safe, but also the person of the borrower, is liable for the money lent and the marine interest.

When the loan is not on the ship, but on goods laden on board, which, from their nature, must be sold or exchanged in the course of the voyage, the borrower's personal responsibility is then the principal security for the performance of the contract, which is therefore called *respondentia*.

In this consists the principal difference, between bottomry and *respondentia*; the one is a loan upon the ship, the other upon the goods. The money is to be repaid to the lender, with the marine interest, upon the safe arrival of the ship in the one case, and of the goods in the other. In all other respects these contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the person of the borrower; in the latter, the lender has, in general, only the personal security of the borrower. (1)

The lender upon a *respondentia* bond in the usual form has no lien upon, or interest in, the homeward cargo purchased with the produce of the goods upon which the money was lent. (2)

Bottomry differs materially from a simple loan. In a loan, the money is at the risk of the borrower, and must be paid at all events, — "*incendium ære alieno non liberat debitorem*." But in bottomry, the money is at the risk of the lender during the voyage. Upon a loan only the legal interest can be reserved; but upon bottomry any interest may be legally reserved, which the parties agree upon.

This contract, which must always be in writing, is sometimes made in the form of a deed poll, called a bill of bottomry, executed by the borrower, sometimes in the form of a bond or obligation with a penalty. But whatever may be its form, it must contain the names of the lender and borrower, and those of the ship and the master; the sum lent, with the stipulated marine interest; the voyage proposed, with the duration of the risk, which the lender is to run. It must shew, whether the money be lent on the ship, or on goods on board, or on both; and every other stipulation and agreement, which the parties may think proper to introduce into the contract. (3) And it is essential to this contract, that the marine interest be expressly reserved in it. (4)

In *Simonds v. Hodgson* (*in error*) (5) Lord Tenterden observed, "Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest; this recompense is very properly called in the civil law *periculi pretium*, and of course no person can be entitled to it, who does not take upon himself the peril of the voyage; but it is not necessary, that his doing so, shall be declared expressly, and in terms, though this is often done; it is sufficient, that the fact can be collected from the language of the instrument considered in all its parts. It has been said, that such instruments, being the language of commercial men and not of lawyers, should receive a liberal construction to give effect to the intention of the parties."

Where an instrument executed in a foreign port by the master of a ship,

* (1) Marshall on Insurance, 743.

(2) *Busk v. Fearon*, 4 East, 319., et vide *Sumner v. Green*, 1 Hen. Black. 301.

(3) Marshall on Insurance, 747.

(4) Pothier, 19.

(5) 3 B. & Ad. 50. 1 Phillips on Insurance, 196.

reciting that his vessel, bound to London, had received considerable damage, and that he had borrowed 1077*l.* to defray the expenses of repairing her, proceeded as follows — “I bind myself, my ship, her apparel, tackle, &c. as well as her freight and cargo, to pay the above sum, with 12*l.* per cent. bottomry premium; and I further bind myself, said ship, her freight and cargo, to the payment of that sum with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges until such principal sum, with 12*l.* per cent. bottomry premium, and all charges, are duly paid:”—It was held, upon error, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it, that the lender should take upon himself the peril of the whole voyage; that the words “my arrival” must be understood to mean “my ship’s arrival;” and that the words “I make liable the said vessel, her freight and cargo, whether she do or do not arrive at London,” were intended only to give the lenders a claim on the ship in preference to other claims, in case of the ship’s arrival at some other than the destined port, and not to provide for the event of the loss of the ship. (1)

BOTTOMRY AND
RESPONDENTIA.

The parties to the contract of bottomry are the lender and the borrower; of the former it is sufficient to say, that any person, who has a capacity to contract, may lend money on bottomry.

PARTIES TO
THE CONTRACT.

With respect to the borrower, every person who has a vested assignable property in a ship or cargo may, by the general law of merchants, borrow money on bottomry or *respondentia* thereon to the extent of his interest.

But an action cannot be maintained on a policy of insurance, where the plaintiff’s interest is founded on a bottomry bond made jointly to the plaintiff and another, although they are general partners in trade. (2)

In *Arthur v. Barton* (3) Lord Abinger said, “Under the general authority, which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage, in which the ship is engaged. But this authority does not usually extend to cases, where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner or his general agent be at the port, or so near to it, as to be reasonably expected to interfere personally, the master cannot, unless specially authorised, or unless there be some usual custom of trade warranting it, pledge the owner’s credit at all, but must leave it to him or to his agent to do what is necessary.

Authority of
master to hy-
pothecate.
Judgment of
Lord Abinger
in *Arthur v.*
Barton.

“But if the vessel be in a foreign port, where the owner has no agent, or if in an English port, but at a distance from the owner’s residence, and provisions or other things require to be provided promptly, then the occasion authorises the master to pledge the credit of the owner.” (4)

(1) 3 B. & Ad. 50.

(2) *Everth v. Blackbourne*, 6 M. & S. 152.
2 Stark. 66. 1 Phillips on Insurance, 94.

(3) 6 M. & W. 143.

(4) From *Hunter v. Parker* (7 M. & W.
322.) it seems, that a master of a ship has

authority, when, in consequence of injury to the ship during the voyage there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested. At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification

**BOTTOMRY AND
RESPONDENTIA.**

In a foreign country the master can only borrow money for the use of the ship in cases of necessity, and which must appear in the contract; and he cannot raise it to pay any debt of his own.

If it appear that the lender advanced the money *bond fide* to supply the necessities of the ship, he is not responsible for its subsequent misapplication by the master; but if the lender be an accomplice in any fraudulent misapplication of the money, the owners may impeach the contract on that ground.

Lending of money to an enemy upon bottomry is illegal.

**THE PROPERTY
HYPOTHECATED.**

Money may be lent on whatever may be insured.

The borrower may take the money on board with him.

But the money or its equivalent must be exposed to the perils of the sea, at the risk of the lender.

It is a general rule, that money may be lent on bottomry or *respondentia* on any object which may be the subject-matter of insurance. It may be lent on the body, tackle, furniture, and provisions, of the ship; or upon both ship and cargo. (1)

But money may be borrowed on *respondentia*, without hypothecating any thing. The borrower may, and frequently does, take the money on board with him in specie, in order that he may employ it in trade in the course of the voyage, which was probably the original intention of such loans.

But it is of the essence of this contract, that the money lent, or something equivalent to it, be exposed to the perils of the sea, at the risk of the lender. And the same reasons of policy which forbid gaming insurances, equally apply to wagers, in the form of bottomry loans. If the borrower have no effects on board, or, having some, he borrow much beyond their value, and agree to pay a high marine interest, this will afford a strong ground to suspect fraud, and that the voyage will have an unfortunate end—“*Cum capitaneus, ad cambium receperit longe majorem pecuniæ summam quam fuerit risicum super navi existens, præsumi debet sinistrum fuisse dolosum.*” (2)

Stat. 7 Geo. 1.
c. 21. s. 2.

By stat. 7 Geo. 1. c. 21. s. 2. “all contracts and agreements whatsoever made or entered into by any of his majesty’s subjects, or any person or persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or destined to trade in the East Indies, are void.”

Stat. 19 Geo. 2.
c. 37. s. 5.

By stat. 19 Geo. 2. c. 37. s. 5. all money lent on bottomry or at *respondentia* upon ships belonging to any of his majesty’s subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandise on board, and shall be so expressed in the condition of the bond; and the benefit of salvage shall be allowed to the lender, who alone shall have a right to make assurance on the money so lent; and no borrower of money shall recover more than the value of his interest on the ship, or in the effects laden on board, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or the effects on board, does not amount to the full sum or sums he has borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed, as he has not laid out on the ship or merchandise laden thereon, with lawful interest for the same, in the proportion that the money laid out shall bear to the whole money lent, notwithstanding the ship and merchandise shall be totally lost.

by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser, or one claiming under him.

an auctioneer acting under a parol authority from the master.

(1) Pothier, 9.

(2) Casaregis, dis. 62. n. 7. vide Le Guidon, ch. xix. art. 10.

So it is equally a ratification of a sale by

Money may be borrowed on freight upon a bottomry contract.

Seamen can borrow money on any goods they may have on board, because, as far as relates to such goods, they are in the same situation as those of any other shipper.

Respecting their wages, the same reasons of policy, drawn from the necessity of interesting them in the preservation of the ship, which prohibit their being insured, equally forbid their borrowing money on them.

An insurance on goods does not extend to a *respondentia* interest. (1)

Whether money may be lent on a ship or goods already in risk has been questioned. (2)

Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which the ship is sold, they are liable for all the damage which accrues to the owner in consequence of that refusal. (3)

To constitute this contract, one party must lend the other a sum of money, upon the usual conditions. Not that this contract could only be made upon a loan of money; for, as a loan, it may consist, according to the Roman law, of all those things, "*quæ pondere, numero, et mensura constant, et quæ usu consumuntur.*" In practice, however, such loans are scarcely ever made but in money.

There is no standard by which the amount of marine interest can be fixed; and however high or exorbitant it may seem, it cannot be deemed usury, provided the money lent be *bond fide* put in risk. (4)

If, however, the form of a bottomry or *respondentia* loan be used as a cloak to an usurious contract, there can be no doubt, but that it would be illegal and void.

It is the essence of the contract that the sum lent be put in risk; and it does not become a bottomry or *respondentia* contract, till the risk commences.

And if the risk be not commenced, the contract, will become a simple loan, even though the borrower covenant to perform the voyage.

When the time of the risk is limited, the risk and the marine interest will end with the time, though the voyage be not ended; and the risk of the lender will cease, though the ship be prevented by accident from performing her voyage within the time limited. (5)

If, when the sea risk is ended, the borrower delay payment, the common interest begins to run *ipso jure*, without any demand — "*Discussio periculo, majus legitimè usurâ non debebitur.*" (6) But this interest runs only on the principal, not on the marine interest; for this would be interest upon interest — *accessio accessionis non est.* (7)

It is essential to this contract, not only that the money be lent on a ship or goods, but likewise that these be exposed to the perils of the sea, at the risk of the lender; that is, that the repayment of the sum lent and the marine interest shall depend upon the safe arrival of the ship or goods. (8)

BOTTOMRY AND
RESPONDENTIA.

Freight.

Seamen's goods
and wages.

Ship or goods
already in risk.

When under-
writers respon-
sible for repairs.

PRINCIPAL AND
MARINE IN-
TEREST.

When time
of the risk is
limited, the risk
and marine in-
terest will end
with the time.

PERILS AND
RISKS TO WHICH
THE LENDER IS
LIABLE.

It is essential
to this contract
that the lender
run sea risk.

(1) *Glover v. Black*, 1 W. Black. 306. *Joy v. Kent*, Hardr. 418. *Deguilder v. Depeister*, 1 Vern. 263.

(2) *Marshall on Insurance*, 754.

(3) *Da Costa v. Newnham*, 2 T. R. 407.,
and vide *Phillips on Insurance*, 196.

(4) *Sharpley v. Hurrell*, Cro. Jac. 208.

(5) *Ingledeu v. Foster*, 4 Vin. Abr. Bot-
tomry Bonds, 281. [A.].

(6) ff. De Naut. Fœn. 4.

(7) *Pothier*, 51.

(8) *Pothier*, 16. 38.

**BOTTOMRY AND
RESPONDENTIA.**

The perils are
nearly the same
as in insurance.

The perils of the sea, in a large sense, comprehend all those accidents and misfortunes, to which ships at sea are exposed, and which no human foresight or precaution can avert or resist—" *Via divina, quæ præcaveri, et cui resisti, non potest.*" This idea seems to be very fully expressed in the usual terms of our bottomry and *respondentia* contracts; by which it is provided, that, "if, in the course of the voyage, and within the time prescribed, an utter loss of the ship, by fire, enemies, men-of-war, or any other casualties, shall unavoidably happen," the bond shall be void, and the borrower discharged; so that the perils to which the lender is exposed, are nearly the same as those, to which the underwriters upon a policy of insurance are liable. (1)

A loss by
pirates is within
the contract.

Though a loss by pirates is not usually expressed in bottomry or *respondentia* securities, yet this is a risk within the meaning of the words, piracy, being one of the casualties to which ships at sea are liable. (2)

Nothing short
of a total loss
will discharge
the borrower.

An assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship; for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond. (3)

The obligation remains, however the goods may be damaged by the perils of the sea; nor is there any deduction on account of such damage; for the lender is not bound to contribute to simple average, or particular damage, unless by express agreement. In this respect, the lender on bottomry is in a better situation than an insurer, who is obliged to indemnify the insured, to the extent of the sum insured, from all damage, arising from any of the perils insured against. A capture, therefore, to have the effect of discharging the borrower, must be such a taking and detention, as would amount to a total loss, in a case of insurance; a mere temporary detention will not discharge the borrower unless the voyage be thereby lost.

The lender is
not liable for
loss proceeding
from the in-
ternal defect of
the thing, un-
less by express
stipulation.

No loss will have the effect of avoiding the contract, or discharging the borrower, but a total loss, proceeding from the perils of the sea, during the voyage, and within the time specified in the contract—" *Creditor subit periculum navigationis, in casibus fortuitis tantum.*" (4) But no loss shall be reputed to have arisen from the perils of the sea, which arose from the internal defect of the thing hypothecated.

Acts of owner
or master.

The lender is not liable for the act of the owners or master of the ship; nor for a loss by smuggling, unless he was privy to it.

Smuggling.

If the ship do not sail on the voyage described, or deviate without necessity, the lender will be discharged from the risk.

Deviation.

*If a ship be lost after a wilful deviation, the lender is not liable. (5)

Ship pressed
into the king's
service.

If a vessel be pressed into the king's service, this will excuse a deviation; but if the borrower allege a deviation, this must be explicitly denied. (6)

Loss from cap-
ture.

A lender on bottomry cannot recover if a loss happen by capture, if it be such as to occasion a total loss; but if the ship be taken and detained for a short time, and yet arrive at the port of destination within the time

(1) *Vide* Le Guidon, ch. xviii. art. 2. Pothier, 16. Marshall on Insurance, 759.

(2) *Recog.* in *Barton v. Wolliford*, Comb. 56.

(3) *Thomson v. Royal Exchange Assurance Comp.* 1 M. & S. 30. 16 East, 214.

(4) *Roccus*, 51.

(5) *Western v. Wildy*, Skin. 152.

(6) *Williams v. Steadman*, *ibid.* 345. Holt, 126. 1 Phillips on Insurance, 640.

limited (if time be mentioned in the condition), the bond is not forfeited, and the obligee may recover. (1)

BOTTOMRY AND
RESPONDENTIA.

So where money is lent on goods, on board a certain ship, the lender is only considered as liable for the risk on those goods, while they are on board that ship; and if they be removed to another ship without necessity, the lender will be discharged. (2) But if the change be occasioned by any necessity, he will still continue liable.

Goods removed
to another ship.

Money is generally lent for the whole voyage, outward and homeward; or for either separately; or for a limited time. The contract usually specifies the commencement and end of the risk; and any misfortune happening before or after, is at the risk of the borrower. (3) If the voyage be described in the bond, but the time of the commencement and end of the risk be not specified, the risk, as to the ship, shall commence from the time she sets sail, and continue till she anchors in safety, at her port of destination; and, as to goods, from the time they are shipped, till they are safely landed.

Commence-
ment and end
of risk.

When the loan upon goods is both for the outward and homeward voyages, the lender continues liable to the risk, during the homeward voyage on the goods, by which those, on which the money was lent, have been replaced. (4)

There is a difference between insurance and bottomry, that an insurer, unless he stipulate to be free of particular average, is always liable to that charge; whereas a lender is not liable to it, unless by express stipulation. But by the general law of merchants, in case of gross or general average the lender must contribute to discharge the borrower.

LIABILITY OF
LENDER TO
GENERAL
AVERAGE.

In *Joyce v. Williamson* (5) Lord Mansfield stated, that, "By the law of England, there is neither average nor salvage upon bottomry contracts." (6)

But if an insurance be made in England upon a *respondentia* interest upon a foreign ship, and it appear, that the lender is liable by the law of the country to which the ship belongs to contribute to a general average, the underwriters upon the policy will be liable for such contribution.

Stat. 19 Geo. 2. c. 37. gives the benefit of salvage to lenders on bottomry and *respondentia*, being confined to East India voyages. But, according to the opinions of Lord Mansfield and Lord Kenyon, there is neither average nor salvage upon bottomry contracts.

LIABILITY OF
LENDER TO
SALVAGE.

15. CONSOLIDATION RULE.

CONSOLIDATION
RULE.

Where several actions are brought upon the same policy, the court, or a judge upon application of the defendants, will grant a rule or order to stay the proceedings in all the actions but one (7), the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs, if the plaintiff should recover. (8)

Generally.

(1) *Joyce v. Williamson*, 3 Doug. 164. Park on Insurance, 627. Marshall on Insurance, 760. 1 Phillips on Insurance, 734, 735.

(2) Pothier, 18. 2 Emerigon, 524.

(3) Valin, 13. 2 Emerigon, 514.

(4) Pothier, 34.

(5) 3 Doug. 164. cit. Marshall on Insurance, 765.

(6) Vide etiam *Walpole v. Ewer*, Marshall on Insurance, 767.

(7) Tidd, 614.

(8) *Doyle v. Anderson*, 1 A. & E. 635.

**CONSOLIDATION
RULE.**

Rule will not be granted except upon terms.

If the plaintiff consent to the rule, the court will make the defendant submit to reasonable terms, such as admitting the policy, producing and giving copies of books and papers, and undertaking not to file a bill in equity, or bring a writ of error.

Formerly it was thought, that a consolidation rule bound the plaintiff as well as the defendant, and the court or judge could not, though fresh evidence had been discovered, permit the plaintiff to try the other actions. (1)

Judgment of Lord Denman in *Doyle v. Stewart*.

But in *Doyle v. Stewart* (2), where actions against underwriters had been consolidated by rule of court, and the defendant had obtained a verdict in one, the court refused to restrain the plaintiff from trying a second cause included in the same rule till the costs of the first were paid; Lord Denman observing, "that the principle of the consolidation rule had always been, that as the defendants ask for a favour, they may reasonably be required to pay the price of it. It may be, that in this case the consolidation rule would benefit the plaintiff; but we cannot compel a party to accept a benefit for which he does not ask."

The rule can be opened for the defendant.

The plaintiff however, by proceeding in a second consolidated action without applying to the court, loses the benefit of any terms which were imposed on the defendants by the consolidation rules. (3)

The court or judge, under circumstances, may open the consolidation rule for the defendant and try a second cause; if it be done, they will in general extend to the second cause all such terms made compulsory on the party successful in the first, as are requisite for attaining the merits. (4)

Where actions will not be consolidated, without the consent of the plaintiff.

Where two actions were brought on policies of insurance by the same plaintiffs against different defendants, the court refused, against the consent of the plaintiff, to make a consolidation rule upon the terms of the plaintiff and defendant being included by the verdict in one action. (5)

Rule can be obtained notwithstanding the plaintiff refuses his consent

The rule or order may be acquired, notwithstanding the plaintiff refuses his consent to it; and formerly, though the plaintiff refused his consent, the court or judge granted time to plead, and stayed the proceedings in all the actions but one, until that one had been determined (6); and if determined in favour of the plaintiff, the other defendants may (if necessary) obtain a stay of proceedings in their several actions upon payment of the amount of their subscriptions and costs.

Consolidation rule will be granted before plea pleaded.

Formerly the consolidation rule was not granted until after plea pleaded; but in *Hollingsworth v. Brodrick* (7) it was decided, that it may be done after service of the writs and before declaration, notwithstanding the plaintiff may be opposed to it.

The court having granted a new trial, on the ground that the verdict was

(1) *Doyle v. Douglas*, 4 B. & Ad. 544. Archb. by Chitt. 1013.

(2) 4 N. & M. 873. 1 A. & E. 635.

(3) *Long v. Douglas*, 4 B. & Ad. 545. n.

(4) *Cohen v. Bulkeley*, 5 Taunt. 165. Archb. by Chitt. 1014.

(5) *M^r Gregor v. Horsfall* and *M^r Gregor v. Smith*, 6 Dowl. P. C. 338. 3 M. & W. 320.

(6) Archb. by Chitt. 1013. *Hollingsworth v. Brodrick*, 4 A. & E. 646.

(7) *Ibid.* 649. In the foregoing case the

following consent rule was drawn up:—
"It is ordered, that all proceedings in the last mentioned cause be stayed, until the trial of the first mentioned cause, the defendant in the last mentioned action hereby undertaking to be bound and concluded by the verdict found in the first action, if such verdict shall be to the satisfaction of the judge, who may try the same. And it is further ordered that, if the defendant pays the premium into court in that action, the other defendant shall, within one week after

against the evidence on the question of seaworthiness, and having refused a second new trial upon a verdict the same way on the same evidence, refused also to open the consolidation rule, and retry the same question in another action against another underwriter on the same policy. (1)

By Reg. Gen. H. T. 2 Will. 4. s. 104., "where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court."

The defendants in several actions paid money into court, at the rate of 46*l. per cent.* on their respective subscriptions, and then took out a summons to consolidate, to which the plaintiff refused to consent; an order was thereupon made, that the proceedings in all the actions but one should be stayed until the fifth day of the term next after the trial of that one; the defendants admitting their subscription to the policy, the plaintiff's interest, &c. at the trial of the first action, a case was reserved for the opinion of the court; and the court being of opinion, that the defendant was liable only to the extent of the money paid into court, gave judgment for him; but the court held, that, in the other actions, the plaintiff was entitled to his costs up to the time of payment of money into court. (2)

CONSOLIDATION RULE.

When the consolidation rule will not be reopened.

Payment of money into court.

16. THE DECLARATION.

The forms of action on a policy of insurance are *assumpsit* when not under seal, debt and covenant when under seal.

By stat. 6 Geo. 1. c. 18. the Royal Exchange and the London Assurance Companies must be sued by action of debt or covenant.

The action on a policy of insurance being transitory, the venue, if laid in a different county from that in which the cause of action arose, may be changed at the instance of the defendant on the usual rule (3), unless the

THE DECLARATION.

FORMS OF ACTION.

Stat. 6 Geo. 1. c. 18.

VENUE.

such payment, pay the premium into court in the other action under this rule, and that the plaintiff be at liberty to take the same out of court; and, if he elects to accept such premiums in satisfaction of such action, that he be at liberty to proceed to tax his costs at any time either before or after the verdict in the first mentioned action. And it is further ordered, that, if the verdict be found for the plaintiff in the first mentioned action to the satisfaction of the judge before whom the same may be tried, then the defendant in the other action shall pay to the plaintiff the amount of the sum assured by him, or such proportion thereof, as the verdict recovered bears to the sum assured by the defendant in that action, together with the costs up to that time, to be taxed by the master, within a fortnight after the taxation of the plaintiff's costs in the action tried. And it is further ordered, that, if the money be not so paid, the plaintiff shall be at liberty to file a declaration, and sign judgment by default for the amount in the action in which the money is neglected to be paid,

unless a judge shall otherwise order. And it is further ordered, that, if the defendant in the first mentioned action to be tried, pays the premium into court, and the verdict is found for the defendant, the plaintiff, nevertheless, shall be at liberty to tax his costs, sign judgment, and issue execution in the other action for such costs, unless the defendant pays the same within a fortnight after the verdict in the action which shall be so tried as aforesaid."

(1) *Vaughan J. dissent. Foster v. Alves*, 3 Bing. N. C. 896. *Foster v. Allenby*, 5 Dowl. P. C. 619.

(2) *Powell v. Parkinson*, 6 M. & S. 107., vide *Redman v. Woodman*, 5 Taunt. 607. *Burstall v. Horner*, 7 T. R. 372. Archb. C. Att. Prac. 242.

(3) *Tidd*, 604. *Watkins v. Towers*, 2 T. R. 275. *Cailland v. Champion*, 7 ibid. 205. *Holcroft v. Collwest*, Andr. 66. *Howarth v. Willett*, Str. 1180. *Kirk v. Broad*, Sayer, 7., sed vide *Morrice v. Hurry*, 7 Taunt. 306. *Stanway v. Heslop*, 3 B. & C. 9.

THE DECLARATION.

policy be under seal. (1) The application for changing it must be made (before the defendant has pleaded either in abatement or in bar) (2) upon an affidavit, that the cause of action (if any) arose in the county of A., and not in the county of B., or elsewhere out of the county of A. (3) But the venue cannot be changed where the cause of action arises out of the realm. (4)

PARTIES.

The action may be brought in the name of the person interested, or of the person in whose name the policy was effected. (5) Though the person whose name is used in the policy is interested in the property insured jointly with another, the action may be brought in his separate name, the joint interest being stated in the declaration. If the policy be effected in the names of two persons, when only one of them is interested, the action may be brought in the name of that one. (6) If brought in the name of the party interested on a policy effected in the name of an agent, the declaration states, that the plaintiff "by one E. F. his agent in that behalf, made, &c."

If the policy be effected in the name of a firm, it is usual to aver, that "the plaintiffs, by the name, firm, and description of Messrs. A. and B. and Co. &c." as in the policy. (7)

An alien enemy cannot maintain an action on a policy of goods, though they were shipped before the war commenced. Nor can his agent, though a creditor of the insured for more than the sum insured. (8) Neither can a policy on the property of an alien enemy, though of British manufacture exported from hence, be the subject of an action. (9)

STATEMENT OF THE POLICY.

In stating the policy it must be described according to its legal effect, and a material variance would be fatal. It is usually set forth in the past tense in the precise terms in which it was made.

Regulations or qualifications indorsed on the policy.

The legal effect of the regulations indorsed on a policy and forming a part of it must be stated. (10)

Thus, in an action on a valued policy, where the goods had been estimated at too low a sum, and the mistake was corrected by the insertion of an increased sum in the margin, the declaration stated the policy according to its altered state without noticing the original value, was held sufficient, because at the time of the alteration, all was *in fieri*. (11)

The qualifications introduced into the contract by means of warranties or exceptive stipulation should be stated. (12)

But clauses which do not bear upon the plaintiff's cause of action, and are unnecessary to a just comprehension of it, need not be detailed (13), such as the enumeration of all the perils, when the loss is plainly attributable to only one of them.

(1) Tidd, 605. *Foster v. Taylor*, 1 T. R. 781. *Watt v. Daniel*, 1 B. & P. 425. *Fenwick v. Farrow*, 1 Chitt. 334.

(2) *Wigley v. Dubbins*, 4 Bing. 18. *Ford v. Gainer*, Sayer, 207. The venue may be changed after an order for time to plead on the terms of pleading issuably; but not in town causes after an order for time to plead, where the terms are to plead issuably, and take short notice of trial, because a trial would by that means be lost. Tidd, 608.

(3) Tidd, 609.

(4) *Cailland v. Champion*, 7 T. R. 205. Tidd, 610.

(5) Park on Insurance, 608. Marshall

on Insurance, 688. Hughes on Insurance, 463.

(6) *Marsh v. Robinson*, 4 Esp. N.P.C. 98.

(7) 2 Chitt. Pl. 108. n.

(8) *Brandon v. Nesbitt*, 6 T. R. 23. *Om v. Bruce*, 12 East, 225.

(9) *Bristow v. Twiss*, 6 T. R. 35. *Fild v. Waters*, 15 East, 260.

(10) *Strong v. Harvey*, 3 Bing. 504.

(11) *Robinson v. Tobin*, 1 Stark. 336.

(12) *Strong v. Rule*, 3 Bing. 315. *Howd v. Richards*, 11 East, 633. *Tempany v. Burnand*, 4 Camp. 20. *Latham v. Rudge*, 2 B. & C. 20.

(13) *Cotterill v. Cuff*, 4 Taunt. 235.

It is not requisite to state, that the instrument was stamped.

The insurer's subscription of the policy and promise to become an insurer are then stated.

The promise is an inference of law, which requires no further proof than the execution of the policy by the defendant. And where a policy in the common printed form on ship and goods contains a written memorandum declaring the insurance to be on goods, a general averment is proper, that the defendant became an insurer on the premises mentioned in the policy (1); for the effect of the memorandum is to confine the policy to the goods, and the word "premises" is an apt description of the subject-matter by reference to the previous part of the declaration.

The shipment of the goods on board is then stated.

If by the terms of the policy the loading is required to take place at a certain port, it seems, that the declaration should state them to have been laden at that port (2); or if the policy be on goods of a particular nature, or distinguished by certain marks, it should appear from the record that the goods sought to be protected corresponded with the description in the contract. (3)

But if a declaration state, that the policy was on indigo and bale goods, that divers goods were shipped of great value, that the insured were interested in them, and that the policy was made on the said goods for the use and benefit and on the account of the insured, this statement is sufficient on special demurrer. (4)

By Reg. Gen. Hilary Term, 4 Will. 4. r. 5., in actions on policies of insurance the interest of the assured may be averred: thus, "that A., B., C., and D., or some or one of them, were or was interested," &c.; and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

The declaration, whether the policy be effected on ship, goods, or freight, must correctly describe the parties in whom the interest is vested. (5)

But prefatory matter unnecessarily introduced into the declaration, unconnected with the averment of interest, and not referred to by it, may be rejected as surplusage. (6)

An averment of interest at the time of effecting the policy is immaterial, and if alleged, need not be proved; it is sufficient to prove, that the interest was vested during the period of the risk. (7)

"A change in the interest after the policy is effected, much less after the loss has happened, cannot be set up as an answer by the underwriters, against a claim for such loss." (8)

Although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large. (9) If the right of action be founded upon an usage in derogation of a general rule of law, the usage must be stated: — but it need not be stated, if it only modifies an exception to a general rule of law. (10)

THE DECLARATION.

Stamp.

THE SUBSCRIPTION.

SHIPMENT OF THE GOODS.

AVERTMENT OF INTEREST.

Parties must be correctly described.

Prefatory matter.

Averment of interest at the time of effecting the policy.

Nature of interest may be generally described.

(1) *Haughton v. Ewbank*, 4 Camp. 88.

(2) *De Symonds v. Shedden*, 2 B. & P. 153.

(3) *Ibid.*

(4) *Ibid.*

(5) *Page v. Fry*, 2 B. & P. 240. 3 Esp. N. P. C. 185.

(6) *Lucena v. Craufurd*, 2 N. R. 309.

(7) *Rhind v. Wilkinson*, 2 Taunt. 237.

(8) *Per Tindal C. J. in Sparkes v. Marshall*, 2 Bing. N. C. 776.

(9) *Crowley v. Cohen*, 3 B. & Ad. 478.

(10) *Hurley v. Milward*, 1 Jones & Carey (Irish), 224.

THE DECLARATION.

Person who has several interests in a cargo.

A person who has several interests in a cargo, viz. as partner in seven-sixteenths, as consignee of the whole, and as having a lien on the whole for advances, may protect them all by one insurance, without expressing in the policy the number or nature of his interests. (1)

Interest founded on freight.

An averment of interest is requisite in the case of a policy effected on a British ship, as well as in the case of a policy on a foreign ship, effected to protect an actual interest; unless the policy contain a clause, denoting the proof of interest to be unnecessary, as the words "interest or no interest," "without proof of interest than the policy," or others to the like effect. (2)

When interest created by certain special circumstances.

Where the interest is founded on freight or profits, the contract must be so stated in the declaration. (3)

When the interest is alleged to be created by certain special circumstances, the averment, if not made out in proof, cannot be rejected as surplusage, for if it were struck out of the declaration, there would be no foundation for the action. (4)

Joint owners of property insured.

Joint owners of property insured for their joint use, and on their joint account, cannot recover upon a count on the policy averring the interest to be in one of them only. (5)

SAILING OF VESSEL.

An averment that the ship sailed on the voyage, is introduced to shew a compliance with the requisitions of the policy. But whether the ship sailed before or after the making of the policy is quite immaterial; for every policy contains the words "lost or not lost," and protects the insured against the perils, that have or shall come to the detriment of the property. (6)

PERIOD OF LOSS.

But with regard to the period at which the loss took place, an averment, that a ship was lost after she had received her cargo on board and sailed on the voyage, is not satisfied by proof, that she was driven from her moorings and lost before the commencement of the voyage. (7)

CAUSE OF LOSS.

The cause of the loss must be correctly stated, because the declaration is to apprise the underwriters of the nature of the claim, and to enable them to prepare their defence. Therefore, if a loss be alleged by perils of the sea, and it appear to have happened from barratry, the variance is fatal. (8)

A statement of the particular facts which occasioned a loss may therefore be preferable, in some cases, to ascribing it to one of the perils specified in the policy: in other cases, where the law is doubtful, such a statement may be advisable, because the question of law is raised on the record, and the opinion of a higher court may be obtained, if it be desired; a minute statement may also be advisable, because the facts will be admitted in case of payment of money into court. (9)

A loss by barratry is well alleged, though the proof is, that it happened by the act of an enemy and by barratry jointly. (10)

(1) *Carruthers v. Sheddon*, 6 Taunt. 14.

(2) *Cousins v. Nantes*, 3 ibid. 513., sed vide *Kellner v. Le Mesurier*, 4 East, 396. *Craufurd v. Hunter*, 8 T. R. 15. *Nantes v. Thompson*, 2 East, 385.

(3) *Lucena v. Craufurd*, 2 N. R. 309.

(4) *Per Chambre J.* in ibid. If action be founded upon an usage, vide *Hurley v. Milward*, 1 Jones & Carey (Irish), 224., ante, 2207.

(5) *Bell v. Ansley*, 16 East, 141.

(6) *Peppin v. Solomons*, 5 T. R. 496.

(7) *Abitol v. Bristow*, 6 Taunt. 464.

(8) *Cullen v. Butler*, 4 Camp. 289. 1 Stark. 138.

(9) In the case of a double insurance to a full amount, under each policy, the insured can recover to the extent of his loss from either of his insurers; and upon principle it seems, that an action might be maintained by such payee against the unused insurer for a proportionate part.

(10) *Toulmin v. Anderson*, 1 Taunt. 227.

It seems, that if a declaration on a policy of insurance lay the loss by the perils of the seas, the plaintiff may recover upon proof, that the ship was wrecked, although this may have been occasioned by the barratry of the master and mariners. (1)

THE DECLARATION.

As it is not necessary to aver the fact whereby the loss is occasioned (2) in the very words of the policy, provided the fact alleged be within the meaning of these words, in a case where, by the policy, the insurance was against the barratry of the master, and the breach assigned in the declaration was, that the ship was lost by the fraud and neglect of the master, the declaration was holden to be good; for barratry imports fraud, and he who commits a fraud may properly be said to be guilty of neglect, viz. of his duty.

Barratry.

The averment of the amount of loss is not material, provided it be framed in terms sufficiently comprehensive. For a total loss may be given in evidence under an allegation of a partial loss. (3)

AMOUNT OF LOSS.

The damages are severable, and a plaintiff may recover less, though he cannot recover more, than those alleged in the declaration.

Damages severable.

The plaintiff may give in evidence any damages that is "within the cause of action as stated," without its being specially averred. (4)

When an adjustment has taken place, it need not be declared upon specially, but may be given in evidence as an admission. (5)

By Reg Gen. 4 Will. 4. r. 5. "two counts upon the same policy of insurance are not to be allowed. But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed. Two counts on the same charter-party are not to be allowed. But a count for freight upon a charter-party, and for freight *pro rata itineris* upon a contract implied by law, are to be allowed."

Reg. Gen. 4 Will. 4. r. 5. Two counts will not be allowed. Money had and received.

The account stated may be joined, "and there may be several breaches of the same contract."

"Account stated."

17. THE PLEADINGS.

If *assumpsit* be the action instituted, the defendant can plead any plea applicable to that form of action. (6)

THE PLEADINGS.

The same observation will apply to the actions of debt (7) and covenant. (8)

If either the Royal Exchange or London Assurance Companies be defendants, it has been enacted by stat. 11 Geo. 1. c. 30. s. 43. that in all actions of debt against either of the said corporations, or upon any policies of insurance under their common seal, it shall be lawful for them to plead generally, that "they owe nothing to the plaintiff" in such action, and in actions of covenant upon such policies to plead generally that "they have not

Royal Exchange or London Assurance Companies. Stat. 11 Geo. 1. c. 30. s. 43.

(1) *Heyman v. Parish*, 2 Camp. 149.

194. *Christian v. Coombe*, 2 Esp. N. P. C.

(2) *Knight v. Cambridge*, 1 Ld. Raym. 1349. Str. 481. 8 Mod. 290.

489. *De Garraon v. Galbraith*, Park on Insurance, 194. *Sheriff v. Potts*, 5 Esp. N. P. C. 96.

(3) *Gardiner v. Croasdale*, 2 Burr. 904. 1 W. Black. 198.

(6) *Vide antè*, 364—401. tit. ASSUMPSIT.

(4) *Cary v. King*, R. T. H. 304.

(7) *Vide antè*, 1180—1193. tit. DEBT.

(5) *Rogers v. Maylor*, Park on Insurance,

(8) *Vide antè*, 1148—1169. tit. COVENANT.

THE PLEAD-
INGS.

broke the covenant in such policy contained, or any of them." And if issue be joined thereupon, it shall be lawful for the jury, if they see cause to find a verdict for the plaintiff, to give such part only of the sum demanded if it be in debt, or so much in damage if it be in covenant, as it shall appear to them upon the evidence such plaintiff ought in justice to have.

Reg. Gen. H.
T. 4 Will. 4.

Under Reg. Gen. Hilary Term, 4 Will. 4., "in all actions of *assumpsit* the plea of *non assumpsit* shall operate only as a denial, in fact, of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law;" *e. g.* "the plea will operate as a denial of the fact," "in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties."

Unseaworthi-
ness of ship.

A plea to an action on a policy, that the ship became unseaworthy after the voyage commenced, and might have been made seaworthy with reasonable care, was holden insufficient on demurrer, assigning for cause, that it was not averred in the plea, that the loss was in anywise caused by reason of the plaintiff not repairing, amending, or rendering the said ship seaworthy. (1)

Vessel lost by
the wrongful
conduct of the
master.

To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded, that though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wrongful neglect and improper conduct (the same not being barratrous) of the master and mariners of the ship by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing over so much of the ballast, that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury having at the trial found a verdict for the defendant on this issue, it was held, on a motion for judgment *non obstante veredicto*, that the plea was bad, and that the underwriters were liable for the consequences of the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast. (2)

EVIDENCE.

18. EVIDENCE.

THE POLICY.
Must be
stamped.
Signature of
party.

The policy must be produced properly stamped, and proved either by evidence of the defendant's signature or that of his agent; and in the latter case the authority of the agent must also be proved (3), either by the direct evidence of the agent, who is a competent witness for the purpose, or by proof of his handwriting, and evidence, that he is the general agent of the defendant for these purposes, or that he has been specially authorised in the particular instance. (4)

Written au-
thority.

If a written authority have been given, it should be produced and proved. (5)

(1) *Hollingsworth v. Brodrick*, 7 A. & E. 40. A plea stating, that the plaintiff was born out of the ligeance of the king, and that the persons exercising the powers of government in the country where he was born are enemies of the king, is not good: it ought to state, that the plaintiff *himself* is an enemy. *Casseres v. Bell*, Feb. 8. 1799,

B. R., L. P. B. 264; *Dampier's MSS.* Lincoln's Inn Library.

(2) *Dixon v. Sadler*, 5 M. & W. 405. S.C. *anté*, 2123, 2124.

(3) *Johnson v. Mason*, 1 Esp. N. P. C. 89.

(4) 3 Stark. Ev. 3d ed. 866.

(5) *Ibid.*

Proof of authority may also consist in shewing, that the defendant has in other instances recognised the authority of the agent to subscribe policies for him by payment of losses due upon such policies, or that he has admitted the making of the policy in the particular instance, as by paying money into court generally. (1)

Proof of subscription by an authorised agent, will satisfy an allegation of signature by the defendant. (2)

Upon an undertaking to effect an insurance according to special instructions, a part of the duty implied is to give notice to the employer in case of failure, and an actual promise to that effect, though averred in the declaration, need not be proved. (3)

Parol proof of what passed at the time of effecting the policy is inadmissible. (4) Mercantile usage means the general usage of the whole trade in the place where the policy is effected, and not the particular usage of any limited class of persons (5), and is admissible to explain the terms of the policy, but not to add to or vary its stipulations. (6)

The actual possession of a ship by the party in whom the interest is alleged to be, and acts of ownership by him, afford in this, as in other cases, presumptive evidence of title. (7)

Where a ship was purchased in a foreign country, a copy of a bill of sale issued by a public officer, authorised by law to authenticate the original and to make copies, was admitted as evidence of the fact. (8)

It is sometimes necessary to resort to the register, as where the party claims through a transfer under which he has not had actual possession; for then the bill of sale is a medium of proof essential to his title, and that will be of no effect, unless the requisites of the registry acts have been complied with. It is a matter of prudence, although it may not be of strict necessity, to be prepared with such evidence wherever the possession has been of short duration; or of an ambiguous character; or is likely to be encountered by contrary evidence. (9)

Where title is claimed by transfer upon a sale, it is not only necessary to produce and prove the execution of the bill of sale and also the possession of the vessel by the vendors in the usual way, but also to prove, that the requisites of the registry acts (10) have been complied with.

By stat. 6 Geo. 4. c. 110. s. 43. every person shall, on reasonable request made to the collector of the customs, have inspection of all oaths and affidavits made by owners or proprietors, and of registers relative to any ship; and copies being proved to be true copies, shall be receivable in any court of law.

The objects of the registry acts were *aliene* from those of evidence. A register is frequently essential to the communication of a title, and the want of it is in many instances conclusive to disprove a title, but in other respects the instrument is a mere private document, and it has no operation as

EVIDENCE.

Recognition of authority.

Duties of agent in effecting an insurance.

PLAINTIFF'S INTEREST. IN SHIP.

When title claimed by transfer.

Stat. 6 Geo. 4. c. 110. s. 43.

Proof of interest in ship.

Registry acts.

(1) *Barlow v. Leckie*, 4 Moore, 8. *Grant v. Hill*, 4 Taunt. 380. *Neal v. Erving*, 1 Esp. N. P. C. 61.

(2) *Nichleson v. Croft*, 2 Burr. 1188.

(3) *Callander v. Oelrichs*, 5 Bing. N. C. 58.

(4) *Weston v. Ernes*, 1 Taunt. 115.

(5) *Gabay v. Lloyd*, 3 B. & C. 793.

(6) *Vide ante*, 1547—1550. tit. EVIDENCE.

(7) *Abbott on Shipping*, by Shee, 78. *Robertson v. French*, 4 East, 130.

(8) *Woodward v. Larking*, 3 Esp. N. P. C. 286.

(9) 3 Stark. Ev. 3d ed. 868.

(10) Stat. 6 Geo. 4. c. 110.

- EVIDENCE.** evidence, but that which it derives from the general principles of evidence. Proof of a registry of a ship in the name of one or more persons is no evidence for them to prove any interest in them (1), for it amounts to nothing more than their declarations. (2)
- Where the defendant, who was sued as part owner for repairs done to a ship, relied on a previous transfer of his share, and proved a bill of sale of that share to a third person, in which it appeared, that the certificate was not truly recited: — It was held, that no interest passed, and that the defendant was still liable. (3)
- IN GOODS.** Where the interest is on goods, it may be proved by evidence of possession of the goods by the assured or his agent, and by acts of dominion and ownership.
- Bills of sale, &c.** The ownership is also evidenced by bills of sale, bills of parcels, bills of lading, custom-house clearances, &c.; and such documentary evidence of this nature as can be procured, ought to be produced, in proof of the interest as alleged; but a bill of lading is not evidence of the shipment. (4)
- What is a delivery.** Where goods have been ordered by the assured, a delivery to an agent, or on board a ship, according to the directions of the latter, is a delivery to him.
- Bill of parcels from the seller abroad.** The production of a bill of parcels from the seller abroad, with the receipt to it, and proof of the handwriting, has been held to be sufficient proof of the interest of the assured. (5)
- IN FREIGHT.** When the policy is on freight, the insured must prove that, but for the intervention of the perils of the sea insured against, some freight would have been earned, either by shewing, that some goods were put on board, or that there was an inception of the right to freight under the charter-party, or some other express or implied contract. (6)
- PROOF OF LOSS.** The loss accruing by reason of the insured being deprived of the means of carrying his own goods in his own ship, is recoverable under such a policy. (7)
- INCEPTION OF RISK.** Where the insurance is on a particular voyage, it is necessary to prove an inception of the identical voyage. (8)
- This may be done by the testimony of the master or other officer acquainted with the circumstances, or where the ship and crew have been lost by means of written directions, or copies of them transmitted to the master by acts done by him, licenses, charter-parties, entries, clearances, convoy bonds, &c. preparatory to the departure of the vessel, and which indicate her destination. (9)
- Ship warranted to sail.** Where the ship is warranted to sail on a particular day, or before or after a particular day, the plaintiff must prove his compliance with the terms. (10)
- Whether the loss proved, will satisfy the averment, is a question for the court; but the proof must correspond in substance with the averments. (11)

(1) *Pirie v. Anderson*, 4 Taunt. 652. 3 Stark. Ev. 3d ed. 870.

(2) *Flower v. Young*, 3 Camp. 240.

(3) *Westerdell v. Dale*, 7 T. R. 306., vide etiam *Camden v. Anderson*, 5 ibid. 709.

(4) *Dickson v. Lodge*, 1 Stark. 226.

(5) *Russel v. Boheme*, Str. 1127.

(6) *Davidson v. Willasey*, 1 M. & S. 313. *Flint v. Flemmyng*, 1 B. & Ad. 45.

(7) Per Bayley J. in *Flint v. Flemmyng*, 1 B. & Ad. 45.

(8) *Koster v. Innes*, R. & M. 336.

(9) *Cohen v. Hinckley*, 2 Camp. 51.

(10) *Hore v. Whitmore*, Cowp. 784.

(11) *Abitbol v. Bristow*, 6 Taunt. 464.

If it appear, that the loss may be fairly attributed to sea damage, or any other unforeseen misfortune, but yet the insurers mean to allege, that the ship at her departure was not seaworthy, the *onus probandi* will lie on them. (1)

The age of the ship is not of itself any proof of unseaworthiness, but is of weight in evidence. (2)

Upon a question concerning the seaworthiness of a ship, after the evidence of persons who have been examined as to her condition, experienced shipwrights, who never saw her, may be called to say, whether, upon the facts sworn to, she was in their opinion seaworthy or not. (3)

A sentence of condemnation for insufficiency, after a survey by a vice-admiralty court, although received as conclusive to prove the fact of condemnation, was refused as evidence of the facts contained in it, that, from prior defects, unseaworthiness might be presumed. (4)

The evidence of a survey is not conclusive, but only raises a presumption that the vessel was in repair, and it is optional with the insurer to prove the contrary.

If a ship have sailed (5), and no intelligence has been received of her within a reasonable time afterwards, a presumption arises, that she is lost, but the question of loss or no loss belongs to the jury.

In these cases it is advisable to have evidence of some collateral facts which tend to fortify the presumption of loss, such as, that other vessels which sailed at the same time did actually arrive (6), the usual length of the voyage, the difficulty of navigation, the prevalence of tempestuous weather likely to occasion danger.

A foreign sentence of condemnation (7) is not evidence to prove a capture, until a foundation has been laid for it, by proof of a capture in fact; after such proof, the sentence is evidence to shew the grounds of condemnation. (8)

A count on a policy of insurance laying the loss by capture, is sustained by evidence, that the ship was captured by a privateer, although this happened from a collusion between the master of the ship and the commander of the privateer, and the plaintiff might have recovered under a count laying the loss by the barratry of the master. (9)

Lloyd's books are evidence of a capture, but not of notice of a loss to any person in particular, unless it be to a subscriber, but may go, coupled with other evidence, to the jury. (10)

If an insured declare upon a total loss by capture, and after proving a capture shew a recapture, upon which proceedings were had in an admiralty court, he cannot recover without proving the proceedings in the admiralty court under seal, though he only claim the amount of the loss sustained by the salvage proceedings and sale. (11)

EVIDENCE.

When loss or disability can be ascribed to sea damage.

Effect of previous surveys.

Missing ship.

CAPTURE.

(1) Marshall on Insurance, 151.

(2) Watson v. Clark, 1 Dow, 344.

(3) Beckwith v. Sydebotham, 1 Camp. 117.
Thornton v. Royal Exchange Assurance Comp.
Peake's N. P. C. 37.

(4) Wright v. Barnard, Park on Insurance, 610. Marshall on Insurance, 152.

(5) Antè, 2151.

(6) Newby v. Read, Park on Insurance, 106.

(7) Antè, 1653—1657. tit. EVIDENCE.

(8) Marshall v. Parker, 2 Camp. 69.

(9) Arcangelo v. Thompson, ibid. 620.

(10) Abel v. Potts, 3 Esp. N. P. C. 342.,
antè, 1669.

(11) Thellusson v. Shedden, 2 N. R. 228.

EVIDENCE.

If the defendant on a policy would impugn the plaintiff's right to recover for a loss by capture, on the ground, that the condemnation appears by the sentence of a foreign court to have proceeded on the want of certain documents, not required by the law of nations, which the plaintiff ought to have provided, it is for the defendant to shew by evidence, the foreign law or treaty, which renders such documents necessary. (1)

A sentence condemning an enemy's property a cargo, which the master had barratrously carried into an enemy's blockaded port, although it may be conclusive evidence, that the cargo was enemy's property at the time of capture and condemnation, does not disprove the allegation, that the cargo was lost by the captain's barratrously carrying the cargo to places unknown, whereby the goods were confiscated. (2)

In an action by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person who was described in the policy as master, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, is *prima facie* sufficient for the plaintiff to recover, without shewing negatively, that he was not the owner, or that any other person was. (3)

AMOUNT OF LOSS

Where the policy is an open one, it is incumbent on the plaintiff to prove the extent of his loss; and so he must in the case of a valued policy, where the loss is partial (4): but in the case of a valued policy and total loss, proof of the extent of the loss is not necessary, for the object of a valued policy is to supersede all disputes as to value; and if some interest be proven, in order to shew that the case is not within the stat. 19 Geo. 2 it will suffice. (5)

Where no evidence to estimate the amount of loss.

If there be no evidence as to the amount of loss by which the jury can estimate the extent, the plaintiff will be entitled to nominal damages. (6)

Certificate of an agent at Lloyds'.

The certificate of an agent for Lloyd's at a foreign port, ascertaining an average loss on a cargo damaged by sea water, is not of itself admissible evidence as to the amount of the loss in an action by the assured against the underwriter in this country. (7)

ADJUSTMENT.

An adjustment is proved by evidence of the signature of the underwriter, or his agent, with proof of the authority of the latter; and it seems, unless the contrary be proven, that an agent who has authority to subscribe a policy, has also authority to sign an adjustment of loss. (8)

Acknowledgment in policy.

The usual acknowledgment in the policy of the receipt of the premium by the underwriter from the broker, is conclusive evidence of the fact, in an action by the assured to recover the premium. (9)

In an action by the assured against an underwriter for a return of premium, the policy is conclusive evidence of the receipt of the premium by the defendant. (10)

(1) *Le Cheminant v. Pearson*, 4 Taunt. 367.

(2) *Goldschmidt v. Whitmore*, 3 *ibid.* 508.

(3) *Ross v. Hunter*, 4 T. R. 33.

(4) *Gorram v. Sweeting*, 2 Saund. 201. n.

(5) *Lewis v. Rucher*, 2 Burr. 1171. 3 Stark. Ev. 3d ed. 880.

(6) *Tanner v. Bennett*, R. & M. 182., *vide* as to estimating the amount of the loss on freight, *Palmer v. Blackburn*, 1 Bing. 62.; on goods damaged by the sea, *Johnson v. Sheddon*, 2 East, 581., *Langhorn v. Allnutt*, 4

Taunt. 511., *Hurry v. Royal Exchange Assurance Comp.* 3 B. & P. 308., *Thellusson v. Bewick*, 1 Esp. N. P. C. 77.; on ship, *Barclay v. Stirling*, 5 M. & S. 13., *Da Costa v. Newnham*, 2 T. R. 407., *anté*, 2188—2197.

(7) *Drake v. Marryat*, 1 B. & C. 473.

(8) *Richardson v. Anderson*, 1 Camp. 43. 3 Stark. Ev. 3d ed. 882.

(9) *Dalzell v. Mair*, 1 Camp. 532.

(10) *Ibid.*, et *vide De Gaminda v. Pigeon*, 4 Taunt. 246.

Whenever the fixing the fair price and value upon a contract to insure is a matter of skill and judgment, acting according to certain general rules and principles of calculation, applied to the particular circumstances of each individual case, it seems to be a matter of evidence to shew, whether the fact suppressed would have been noticed as a term in the particular calculation. (1)

EVIDENCE.
FRAUD.

The order in which the signatures appear, as subscribed to the policy, is evidence, that the contracts were made with the underwriters in that order. (2)

The defendant is also at liberty, under the general issue, not only to negative, by evidence, the performance of such express conditions and warranties as are precedent to the plaintiff's title to damages, the burden of proving which, by *prima facie* evidence at least, lies on the plaintiff; but he may also shew, that the plaintiff has not performed those conditions, which the law implies. (3)

BREACH OF
WARRANTY

It has been held at Nisi Prius, that a representation made by the broker at the time when the names of the underwriters are put down upon a slip, is binding upon the assured, unless it be qualified or withdrawn before the execution of the policy. (4) But where a ship, at the time of subscribing the slip, was represented to be an American, but at the time of subscribing the policy the goods were insured on board the ship Hermon, and she was not represented to be of any particular country or place:—It was held, that although she was in fact an American, it was not necessary, that she should be documented as such. (5)

Evidence that the ship, when she was free from danger carried a neutral flag, and that the captain addressed himself to the consul of that nation in a foreign port, is *prima facie* sufficient to prove, that the vessel was neutral (6); and proof, that at the time of capture the ship's papers were thrown overboard is evidence to the contrary. (7)

The official letter of the commander of a convoy, or a log book of a man-of-war, is admissible in evidence to prove a compliance with a warranty in sailing with convoy. (8)

DOCUMENTARY
EVIDENCE.
Official letter
from com-
mander of con-
voy.

In an action on a policy of insurance on a voyage from L. a port in this country, to B. a foreign port, it was proved, that the vessel sailed from L. on the voyage, before it was notified in this country, that the port of B. was in a state of blockade; but afterwards, and after the notification of the blockade in the Gazette, put into another port in this kingdom through stress of weather, and continued there for some time, during which the master went to Greenock in Scotland and remained there for five days:—It was held, that the notification in the Gazette was not of itself notice of the blockade, but that the question whether or not the master had actual knowledge of the blockade ought to have been left to the jury. (9)

When notifica-
tions in Gazette
not notice of a
blockade.

Where a license granted under the king's sign manual has been lost, evidence should be given of an examined copy of it from the proper register. (10)

LICENSED VES-
SEL.
License under
the king's sign
manual.

(1) 3 Stark. Ev. 3d ed. 888.

(2) *Maraden v. Reid*, 3 East, 572.

(3) 3 Stark. Ev. 3d ed. 889.

(4) *Edwards v. Footner*, 1 Camp. 530. Park on Insurance, 531.

(5) *Darson v. Atty*, 7 East, 367.

(6) *Arcangelo v. Thompson*, 2 Camp. 620.

(7) *Bernardi v. Motteux*, Doug. 575.

(8) *D'Iraedi v. Jowett*, 1 Esp. N. P. C. 427., *vide ante*, 1642. 1669. tit. EVIDENCE.

(9) *Rhodes v. Hunter*, 2 Hudson & Brooke (Irish), 581.

(10) *Rhind v. Wilkinson*, 2 Taunt. 237.

EVIDENCE.

License by
governor of a
foreign colony.

Where a license, granted by the governor of a foreign colony, has been lost, parol evidence of its contents is admissible. (1)

If a license be to legalise a voyage, which would otherwise be illegal, such license should, if it be in existence, be produced and proved, and shewn to apply to the voyage in question. (2) And where a license is granted, but upon condition, performance of the condition must be proven. (3)

If the original license be in existence, it ought to be produced, as being the best evidence. If it have been lost, after evidence of the loss, proof should be given of an examined copy of the order in the council book, and of the license remaining in the secretary of state's office. (4)

License burnt
at the custom-
house.

If a license to import certain specified articles be burnt at the custom-house, after proof that the custom-house would not permit an entry to be made without an indorsement of the time of clearance upon it, in conformity with the order in council, it will be presumed, that such an indorsement was made upon it. (5)

Insufficient
evidence of loss.

Where the insured vessel was warranted to carry a French license, it was held to be insufficient to shew, that the captain, before the ship sailed from Dantzic, received a document purporting to be a French license, without shewing, that he received it from some person in authority under the French government; but proof, that after the arrival of the vessel at Bourdeaux, she remained there a month after the inspection of the French license and other documents by the officers of the French government, was held to afford *prima facie* evidence that the document was genuine. (6)

Sale of damaged
goods.

Certificate of
consul.

Official report
of an officer of
the customs.

The certificate of a British vice-consul abroad is not admissible to shew, that damaged goods were sold according to the law of the country, under his inspection, in order to prove the amount of the damage. (7)

A copy of an official report of the cargo of a ship, made under legislative authority by an officer of the customs, in whose custody the original is lodged, is, it seems, evidence to prove the shipment of the goods which it specifies. (8)

Protest of the
captain.

A protest made by the captain is not admissible as original evidence, but may be read for the purpose of contradicting his testimony. (9) Where the plaintiff's agent shewed the protest to the defendant, who read it, this, it was held, no more made the instrument admissible evidence for the plaintiff, than a bill in equity would be, which the plaintiff had filed and the defendant had read. (10)

Sentence of
condemnation
for breaking a
blockade.

A plaintiff declared on a policy from Jutland to Leith, and averred a loss by seizure. The captain stated, that the ship was pursuing her course for Leith, when she was captured by a Swedish frigate, five German miles off the coast of Norway; and the defendant produced a Swedish sentence of condemnation for breaking the blockade of Norway:—It was holden, that this was conclusive evidence, of the blockade having been violated. (11)

**COMPETENCY
OF WITNESS.**

One underwriter is a competent witness for another, who has subscribed

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| (1) <i>Kensington v. Inglis</i> , 8 East, 273. | (7) <i>Waldron v. Coombe</i> , 3 Taunt. 162. |
| (2) <i>Barlow v. M'Intosh</i> , 12 ibid. 311. | (8) <i>Flint v. Flemyng</i> , 1 B. & Ad. 48. |
| (3) <i>Camelo v. Britten</i> , 4 B. & A. 184. | (9) <i>Senat v. Porter</i> , 7 T. R. 158. <i>Christian v. Coombe</i> , 2 Esp. N. P. C. 489. |
| (4) <i>Eyre v. Palgrave</i> , 2 Camp. 605. | (10) Ibid. |
| <i>Rhind v. Wilkinson</i> , 2 Taunt. 237., that was under the stat. 48 Geo. 3. c. 126. | (11) <i>Everth v. Haunam</i> , Marshall on Insurance, 527. 6 Taunt. 375. |
| (5) <i>Buller v. Allnutt</i> , 1 Stark. 222. | |
| (6) <i>Everth v. Tunno</i> , ibid. 508. 3 Stark. Ev. 3d ed. 876. | |

the same policy (1), unless he has entered into the consolidation rule, or has paid the loss, upon an agreement, that the amount shall be repaid in case the plaintiff fails in the present cause. (2) If he have paid the loss, a mere subsequent promise to pay him under that contingency will not, it seems, render him incompetent. (3)

EVIDENCE.
Underwriter.

In an action on a policy of insurance on goods, where the only question was, concerning the original destination of the ship, the captain has been considered competent to give evidence for the plaintiff respecting that fact, though he was a part owner of the ship, and as such liable to the owners of the goods in case the ship had unnecessarily deviated from the voyage; but if the question had turned on a deviation, he could not have been examined. (4)

Captain.

The shipment of particular goods on board the ship may be proved by the master, or any other person acquainted with the fact of delivery.

A bill of lading, signed by a deceased master of a ship, is evidence to prove the shipment of the goods specified in the bill of lading, as well as the interest of the consignee. (5)

An agent of an insurance company is competent to prove the usage of the company in effecting assurances. (6)

Agent of an insurance company.
Trustee.

If an action be brought by or against a person as a trustee for another, the person who is substantially interested in the action, though not nominally a party, is incompetent by reason of a direct interest.

Therefore, in an action on a policy of insurance, where the declaration averred, that the policy was made in the names of the plaintiffs as agents for the sole use and benefit of A. and B., who were interested in the goods insured, neither of the persons so interested, is a competent witness for the plaintiffs. (7)

One who was jointly interested in the property at the time of effecting the policy, is not only incompetent on the score of interest, but he is so far to be considered a real party in the suit, although the action be brought in the name of the agent, that his declarations and admissions may be given in evidence by the defendant (8); and where his interest has accrued subsequently to the effecting the policy by his becoming a partner in the goods, he is disqualified as a witness. (9)

Interested witness.

A witness is incompetent to repel a charge of negligence or misconduct, for the consequence of which he himself would, if the verdict were given the other way, be personally liable. The master is not a competent witness for the defendant to disprove a charge of barratry (10); and the owner is not a competent witness for the plaintiff to prove the seaworthiness of the vessel. (11)

The opinions of underwriters, whether, upon certain facts being communicated to them, they would have insured or not the particular voyage, may be received as evidence. (12)

Opinion of underwriters.

(1) *Bent v. Baker*, 3 T. R. 27. *Akers v. Thornton*, 1 Esp. N. P. C. 414.

(2) *Forrester v. Pigou*, 1 M. & S. 14.

(3) *Ibid.*

(4) *De Symonds v. De La Cour*, 2 N. R. 374.

(5) *Haddow v. Parry*, 3 Taunt. 305.

(6) *Quin v. National Assurance Company*, 1 Jones & Carey (Irish), 316.

(7) *Bell v. Smith*, 5 B. & C. 188.

(8) *De Symonds v. Shedden*, 2 B. & P. 155. *Perchard v. Whitmore*, *ibid.* n.

(9) *Ibid.*

(10) *Bird v. Thompson*, 1 Esp. N. P. C. 339.

(11) *Rotheroe v. Elton*, Peake's N. P. C. 117., et vide *Symonds v. De La Cour*, 2 N. R. 374. *Moorish v. Foote*, 2 Moore, 598.

(12) *Richards v. Murdock*, 10 B. & C. 527. S. P. contra *Durrell v. Baderley*, Holt's N. P. C. 283.

DAMAGES —
STATUTE OF
LIMITATIONS —
PAYMENT OF
MONEY INTO
COURT — NEW
TRIAL.

Stat. 3 & 4
Will. 4. c. 42.

STATUTE OF
LIMITATIONS.

Judgment of
Lord Ellen-
borough in
*Hibbert v.
Martin*.

PAYMENT OF
MONEY INTO
COURT.
NEW TRIAL.

19. DAMAGES—STATUTE OF LIMITATIONS—PAYMENT OF MONEY INTO COURT—NEW TRIAL.

By stat. 3 & 4 Will. 4. c. 42. s. 29. "the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the money recoverable in all actions on policies of assurance made after the passing of this act." (1)

Where a plaintiff sued a defendant for damaging his ship by collision, it was held, that the defendant was not entitled to deduct from the amount of damages to be paid by them, a sum of money paid to the plaintiff by the insurers in respect of such damage. (2)

The captain of a ship insured, barratrously carried her out of the course of her voyage, procured her to be condemned in a vice-admiralty court, sold her, and delivered her to the purchaser. In an action on the policy, to which the Statute of (3) Limitations was pleaded, Lord Ellenborough was of opinion, "that the cause of action did not accrue, as the loss did not happen till the master had divested himself of the possession of the ship, by delivering her up to the purchasers;" and therefore, although the barratrous abandonment of the voyage for the purpose of making away with the ship, and fraudulent condemnation had taken place more than six years before the commencement of the action, yet, as the sale and delivery were within six years, the plea did not operate as a bar.

A payment of money into court precludes the defendant from objecting that the averment of interest was not substantiated. (4)

In *Elmslie v. Wildman* (5) it appeared, that a vessel was exposed to the sun while in harbour at Jamaica, where she was loading a cargo of sugars for this country, her timbers shrunk, by which means she became leaky, and the cargo was injured. In an action against an underwriter for an average loss, the jury having given a verdict against him, the court refused to grant a new trial in the absence of a material witness, who would have proved, that the sugars were injured by the leaking of the vessel before she left her loading port. (6)

(1) August 14. 1833.

(2) *Yates v. Whyte*, 4 Bing. N. C. 272.

(3) *Hibbert v. Martin*, 1 Camp. 539.

(4) *Bell v. Ansley*, 16 East, 146.

(5) 2 Moore, 179.

(6) EXECUTION. — In an action against the St. Patrick Insurance Company of Ireland, A., a member of the company having been made nominal defendant, afterwards and before execution assigned all his shares

in the books of the company; and a memorial of his having ceased to hold any share or shares in the company was duly enrolled, pursuant to the provisions of the act in that behalf: — It was held, that he was not liable to execution upon the judgment obtained against him, except under the 8th section of the act regulating the company. *Gray v. Mayne*, 2 Hudson & Brooke (Irish), 147.

LIBEL.

1. GENERALLY, pp. 2221—2224.

Defined — That which tends to injure the feelings or reputation of another, is libellous — *Distinction between publications relating to public and private individuals* — *Judgments of Mr. Baron Parke and Mr. Baron Alderson in Parmiter v. Coupland* — *Observations upon the conduct of another in an illegal transaction* — *Expulsion from a Quaker's society* — *Writings may be libellous, though the scandal be not directly charged* — *Crime of libel arises from its tendency to create a breach of the peace* — CONSTRUCTION OF LIBELS — *The whole writing will be construed in the ordinary meaning of the words* — *When the language is ambiguous* — *Where the tendency of the writing is injurious* — *Where one part of a writing is qualified by another part* — *Where there is no averment respecting the injurious consequences of the publication* — PERSONS HOLDING OFFICIAL SITUATIONS IN FOREIGN COUNTRIES — MEMBERS OF CLUBS AND SOCIETIES — ATTORNEYS — DECEASED PERSONS.

2. PRIVILEGED AND UNPRIVILEGED COMMUNICATIONS, pp. 2225—2228.

Privileged communication defined by Mr. Baron Parke in Wright v. Woodgate — *Judgment of Chief Justice Tindal in Shipley v. Todhunter* — *Judgment of Mr. Justice Parke in Cockayne v. Hodgkinson* — *One person intending to have dealings with another* — *Son-in-law to a mother-in-law* — *Dismissed tradesman imputing dishonesty to his servants* — *Charges injurious to the character of a solicitor* — *Steward* — *Gamekeeper* — *Surveyor* — *Dissenting minister* — UNPRIVILEGED COMMUNICATIONS — *Public officers* — *Postmaster general* — *Governor of a province* — *Officer in the navy* — *Correspondents of a mercantile house* — *Relations of a person to whom a letter is addressed* — *Secretary of a society* — *Superintendent of the works of a railway company* — *To the commissioner of Insolvent Debtors' court*.

3. PROCEEDINGS IN THE HOUSES OF LORDS AND COMMONS, AND COURTS OF JUSTICE, pp. 2228—2231.

4. CRITICS AND EDITORS OF NEWSPAPERS, pp. 2231—2234.

If a critic improperly attack the private character of an author, it is a libel — *Evidence before a coroner's jury* — *Magistrates* — *Theatres and places of public amusement* — *Erroneous criticisms* — *Judgment of Lord Ellenborough in Carr (Sir John) v. Hood* — *Editors of newspapers, civilly as well as criminally responsible for misconduct in conducting their papers* — *Asterisks put instead of the name of the party* — *Libellous paragraph, with the word "Fudge" at the close* — *An advertisement reflecting upon the character of a bankrupt* — *Stating a ship not to be seaworthy* — *Observations upon a candidate for parliament* — *One newspaper charging another with being vulgar or scurrilous* — *When statements of libels in a newspaper respectively form a separate count* — *Where words are actionable, without any extrinsic averment*.

5. THE DECLARATION, pp. 2234—2242.

VENUE — FORM OF ACTION — PARTIES — *Partners* — *Chairman of a joint stock company* — *Husband and wife* — *Alien amy* — *Actions against different proprietors of a newspaper for the same cause of action* — *Joint action against several for publishing or composing a libel* — *When action cannot be maintained against the parties who deliver a libellous publication* — *When misdescription of the name of a company not ground of nonsuit* — INTRODUCTION AND INDUCEMENT — *Declaring upon a libel, when there are several matters alleged as inducement* — *Effect of the words "of and concerning"* — *Where distinct allegation requisite, that the plaintiff was in his profession, trade, or business* — *It must appear, that the libel was composed and published "of and concerning the plaintiff"* — *Setting out the particular matter complained of, without alleging such matter to be of and concerning the plaintiff* — *The libellous matter must be set out in hæc verba* — *Only requisite to set out enough of the libel to comprise the substance of the charge* — *If*

separate passages be set out, they should be described as separate — When index contains per se libellous matter — INNUEENDO — Where an innuendo is requisite — When innuendo not supported by the libels — Where an innuendo does not extend the sense of the words — When the plaintiff will be bound at the trial to shew, that he ascribed to the words the right meaning — When matter sufficiently explained to shew that it was libellous of an attorney in his profession — When statement of extrinsic circumstances need not to be mentioned — Libel in a foreign language — The publication of the libel by the defendant must be stated — Averment of a malicious publication.

6. THE PLEADINGS, pp. 2242—2246.

General issue — PLEA OF JUSTIFICATION — Where the evidence will establish the plaintiff's guilt, or at least his culpable conduct — Where the libellous matter is "true in substance and effect" — When plea defective in purporting to answer the whole declaration, and leaving a part unanswered — Special plea of justification should admit the libel, but should not extend to more than the defendant professes to plead to — Justification that the libellous matter was communicated by a third person, cannot be supported — Publication of proceedings in courts of justice — Publication of words substantially different from those in the declaration — Plaintiff cannot upon the trial, object that a plea of justification is insufficient — Where it cannot be said, that the two libels alleged to be composed and published were one and the same libel — Justification in the words of the libel is insufficient — Issuable facts must be stated — Accord and satisfaction — DEMURREL.

7. THE EVIDENCE, pp. 2246—2256.

Provinces of judge and jury — Judgment of Lord Denman in *Baylis v. Lawrence* — What plaintiff must prove under plea of not guilty — Inducement is admitted, if it be not traversed — Not necessary to prove the truth of averments in the declaration, which accord with statements in the publication — Counsel should not, without evidence, make a particular detail of circumstances — Where possession of an instrument will be assumed, from the statements of counsel — PUBLICATION OF LIBEL — Judgment of Mr. Justice Holroyd in *Rex v. Burdett* — When defendant by his plea admits the publication — Stat. 6 & 7 Will. 4. c. 76. ss. 6. & 8. — Proprietor of a newspaper competent as a witness, in an action against his printer — What a reporter publishes in consequence of what passes with the defendant, is a publication by the defendant — When alterations by an editor of a libellous article, will not discharge the original writer — Sending an article to a newspaper, is evidence of publication — Contents of a placard pasted in the window of a third person, foretelling what will appear in a newspaper — Defendant entitled to have every part of a newspaper read, when put in evidence by the plaintiff — Unstamped newspaper may be given in evidence — PERIODICALS — CARICATURES — LETTERS — PROOF OF HANDWRITING — QUA ANIMO — Libel circulated after issue joined — Identification of the person with the subject of the libel — Evidence of personal malice inadmissible — WHEN JUSTIFICATION PLEADED — WHEN NO JUSTIFICATION PLEADED — DAMAGES — Printing a libel with a view to disprove the imputation of having intended to promulgate it — Other papers which are in themselves liable may be given in evidence — When plaintiff does not prove himself to be a member of the profession in which he is libelled — In a joint action by two partners, damages cannot be given for their private feelings — Proprietor of a newspaper cannot, for the publication of a libel, recover the damages against his editor — Plaintiff entitled to retain his damages, although the jury find that there was no express malice — ADMISSIBLE AND INADMISSIBLE EVIDENCE IN MITIGATION OF DAMAGES.

8. RIGHT OF COUNSEL TO BEGIN AND REPLY — PAYMENT OF MONEY INTO COURT — STATUTE OF LIMITATIONS — ENTRY OF VERDICT — NEW TRIAL — COSTS — ATTACHMENT — JUDGMENT, pp. 2256—2258.

9. CRIMINAL INFORMATION, pp. 2258—2264.

I. GENERALLY, pp. 2258—2262.

Defined — Cases in which permission will be granted to file an information — Denial of charge — Libelling magistrates in the discharge of their duty — Libels in corporation books — Publishing proceedings before commissioners injurious to the character of another — When information will be granted for the protection of the family of a person, to whom individually it would be refused — Information will

not be granted for light or trivial causes — Court will not interfere if applicant have commenced an action against the accused — Giving another into custody, is not such an election of a remedy, as to preclude the party from applying for an information — Information will not be granted, except upon such evidence, as would warrant a grand jury in finding a true bill — Judgment of Lord Denman in *Regina v. Collinridge* — Prosecutor cannot use a statement in the defendant's affidavits, to supply a defect in his own — When rule nisi has been discharged, from the perjury of the defendant's witnesses — Application for an information must be made within a reasonable time.

II. THE AFFIDAVIT, pp. 2262, 2263.

How intitled — Joint information — Substance of affidavit — Affidavits made use of on a former motion, cannot be used in a subsequent stage of the same cause — Impertinent and censurable statements — Prosecutor need not exculpate himself from charges of a general nature — Absence of the statement of the rank of life of the parties, is a substantial defect — Prosecutor need not adopt the statutory mode of proof.

III. FILING INFORMATION — ENFORCEMENT OF APPEARANCE — MAKING DEFAULT — BILL OF EXCEPTIONS — VERDICT — JUDGMENT — COSTS, pp. 2263, 2264.

1. GENERALLY.

GENERALLY.
Defined.

In the case, *De Libellis Famosis* (1), a libel is described as being either in writing, or without writing. A libel in writing is, when an epigram, rhyme, or other writing, is composed or published to the scandal and contumely of another; a libel without writing may be by pictures and signs.

The infamous matter or language does not *per se* make the libel (2), as an action lies for scandalising a man by writing those words, which, if spoken, would not be the subject of prosecution. (3)

With respect to individuals, any thing will be deemed a libel, which tends to injure their feelings or reputations (4); and with respect to the government, any thing is libellous, that tends to hold it up to hatred, contempt, and disesteem.

Thus, it is libellous to publish of a protestant archbishop, that he attempts to convert Roman catholic priests by offers of money and preferment (5); to print in a newspaper a story of an individual, calculated to render him ludicrous, although he may have previously told the same story of himself (6); to publish a writing, in which a party is spoken of in language usually applied to the keeper of a gaming-house, whether the words are capable of being applied by an innuendo to specific charges of unfair practices or not (7); publishing, that a charitable society acknowledged to have received from the defendant a sum of money, "being his moiety of a fine levied from the plaintiff for not discharging his excise duties" (8); charging an overseer with oppressive conduct towards paupers, in compelling them to

That which tends to injure the feelings or reputation of another, is libellous.

(1) 5 Co. 125. (b.)

(2) *Rez v. Beare*, 1 Ld. Raym. 416.

(3) *Austin v. Culpepper*, 2 Show. 313.
Villers v. Monsley, 2 Wils. 403. *King v. Lake*, Hardr. 470. *Leicester (Earl of) v. Walter*, 3 Camp. 214. 2 *ibid.* 251., *sed vide Thorley v. Kerry (Lord)*, 4 Taunt. 355.

(4) *Tuam (Archbishop of) v. Robeson*, 5 Bing. 17.

(5) *Ibid.* 2 M. & P. 32.

(6) *Cook v. Ward*, 6 Bing. 409. 4 M. & P. 99.

(7) *Digby v. Thompson*, 1 N. & M. 485. 4 B. & Ad. 821.

(8) *Stapleton v. Macartney*, Ridg. Lapp, & Scho. (Irish), 90.

GENERALLY.

Churchward-
ens.

receive payment of their weekly parish allowance in orders for flour upon a particular tradesman (1); representing another as an immoral character (2); or being guilty of gross misconduct and insulting females in a barefaced manner (3); or as devoid of remorse or humanity (4); or charging a churchwarden, "that he diverted himself on Sunday, when he ought to be in the house of God," is actionable (5); — in fact, as observed by Chief Justice Wilmot in *Villers v. Monsley* (6), "If any man deliberately or maliciously publishes any thing in writing concerning another, which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher."

Distinction be-
tween publica-
tions relating
to public and
private indi-
viduals.

Judgments of
Mr. Baron
Parke and Mr.
Baron Alder-
son in *Parmiter*
v. Coupland.

In *Parmiter v. Coupland* (7) Mr. Baron Parke observed, "There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men, which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives, is unquestionably libellous;" and Mr. Baron Alderson said, "There certainly is a material distinction between a publication relating to a public and private person, whether they be libels. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual. The same thing might be no libel on one, which might be a very grievous and injurious libel on another."

Observations
upon the con-
duct of another
in an illegal
transaction.

An action cannot be maintained for any thing written against a party concerning his conduct in an illegal transaction (8); or against persons for keeping a public room for pugilistic exhibitions (9); or for representing to a committee for managing a volunteer corps, that one of their members was an unfit and improper person to continue a member. (10)

Expulsion from
a Quaker's
society.

The reasons assigned in the books of a Quaker's society upon an expulsion of one of their members (11); or for charging a member of parliament with want of sincerity — are not actionable. (12)

Member of
parliament ac-
cused of in-
sincerity.

Writings may
be libellous,
though the
scandal be not
directly
charged.

A painting or writing may be libellous, though the scandal be not directly charged but obliquely and ironically. (13) Thus, if a man were to write of J. N., "There is a vast difference between my character and his; I never robbed my master;" or any similar expressions, it would be the same as if he had directly charged J. N. with having robbed his master (14); or if the imputation be conveyed indirectly, or by way of question, or conjecture, or exclamation, or by expressing one or two letters only of a name.

Crime of libel
arises from its

The crime of libel does not arise merely from the scandal, but from the

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|---|---|
| (1) <i>Woodward v. Dowling</i> , 2 M. & R. 74. | (9) <i>Hunt v. Bell</i> , 7 Moore, 112. |
| (2) <i>Twam (Archbishop of) v. Robeson</i> , 5 Bing. 17. 2 M. & P. 32. | (10) <i>Barbaud v. Hookham</i> , 5 Esp. N.P.C. 109. |
| (3) <i>Clement v. Chivis</i> , 9 B. & C. 172. 4 M. & R. 127. | (11) <i>Rex v. Hart</i> , 1 W. Black. 386. |
| (4) <i>Churchill (Lord) v. Hunt</i> , 1 Chitt. 480. | (12) <i>Onslow v. Horne</i> , 2 ibid. 750. 3 Wils. 177. |
| (5) <i>Moore v. Bloxham</i> , cit. 1 Ridg. Lapp, & Scho. (Irish), 91, 92. | (13) <i>Regina v. Drake</i> , Holt, 425. |
| (6) 2 Wils. 403. | (14) <i>Snell v. Webbing</i> , 2 Lev. 150. <i>Ann.</i> 1 Vent. 276. <i>Com. Dig.</i> Action upon the Case for Defamation (E. 8.). |
| (7) 6 M. & W. 108. | |
| (8) <i>Frisarri v. Clement</i> , 3 Bing. 432. 2 C. & P. 223. | |

tendency which it has to occasion a breach of the peace, by making the scandal more public and lasting, and spreading it abroad. (1)

To say one is a dishonest man is not actionable, but to publish such an assertion is (2); or to publish that a man is a swindler (3); or a villain (4); or, that the plaintiff is an itchy old toad. (5)

Respecting the construction of libels, Mr. Justice Buller in *Rex v. Watson* (6) thus expressed himself, "I have never adopted any other rule than that, which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel as men of common understanding, and say, whether, in their minds, it conveys the idea imputed." (7)

The heading prefixed to a paragraph will be read with the rest of it, and the whole taken in the ordinary meaning of the words. (8)

Where the language is ambiguous, and it is doubtful whether it imputes any injurious matter to the plaintiff, the proper question for the jury is, not, whether the intention of the publisher be to injure the plaintiff, but whether the tendency of the matter be injurious to him. (9)

In *Stockley v. Clement* (10) the following advertisement was inserted in a newspaper, "To bill-brokers and others. Caution. Reward. Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26. 1825, and purporting to be drawn by one John Stockley upon and to be accepted by the Dowager Lady P. Turner for 6000*l.* with interest, payable twelve months after date, to the order of the said John Stockley, I do hereby give notice on behalf of the Dowager Lady P. T. that she has not accepted such bill, and that if her name should appear on any such instrument, the same has been forged; or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance on her part of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. Thomas Binns:"—It was held not a libel on Stockley, at least without innuendo and proof, that he was the person designed to be charged with having forged Lady P. Turner's name.

If the tendency of a libel be injurious to the plaintiff, the defendant must be taken to have intended the consequence of his own act. (11)

But in an action on a libel for publishing a handbill, offering a reward for the recovery of certain bills of exchange, and stating that A. B. is suspected of having embezzled them, it is a good defence on the general issue, that the handbill was published solely with a view to the protection of persons liable on the bills, or towards the conviction of the offender. (12)

Evidence is admissible in such a case, that the party publishing the handbill followed it up, by preferring a charge of the same nature against A. B., before a magistrate. (13)

GENERALLY.

tendency to create a breach of the peace.

CONSTRUCTION OF LIBELS.

The whole writing will be construed in the ordinary meaning of the words.

When the language is ambiguous.

Where the tendency of the writing is injurious.

(1) *Thorley v. Kerry* (Lord), 4 Taunt. 355.

(2) *Austin v. Culpeper*, Skin. 124.

(3) *J'Anson v. Stuart*, 1 T. R. 748.

(4) *Bell v. Stone*, 1 B. & P. 331.

(5) *Fillers v. Monsey*, 2 Wils. 403.

(6) 2 T. R. 206.

(7) *Post*, 2246. tit. EVIDENCE, Province of Judge and Jury.

(8) *Harvey v. French*, 2 Tyrw. 585. 1 C. & M. 11. 2 M. & Sc. 591.

(9) *Fisher v. Clement*, 10 B. & C. 472.

(10) 4 Bing. 162. 12 Moore, 376.

(11) *Haire v. Wilson*, 4 M. & R. 605. 9

B. & C. 643.

(12) *Finden v. Westlake*, M. & M. 461.

(13) *Ibid.*

GENERALLY.

When one part of a writing is qualified by another part.

Where there is no averment respecting the injurious consequences of the publication.

PERSONS HOLDING OFFICIAL SITUATIONS IN FOREIGN COUNTRIES.

MEMBERS OF CLUBS AND SOCIETIES

ATTORNEYS.

DECEASED PERSONS.

Though one part of a statement taken alone be injurious to a man's character, if the jury think, that the effect of that part is removed by the other part of the statement, it is not a libel. (1)

A count in an action for libel, charging that the defendant wrote of the plaintiff, that he was a "man Friday" to another, was held bad for want of an averment to show, that, by the term Friday, as applied to the plaintiff, degradation and subserviency were intended to be imputed to him. (2)

To write of a man, that he has been engaged in a gambling fracas, arising out of a dispute at play, is not libellous, without an averment, that illegal gambling and play were intended by the libel. (3)

Writings which tend to degrade, revile, and defame persons in considerable stations of power and dignity in foreign countries, may be proceeded upon as libels, and the writers punished, particularly when such writings have a tendency to interrupt the pacific relations between the two countries. (4)

An official notice, that A. B. and C. D. are excluded from a public society's rooms, is not a libel (5); but the insertion in such a notice, that the plaintiff is a sharper and swindler would make the document libellous. (6)

It has been held to be actionable to state in a letter respecting an attorney, "he will give vexatious and ill counsel, and stir up a suit, and milk your purse, and fill his own large pockets." (7)

Where a letter contained these words, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it: you may think when you have ordered your attorney to write to Mr. B., he would not do any more without your further orders; but if you once set him about it, he will go to any length without further orders:" — It was held, that the jury were properly directed to consider, whether these expressions were meant of the profession in general, or of the plaintiff in particular. (8)

It is no objection to an attorney maintaining an action for a libel, that during the time of the grievances stated in the declaration, he had omitted to take out his certificate as required by the stat. 37 Geo. 3. c. 90. for more than a year, as he might still sue as an attorney for damages in consequence of a libel, imputing improper conduct to him in his character as such. (9)

Publications defamatory of dead persons are libellous, because it tends to stir up others of the same family blood or society to revenge and break the peace by provoking them to vindicate the memory of the deceased, and to wipe off that stain, which the reflections on their ancestors may cast upon them. (10)

(1) *Chalmers v. Payne*, 2 C. M. & R. 156. 1 Gale, 69.

(2) *Forbes v. King*, 1 Dowl. P. C. 672.

(3) *Ibid.*

(4) *Rex v. Pettier*, Holt on Libel, 78. *Rex v. D'Eon*, 1 W. Black. 517.

(5) *Robinson (Clerk) v. Jermy*, 1 Price, 11.

(6) *Goldstein v. Foss*, 2 C. & P. 252. 6 B. & C. 154.

(7) *King v. Lake (Sir Edward)*, 2 Vent. 28., vide etiam *May v. Brown*, 5 B. & C. 113. *Lewis v. Walter*, *ibid.* 138. n.

(8) *Godson v. Home*, 1 B. & B. 7.

(9) *James v. Stevens*, 11 Price, 235.

(10) *Rex v. Topham*, 4 T. R. 127.

2. PRIVILEGED AND UNPRIVILEGED COMMUNICATIONS.

What are privileged communications are questions of fact. (1)

In *Wright v. Woodgate* (2) Mr. Baron Parke observed, "The proper meaning of a 'privileged communication' is only this; that the occasion on which the communication was made, rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove, that there was malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made:"—and it seems, that a privileged communication need not necessarily be in reply to another; it may be original. (3)

In *Shipley v. Todhunter* (4) Chief Justice Tindal said, "A man has a right to communicate to any other any information he is possessed of, in a matter in which they have a mutual interest." "It is a perfectly legal and justifiable object for one to induce another to become a party to a suit as to a subject-matter in which both have an interest. It is not because strong or angry language is used, that a letter is a libel. Persons differ in their expressions. We must go further, and see, not merely whether expressions are angry, but whether they are malicious."

In *Cockayne v. Hodgkinson* (5) Mr. Justice Parke said, "Every wilful unauthorised publication, injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication," and no action will lie for what is thus written, unless the writer be actuated by malice. (6)

If a letter be written confidentially, and under an impression, that its statements were well founded, an action cannot be maintained (7): thus, a petition addressed by a creditor of an officer in the army to the secretary at war, with a view of obtaining through his interference the payment of a debt due, containing a statement of facts, which, though injurious to the officer's character, the creditor believed to be true, is not a malicious libel. (8)

If A. intending to have dealings with B. make inquiries of C., who gives A. information respecting B., this is a privileged communication. (9)

A letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication. (10)

If B., a tradesman, be dismissed from serving A., because B. charged for goods never delivered, and B. after this, write a letter to A. vindicating

PRIVILEGED
AND UNPRIVILEGED COMMUNICATIONS.

Privileged communication defined by Mr. Baron Parke in *Wright v. Woodgate*.

Judgment of Chief Justice Tindal in *Shipley v. Todhunter*.

Judgment of Mr. Justice Parke in *Cockayne v. Hodgkinson*.

One person intending to have dealings with another.

Son-in-law to a mother-in-law.

Dismissed tradesman imputing dis-

(1) *Blackburn v. Blackburn*, 4 Bing. 395. 3 C. & P. 146.

(2) 2 C. M. & R. 573. 1 Tyrw. & G. 12.

(3) *Ahern v. Maguire*, 1 Armstrong & Macartney (Irish), 39.

(4) 7 C. & P. 680.

(5) 5 *ibid.* 543.

(6) Vide etiam *Clanchy v. Cahill*, 2 Smith & Batty (Irish), 233.

(7) *McDougall v. Claridge*, 1 Camp. 267. *Dunman v. Bigg*, *ibid.* n. 1.

(8) *Fairman v. Ives*, 5 B. & A. 642.

Harwood v. Green, 3 C. & P. 141.

(9) *Storey v. Challands*, 8 C. & P. 234.

(10) *Todd v. Hawkins*, 2 M. & Rob. 20. 8 C. & P. 88.

**PRIVILEGED
AND UNPRIVILEGED COMMUNICATIONS.**

honesty to his servants.

Charges injurious to the character of a solicitor,

steward,

gamekeeper,

surveyor,

or dissenting minister.

UNPRIVILEGED COMMUNICATIONS.

himself, and imputing the dishonesty to a servant of A., this is a privileged communication. (1)

A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns, with which they had intrusted him, and in which B., the writer of the letter, was likewise interested, cannot be considered as a libel, and made the subject of an action for damages. (2)

The defendant was a solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend (who was liable for the costs of the suit), dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer, to whom the plaintiff had been apprenticed, had made him a present of his indentures, because he was worse than useless in his office :— It was held, that this was a privileged communication. (3)

A letter written confidentially to B., who employed the plaintiff as steward of his estates, to inform him of certain supposed malpractices on the part of the plaintiff, was holden not to be actionable (4); — the writer being interested in the proper management of the property.

A., being tenant of B., was desired by B. to inform him, if he saw or heard any thing respecting the game. A. wrote a letter to B. informing B. that his gamekeeper sold game: this was held to be a privileged communication. (5)

If the surveyor to a society, which publishes an account of the different classes of ships for the information of merchants, underwriters, &c., is requested by a shipowner to survey his ship and does so in consequence, and makes a report to the society, who class the vessel according to his report, such shipowner cannot maintain an action against the members of the society for a libel in misdescribing the ship; nor against the surveyor, unless he made a false report. (6)

Communications made to a member of a dissenting congregation, respecting an individual about to be appointed a minister of that congregation, are privileged communications, and cannot be made the subject of an action by such individual (7)

But if, in consequence of those communications, a printed circular be sent round, containing contradictions of them, and reflecting on the motives of the party who made them, and such party afterwards write a letter, and send it to the writer of the circular, in which, after repeating the communications, he adds other statements, which he acknowledges he cannot prove, such letter is not privileged, but will make him liable in damages, though it be specially found by a jury, that he was not actuated by express malice.

Though it may be the duty of all persons to give information to her majesty's proper officers concerning abuses, yet, if one write of another in a letter to such officers, that he is doing something to the prejudice of her

(1) *Coward v. Wellington*, 7 C. & P. 531.

(2) *McDougall v. Claridge*, 1 Camp. 267.

(3) *Wright v. Woodgate*, 2 C. M. & R. 573.

(4) *Cleaver v. Sarraude*, cit. 1 Camp. 268.

(5) *Cochayne v. Hodgkinson*, 5 C. & P.

543. Under such facts the defendant may give in evidence representations made to

him as to the conduct of the gamekeeper but cannot go into evidence of acts done by the gamekeeper. Ibid.

(6) *Kerr v. Shedden*, 4 C. & P. 528. *quæritur* Whether such an action be maintainable without evidence of express malice?

(7) *Blackburn v. Blackburn*, 4 Bing. 335.

majesty's service which is not true, this is sufficient evidence of a malicious intention; and where no excuse is set up by the defendant, the jury may find him guilty, though there be no other publication, and no further proof of malice. But what constitutes a malicious publication is, as previously stated, for the jury to determine. (1)

PRIVILEGED
AND UNPRIVILEGED COMMUNICATIONS.

A letter written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication (2); but if *bond fide* made, and without malice, such communication is not actionable as libellous, though the charges may not be true. (3)

Communications to public officers.

A letter written to the postmaster general, or to the secretary to the general post office, complaining of misconduct in a postmaster, is not a libel, if it be written as a *bond fide* complaint to obtain redress for a grievance, that the party really believed he had suffered; and "particular expressions ought not to be too strictly scrutinised, provided the intention of the defendant was good." (4)

Postmaster general.

The delivery of a pamphlet by the governor of a distant province to his attorney general, not for any public purpose, but in order that he might peruse it, is such a publication as will make him responsible in an action, if the pamphlet be a libel. (5)

Governor of a province.

An officer in the navy has no right to make communications upon subjects with which he becomes acquainted in his professional capacity, except to the government; and therefore, a letter written to Lloyd's coffee-house about the conduct of the captain of a transport ship, by a lieutenant who was superintendent on board, is not a privileged communication. (6) Nor can evidence of its being the practice for persons so circumstanced to make communications to Lloyd's be received in an action for libel against such a person, either as furnishing a defence in conjunction with other circumstances, or in mitigation of the damages to be recovered. (7)

Officer in the navy.

If a letter, written confidentially by the correspondents of a foreign mercantile house, contain very strong expressions concerning third persons engaged in mercantile transactions, and imputing to them "notoriety for every thing but fair dealing, and a strict adherence to their engagements," those expressions will take away the privilege which would often attach to such a communication, and make the letter a libel. (8)

Correspondents of a mercantile house.

Where a letter was sent by B. to C., the manager of a property in Scotland, in which A. and B. were jointly interested, principally about the property and the conduct of A. respecting it, but which also contained a passage reflecting on the conduct of A. to his mother and aunt: — It was held, that the latter part could not be privileged as a confidential communication. (9)

Relations of a person to whom a letter is addressed.

Where the plaintiff, the defendant, and one Atthill, were jointly interested in certain property. In reply to a letter from Atthill (which was not produced, and the contents of which did not transpire), the defendant wrote to Atthill respecting such property, and the letter contained reflections on

(1) *Robinson v. May*, 2 Smith, 3.

(6) *Harwood v. Green*, 3 C. & P. 141.

(2) *Blake v. Filfold*, 1 M. & Rob. 198.

(7) *Ibid.*

(3) *Ibid.*

(8) *Ward v. Smith*, 6 Bing. 749. 4 M.

(4) *Per Alderson B. in Woodward v. Lan-
der (Clerk)*, 6 C. & P. 548.

& P. 595. 4 C. & P. 302.

(9) *Warren v. Warren*, 4 Tyrw. 850. 1

(5) *Wyllatt v. Gore*, Holt's N. P. C. 299. C. M. & R. 150.

PRIVILEGED
AND UNPRIVILEGED COMMUNICATIONS.

Secretary of a
society.

plaintiff's conduct towards his own brother, and on his character in other respects : — It was held, that the letter was not confidential and privileged, as there was nothing to shew, that it was written in reply to an inquiry concerning the plaintiff's character. (1)

A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transactions, is not a privileged communication (2) ; but it seems, that if such letter state particular facts, it will not be a libel, though some of the persons receiving it believed, that it was sent to intimate, that the parties mentioned in it, were common sharpers and swindlers. But it is otherwise, if the letter contain a general statement, such as that the party mentioned in it, is considered as an improper person to be ballotted for as a member of the society. (3) At all events, it is a question for the jury, whether the society really and *bonâ fide* intended to give the particular information, which the letter contains.

Superintendent
of the works
of a railway
company.

A. was engaged to superintend the works of a railway company, and subsequently at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the commissioners for the improvement of the river Wear, and A. became a candidate. B. wrote to C., introducing D. as a candidate, and C., having written to B., informing him, that another person had succeeded in obtaining the appointment, B. wrote an answer to C. reflecting on the conduct of A. whilst in the situation of engineer to the railway company. There was a subsequent election, at which A. was unsuccessful, in consequence of this letter having been shewn. It appeared, that B. and C. were both shareholders in the railway company, and that B. managed C.'s affairs in the railway. B. had not been applied to for his opinion, and the letter containing the libel was written after the termination of one election, and before the other was in contemplation : — It was held, in an action by A. against B. for the libel, that the letter was not a privileged communication. (4)

Commissioner
of insolvent
debtors' court.

A letter written by an opposing creditor to the chief commissioner of the insolvent debtors' court, previously to the hearing of an insolvent's case, is not a privileged communication. (5)

PROCEEDINGS
IN THE HOUSES
OF LORDS AND
COMMONS, AND
COURTS OF
JUSTICE.

Stat. 3 & 4
Vict. c. 9.

3. PROCEEDINGS IN THE HOUSES OF LORDS AND COMMONS, AND
COURTS OF JUSTICE.

By stat. 3 & 4 Vict. c. 9. all proceedings, criminal or civil, against any person for the publication of any report, paper, votes, or proceedings, under the authority of either house of parliament, can be stayed, by bringing before the court or judge a certificate, under the hand of the lord chancellor, &c., or of the speaker of the House of Commons, &c., to the effect, that such

(1) *Ahern v. Maguire*, 1 Armstrong & Macartney (Irish), 39.

(2) *Getling v. Foss*, 3 C. & P. 160.

(3) *Ibid.* In such a case a witness cannot be asked what he understands by finding a person's name inserted in such a circular ; but he may be asked, whether there is any

meaning in such a circular, beyond what appears on the face of it? *Humphreys v. Miller*, 4 *ibid.* 7.

(4) *Brooks v. Blanshard*, 1 C. & M. 773. 9 Tyrw. 844.

(5) *Gould v. Hulme*, 3 C. & P. 625.

publication was made by order of either house of parliament, together with an affidavit verifying such certificate.(1)

PROCEEDINGS
IN THE HOUSES
OF LORDS AND
COMMONS, AND
COURTS OF
JUSTICE.

If a member of parliament publish in the newspapers his speech as delivered in parliament, and it contain charges of a slanderous nature against an individual, an information will lie for a libel, though, had the words been merely delivered in parliament, they would have been punishable in the courts at Westminster.(2) And although the speech be published for the purpose of correcting a misrepresentation, it will not render the author less amenable to the law in respect of the publication.(3)

If a petition to parliament be referred to a committee, an action will not lie for printing and publishing a number of copies for the use of the members, although the matter therein contained be false and scandalous.(4)

Whether a petition to parliament on matters of general importance is such a publication, as renders the petitioner an object of fair criticism and comment, has been questioned.(5)

Allegations and avèrments introduced in proceedings in a regular course of justice cannot be deemed libellous(6); but to secure this species of protection for objectionable matter, it must appear, that the proceedings were instituted in a court of competent jurisdiction.(7)

COURTS OF
JUSTICE.

Lord Ellenborough in *Stiles v. Nokes* (8) stated, "It must not be taken for granted, that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable; but that doctrine must be taken with grains of allowance."

Judgment of
Lord Ellen-
borough in
Stiles v. Nokes.

A publication of proceedings in a court of justice cannot be justified, if it contain disparaging observations made by any other than one whose duty called upon him to make them; and it is no justification of such a publication to plead, that the proceedings in question took place, unless it be also alleged, that the charges made were true, or that the publication is a true and full account of the proceedings.(9)

Disparaging
observations
must be made
only by those
who have a
right to make
them.

It is not lawful to publish even a correct account of the proceedings of a court of justice, if such account contain matter of a scandalous, blasphemous, or indecent nature.(10)

Judicial pro-
ceedings in
matters of a
scandalous and
indecent nature.

So, it would seem, if it contain matter defamatory of a third person, who is neither a party to the suit, nor present at the time of the inquiry.(11)

It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions, upon what passed in court, which contained an insinuation, that the plaintiff had committed

Highly co-
loured account
of judicial pro-
ceedings.

(1) Previously to the passing of the above statute, it was held to be no defence in law to an action that the defamatory matter was part of a document which was by order of the House of Commons laid before the House, and thereupon became a part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published. *Stockdale v. Hansard*, 9 A. & E. 1. 2 M. & Rob. 9. 8 Dowl. P. C. 148.

(2) *Rex v. Abingdon (Lord)*, 1 Esp. N. P. C. 226.

(3) *Rex v. Creevey*, 1 M. & S. 273.

(4) Stat. 3 & 4. Vict. c. 9. *Lake v.*

King, 1 Mod. 58, 59. 2 Keb. 361., vide etiam *Rex v. Wright*, 8 T. R. 293. *Curry v. Walter*, 1 B. & P. 525. 1 Esp. N. P. C. 457.

(5) *Dunne v. Anderson*, 3 Bing. 88. 10 Moore, 407. R. & M. 287.

(6) *Wood v. Buckley (Sir Richard)*, 4 Co. 14. (b.) Cro. Eliz. 230. 247. 1 Saund. 131. (b.)

(7) *Wood v. Buckley (Sir Richard)*, 4 Co. 14. (b.)

(8) 7 East, 503., vide post, 2224.

(9) *Delegall v. Highley*, 3 Bing. N. C. 950. 8 C. & P. 444.

(10) *Rex v. Carlile*, 3 B. & A. 167.

(11) *Lewis v. Clement* ibid. 702.

PROCEEDINGS
IN THE HOUSES
OF LORDS AND
COMMONS, AND
COURTS OF
JUSTICE.

perjury (1); and it is no justification to such an insinuation of perjury against the plaintiff (who had sworn to an assault by A. B. on him), that it did appear (which was the suggestion in the libel) "from the testimony of every person in the room, &c. except the plaintiff," that no violence had been used by A. B. &c.; for *non constat* thereby, that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account, as to make it uncertain, whether it could be separated, to justify the publication by general reference to "such parts of the supposed libel as purport to contain an account of the trial, &c.;" and that the said parts contain a just and faithful account of the trial, &c. (2)

To justify the publication of judicial proceedings, the report must be a fair and accurate statement of facts.

In order to justify the publication of a report of a cause tried in a court of justice, the report must contain a fair and accurate statement of what took place at the trial. A mere statement by counsel in his opening to the jury, unsupported by evidence, is not a fair and impartial report (3); "for," as observed by Mr. Justice Park in *Roberts v. Brown* (4), "it does not follow, that because a counsel is privileged as to what he delivers in a court of justice, a publisher may circulate his expressions all over the kingdom in a printed paper."

A declaration, in stating a libel which purported to be a speech of counsel at a trial of the plaintiff on an indictment for a conspiracy, after setting out the speech of the counsel for the prosecution, which in part contained the libel, proceeded to state, that the first witness who was called, proved all that had been stated by such counsel, and that the defendant was acquitted, such witness not being enabled to prove a mere matter of form. To this it was pleaded, that such a speech was made at the trial, and that the witness called, proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech:—the plea was held bad, as a party cannot be justified in publishing the result of evidence given in a court of justice, but the evidence itself must be stated. (5)

It seems, that although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shewn, that it was published for the purpose of giving the public information, which it was fit and proper for them to receive, and that it was warranted by the evidence (6); and a plea, to an action for a libel, purporting to be the report of a trial, "that the alleged libel was in substance a true report of the trial," was held bad on demurrer. (7)

Matter dis-
creditable to an
attorney.

An account published in a newspaper of proceedings in a court of law, containing matter redounding to the discredit of a person in his business of an attorney, is, whether true or false, rendered actionable as libellous by the paragraph being headed or introduced with the line, "Shameful conduct of an attorney." (8)

(1) *Stiles v. Nokes*, 7 East, 493. S. C. nom. *Carr v. Jones*, 3 Smith, 491. 503.

(2) *Ibid.*

(3) *Saunders v. Mills*, 3 M. & P. 520. 6 Bing. 213.

(4) 10 Bing. 525. 4 M. & Sc. 407.

(5) *Lewis v. Walter*, 4 B. & A. 605.

(6) *Flint v. Pike*, 6 D. & R. 528. 4 B. & C. 473.

(7) *Ibid.* *Quare*, Whether the public-

ation of *ex parte* proceedings in the court of King's Bench is allowable by law? *Dumas v. Thwaites*, 5 D. & R. 447. 3 B. & C. 536. *Lewis v. Clement*, 3 B. & A. 702. S. C. nom. *Clement v. Lewis (in error)*, 7 Moore, 200. 3 B. & B. 297.

(8) *Ibid.* Pleas of justification, averring that the supposed libel was a true report of such proceedings, were therefore held bad.

Slanderous expressions used either in an affidavit in a cause in Chancery (1), or in a sentence of a court-martial (2), cannot be viewed as libellous.

PROCEEDINGS
IN THE HOUSES
OF LORDS AND
COMMONS, AND
COURTS OF
JUSTICE.

Bills in Chan-
cery.

In *Malacky v. Soper* (3) it appeared, that the plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery, to which the plaintiff had demurred:—It was held, that, without alleging special damage, the plaintiff could not sue the defendant for falsely publishing, that the demurrer had been overruled, that the prayer of the petition (for the appointment of a receiver) had been granted, and that persons duly authorised had arrived at the mine.

A court of general gaol delivery has power to make an order to prohibit the publication of proceedings pending a trial likely to continue for several days, and to punish disobedience to such order by fine. (4)

Court of gaol
delivery can
imprison for a
publication of
its proceeding.
COURTS-MAR-
TIAL.

If a court-martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion, that the charge is malicious and groundless, and that the conduct of the prosecutor, in falsely calumniating the accused, is highly injurious to the service, the president of the court-martial is not liable to an action of libel for having delivered such sentence and declaration to the judge advocate. (5)

Where the commander in chief directed a military inquiry to be held, to investigate the conduct of a commissioned officer in the army, who afterwards sued the president of such court of inquiry for a libel stated to be contained in his report, and transmitted by him to the commander in chief:—It was held, that such a report was a privileged communication, and properly rejected as evidence at the trial, and that an office copy thereof was also inadmissible. (6)

An order to a governor abroad to dismiss an officer, does not therefore authorise his publishing the grounds of his dismissal. (7)

4. CRITICS; AND EDITORS OF NEWSPAPERS.

If a critic in criticising a work goes out of his way to attack the private character of the author, this is a libel. (8)

Publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, is a libel. (9)

And it is libellous and a misdemeanour to publish the depositions taken by a magistrate before the party is tried. (10)

It is not within the limits of privileged criticism to print of an exhibitor of flowers, in observations touching the exhibition, "the name of G. is to

CRITICS; AND
EDITORS OF
NEWSPAPERS.

If a critic im-
properly attack
the private
character of an
author, it is a
libel.

Evidence be-
fore a coroner's
jury.

MAGISTRATES.

(1) *Dawling v. Wenman*, 2 Show. 446.
Boulton v. Clapham, Sir W. Jones, 431.

(2) *Jekyll v. Moore* (Sir John), 2 N. R. 341.
6 Esp. N. P. C. 63. *Warden v. Bailey*, 4
Taunt. 67.

(3) 3 Bing. N. C. 371.

(4) *Rex v. Clement*, 11 Price, 68.

(5) *Jekyll v. Moore* (Sir John), 2 N. R.
341. 6 Esp. N. P. C. 63., et vide *Warden*
v. Bailey, 4 Taunt. 67. 4 M. & S. 400.

(6) *Home v. Bentinck* (Lord), 4 Moore,
563. 2 B. & B. 130.

(7) *Oliver v. Bentinck* (Lord), 3 Taunt.
456.

(8) *Fraser v. Berkeley* (Hon. G.), 7 C. &
P. 621.

(9) *Rex v. Hunt*, 31 Howell's St. Tr.
375.

(10) *Rex v. Lee*, 5 Esp. N. P. C. 123.
Rex v. Fisher, 2 Camp. 563.

CRITICS; AND
EDITORS OF
NEWSPAPERS.

be rendered famous in all sorts of dirty work; the tricks by which he and a few like him, used to secure prizes, seem to have been broken in upon by some judges, more honest than usual. If G. be the same man who wrote an impudent letter to the metropolitan society, he is too worthless to notice; if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase." (1)

Theatres and
places of public
amusement.

In *Dibdin v. Swan* (2) Lord Kenyon stated, "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly and without malice, or view to injure or prejudice the proprietor in the eyes of the public. That, if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and therefore actionable."

The proprietor of a public amusement cannot maintain an action against a man for a libel on one of his performers, by reason whereof, she was deterred from appearing on the stage. (3)

Erroneous
criticism.

A fair, reasonable, and temperate, though erroneous, criticism of works of art, not written for the purpose of hurting the plaintiff in his profession, is not a libel (4); and it is not libellous to ridicule a literary composition, or the author of it, so far as he has embodied himself with his work (5); Lord Ellenborough in *Carr (Sir John) v. Hood* (6) having thus expressed himself, "We really must not cramp observations upon authors and their works; they should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflecting on personal character is another thing; show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot bear of malice on account of turning his works into ridicule."

Judgment of
Lord Ellen-
borough in
Carr (Sir John)
v. Hood.

In *Cooper v. Lawson* (7) the alleged libel stated, that the plaintiff, a tradesman in London, became security for the petitioner on the Berwick election petition, and stated himself, on oath, to be sufficiently qualified in point of property, when he was not in fact qualified or able to pay his debts. It then asked, why the plaintiff, being unconnected with the borough, should take so much trouble and incur such an exposure of his embarrassments? and proceeded, "there can be but one answer to these very natural and reasonable queries—he is hired for the occasion." The defendant justified, stating, that the above-mentioned allegations in the libel (except the hiring, which was not specifically noticed) were true, and that the publication was a correct report of proceedings in a legal court, together with a fair and *bona fide* commentary thereon. Replication *de injuriâ*; issue thereon:—It was held, that the concluding observation in the libel, not being a mere inference from the previous statement, but introducing a substantive fact, required a distinct qualification; and therefore, that on trial of the above

(1) *Green v. Chapman*, 4 Bing. N. C. 92.

(2) 1 Esp. N. P. C. 28. *Thompson v. Shackell*, M. & M. 187.

(3) *Ashley v. Harrison*, Peake's N. P. C. 256. 1 Esp. N. P. C. 48.

(4) *Soane v. Knight*, M. & M. 74.

(5) *Macleod v. Wakley*, 3 C. & P. 311.

(6) 1 Camp. 355.

(7) 8 A. & E. 746.

issue, it was properly left to the jury to say, not only whether the evidence made out the facts first alleged, but also whether the imputation, that the plaintiff had been hired, was a fair comment.

CRITICS; AND
EDITORS OF
NEWSPAPERS.

The plaintiff, a surgeon and proprietor of a medical institution, having petitioned the House of Commons against quacks and empirics; the defendant, the proprietor of a periodical publication, in commenting upon and criticising the plaintiff's petition, used expressions charging him with ignorance of his profession generally, and of chemistry in particular. The plaintiff sued the defendant, and declared against him for libelling him in his profession of a surgeon; and the jury were directed, that if they thought the writing complained of to be no more than a fair comment on the petition, it was no libel; and that they were to consider, whether the publication imputed to the plaintiff ignorance in his profession of a surgeon, or merely ignorance of chemistry; and that if they thought the latter, their verdict must be for the defendant. The jury having accordingly found a verdict for him, the court granted a new trial. (1)

Criticism upon
a surgeon's
petition to the
House of Com-
mons.

The proprietor of a newspaper is answerable criminally, as well as civilly, for misconduct in the conducting of the paper, *e. g.* for the publication of a libel, though he has nothing to do with the publication, and the whole is conducted by his servants. (2)

EDITORS OF
NEWSPAPERS.
Civilly as well
as criminally
responsible for
misconduct in
conducting
their papers.

If the printer and the editor of a magazine be sued for a libellous article contained in it, they are both liable for a libellous lithographic print which is contained in the work, though it was not printed by the printer, provided that the print is referred to in the letter-press part of the libellous article. (3)

The editor of a public newspaper is not justified in calumnious attacks on the private character of the writer of another. (4)

If in a libel, asterisks, or one or two letters of a name be put instead of the name of the party libelled, to make it actionable, it is sufficient, that the party should be so designated, that those who know the plaintiff may understand, that he is the person meant; and it is not necessary, that all the world should understand it. (5)

Asterisks put
instead of the
name of the
party.

Where one newspaper copied a libellous paragraph from another, adding the word "Fudge" at the close:—It was held, in an action by the party libelled, against the publisher of the paper in which the word "Fudge" was added, that it was for the jury to say, whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument, in case proceedings should be afterwards taken. (6)

Libellous para-
graph, with the
word "Fudge"
at the close.

An advertisement in a public newspaper, strongly reflecting upon the character of an individual, who has been declared bankrupt is libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been obtained by means less injurious. (7)

An advertise-
ment reflecting
upon the cha-
racter of a
bankrupt.

(1) *Dunne v. Anderson*, 3 Bing. 88. R. & M. 287.

(2) *Rex v. Walter*, 3 Esp. N. P. C. 21.

(3) *Watts v. Fraser*, 7 C. & P. 369.

(4) *Stuart v. Lovell*, 2 Stark. 93.

(5) But if witnesses, who state that they understand that the plaintiff is the person,

also say that they were enabled so to understand by the perusal of another libel, with which the defendant had no concern, their evidence ought to be laid out of the case. *Bourke v. Warren*, 2 C. & P. 307.

(6) *Hunt v. Algar*, 6 *ibid.* 245.

(7) *Brown v. Croome*, 2 Stark. 297.

CRITICS; AND
EDITORS OF
NEWSPAPERS.

Stating a ship
not to be sea-
worthy.

Observations
upon a candi-
date for parlia-
ment.

One newspaper
charging an-
other with
being vulgar
or scurrilous.

When state-
ments of libels
in a newspaper,
respectively
form a separate
count.

Where lan-
guage action-
able without
any extrinsic
avertment.

A statement in a newspaper, that a ship of which plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts; — was held to be a libel on the plaintiff in his trade and business, for which he might recover damages, without proof of malice or allegation of special damage. (1)

A. offered himself as a candidate to represent a place in parliament; B, a voter for that place, published in a newspaper statements of A. reflecting on his character: — It was held, that the facts that A. was a candidate and B. a voter, did not bring the case within the rules respecting privileged publications. (2)

A paragraph in one newspaper, charging another with being vulgar or scurrilous, is not actionable; but *aliter*, where it asserts it to be low in circulation, as addressed to persons who are disposed to advertise in it. (3)

The plaintiff declared against the proprietor of a newspaper for libels contained in successive numbers of the paper, referring to the same subject-matter and to each other. The declaration stated in the commencement, the occasion on which the first libel was published, and set it out; it then proceeded: — “And the defendant afterwards, to wit, on &c. further contriving and intending as aforesaid, in a certain other number of the said newspaper, called &c., published of and concerning the plaintiff, &c. a certain other false, &c. libel, that is to say” (setting it out); two other subsequent libellous paragraphs were afterwards introduced, and set out in like manner: — It was held, that each of these statements was a separate count.

One of the paragraphs was as follows: — “We again assert the cases formerly put by us on record. We assert them against A. S. and A. H. (the plaintiff). We again assert they are such as no gentleman or honest man would resort to:” — It was held, that these words imported a charge of misconduct against the plaintiff, not merely an assertion in contradiction of him, and therefore were actionable without the aid of any extrinsic avertment. (4)

THE DECLAR-
ATION.

VENUE.

This is a transitory action, and consequently the venue may be laid in any county.

But the venue may be changed to that county, where the writing and publication were made (5); or, if the libel be forwarded out of England in a letter, the venue may be changed into that county, in which the letter was written. (6)

FORM OF AC-
TION.PARTIES.
Partners.

The form of action for a libel is an action of trespass on the case.

Partners may join in an action for slander, or for a libel spoken or published of them in the way of their trade (7); and persons in partnership as bankers may, without shewing the proportion of their respective shares,

5. THE DECLARATION.

(1) *Ingram v. Lawson*, 6 Bing. N. C. 212.
vide etiam 5 *ibid.* 66.

(2) *Duncombe v. Daniell*, 8 C. & P. 222.

(3) *Heriot v. Stuart*, 1 Esp. N. P. C. 437.

(4) *Hughes v. Rees*, 4 M. & W. 204.

(5) *Pinkney v. Collins*, 1 T. R. 571.
Freeman v. Norris, 3 *ibid.* 306.

(6) *Metcalfe v. Markham*, *ibid.* 652.

(7) *Forster v. Lawson*, 11 Moore, 360.
3 Bing. 452.

join in an action for a libel against them in respect of their business (1):— **THE DECLARATION.**
But it seems, that they should aver special damage. (2)

Where an act of parliament, after reciting the difficulties experienced by joint stock companies in suits for recovering debts and enforcing obligations, and in the prosecution of offenders, enacted, that actions commenced by the Hope Company for recovering debts, enforcing claims or demands then due, or which thereafter might become due or arise to the company, might be commenced, and indictments for offences be preferred, in the name of the chairman:—It was held, that the chairman might sue for a libel on the company, although it was not a corporate body. (3) **Chairman of a joint stock company.**

In libel the husband and wife should join, if the action be brought for the personal suffering or injury to the wife; and in such case the declaration ought to conclude to their damage, and not to that of the husband alone, for the damages will survive to the wife, if the husband die, before they are recovered (4); but where the libel occasions special damage to the husband, he must sue alone. (5) **Husband and wife.**

If a wife be living apart from her husband, as a servant in the family of A., and so maintaining herself, and she be dismissed from the service by A., in consequence of a letter written by B. reflecting on her character, her husband may maintain an action for special damage (6); but if A. dismissed her colourably, intending to take her back again, the action will not lie. (7) **Wife living apart from her husband as a servant.**

For a libel published by a woman before marriage the husband and wife must be jointly sued, and they must also be jointly sued, when the wife publishes a libel during coverture (8); but the plaintiff cannot in the same action proceed for libel committed by the husband alone (9); nor can the husband and wife be sued jointly for libel by both. (10)

An alien amy, though resident abroad, is entitled to sue in the courts at Westminster for a libel published concerning him in England. (11) **Alien amy.**

If A. and B., having recovered in separate actions for libels against different parties engaged in the management and publication of the same newspaper, commence fresh actions against the same parties, each suing that party against whom the other has recovered, the court will not interfere in a summary way to set aside the latter proceedings. (12) **Actions against different proprietors of a newspaper for the same cause of action.**

A joint action may be brought against several for composing or publishing a libel. (13) **Joint action against several for publishing or composing a libel.**

A porter, who in the course of his business delivers papers containing

When action

(1) *Forster v. Lawson*, 11 Moore, 360.
3 Bing. 452.

(2) *Cook v. Batchellor*, 3 B. & P. 150.

(3) *Williams v. Beaumont*, 10 Bing. 260.

(4) *Com. Dig. Baron and Feme (V.)*.
Ibid. Pleader (2 A. 1.). *Anon.* 1 Sid. 346.
Slayter v. Davis, *ibid.* 386. *Russell v. Corne*, 1 Salk. 119. *Gresham (Sir T.) v. Grinsley*, Yelv. 88. *Harwood v. Hardwick*, 2 Keb. 387.

(5) *Anon.* 1 Sid. 346. *Russell v. Corne*, 1 Salk. 119. *Coleman v. Harcourt*, 1 Lev. 140. *Harwood v. Hardwick*, 2 Keb. 387.
Baldwin v. Flower, 9 Mod. 120.

(6) *Coward v. Wellington*, 7 C. & P. 532.

(7) *Ibid.*

(8) 1 Bac. Abr. Baron and Feme (L.), 735. Co. Litt. 351. (b.) Com. Dig. Baron and Feme (Y.).

(9) *Swithin v. Vincent*, 2 Wils. 227. *Anon. Dyer*, 19. (a.) pl. 112. Com. Dig. Baron and Feme (Y.).

(10) *Ibid.* 1 Bac. Abr. Baron and Feme (L.), 735.

(11) *Pisani v. Lawson*, 8 Dowl. P. C. 57.

(12) *Martin v. Kennedy and Banning v. Perry*, 2 B. & P. 69.

(13) 2 Saund. 117. (a.) 1 Bac. Abr. Actions in general (C.), 58.

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cannot be maintained against the parties who deliver a libellous publication
When misdescription of the name of a company not ground of nonsuit.

libellous handbills, is not liable in an action for libel, if it be shewn, that he was ignorant of the contents of the parcels. (1)

A declaration in an action for libel averred, that the plaintiff carried on the business of a carpenter, builder, and surveyor, and had been appointed the surveyor, agent, and steward of a certain company, or society of persons, called, "The New England Company;" and that the defendant published concerning him, and concerning his said employment by the said company, and concerning him in his said trade of carpenter, builder, and surveyor, &c. in a letter to one J. G., he the said J. G. then and there being the treasurer of the said company, a certain libel, &c. It appeared, that the company in question was a corporation, and that its name was "The Society for the Propagation of the Gospel in New England and Parts adjacent in America:" — It was held, that this misdescription of the company was not, under the circumstances, any ground of nonsuit, as it was not necessary to allege with extreme precision the description of the company, or to prove the plaintiff's appointment, the libel being alleged of the plaintiff in his employment, without reference to his appointment. (2)

INTRODUCTION AND INDUCEMENT.

By way of introduction the plaintiff's innocence of the imputation is generally stated; but since the "new rules" (3), unless the inducement or prefatory matter be particularly traversed or denied, it will in effect be admitted, and need not be proved by the plaintiff upon a mere plea of not guilty. (4)

If the declaration in case for a libel state, *inter alia*, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel, charging him among other things with having taken the chair at the said place, but not saying any thing of the character of the meetings there, it will not be ground of nonsuit, should the plaintiff at the trial fail to prove, that the meetings were such, as he described in his inducement. (5)

When inducement requisite.

Where that which is complained of in the declaration as a libel does not, upon the face of it, apply to the plaintiff and impute a libel, there must be an inducement stating such facts, as will support such an innuendo, and shew the libellous application of the statement to the plaintiff. (6)

Declaring upon a libel, when there are several matters alleged as inducement.

The principle seems to be in declaring upon a libel, that where there are several matters alleged as inducement, each as bearing upon the libel and jointly constituting it, the court will consider in construing the subsequent averment, that the libel was published "of and concerning the matters aforesaid," the essential degrees in which each matter bears upon the libel.

If the matter referred to by the averment be material, and affect the charge in such a manner, that the omission of it would alter the character of the libel, either in the degree in which it is charged to be injurious, or in the estimate of damages, it must be strictly proved as it is charged,

(1) *Day v. Bream*, 2 M. & Rob. 54.

(2) *Rutherford v. Evans* (Clerk), 6 Bing. 451. 4 M. & P. 163. 4 C. & P. 74.

(3) H. T. 4 Will. 4.

(4) *Dukes v. Gostling*, 3 Dowl. P. C. 619.

Chalmers v. Shackell, 6 C. & P. 475.

(5) *Chalmers v. Shackell*, 6 C. & P. 475.

(6) *Hall v. Blandy*, 1 Y. & J. 480.

and the failure of proof, or the disproof of it, will be a fatal variance. (1)

But where the matters referred to consist of several particulars, some of which are material and others not, the court will distinguish between such as are material and such as are not (2); and if any one particular be disproved to which the libel is alleged to relate, if the charge would remain entire and libellous without such proof, the court will not consider it to be a variance: — thus, in *May v. Brown* (3) it was holden, that the words “of and concerning” only render it necessary to prove such antecedent matter, as make up the entire charge, and render it essential to the character of the libel.

In declarations upon libels, which are only actionable in regard to their having affected the plaintiff in his profession, trade, or business, there must be a distinct allegation, that the plaintiff was, at the time of the libel, in such profession, or exercised such calling, &c., otherwise the record will be substantially defective. (4)

Unnecessary minuteness in shewing the plaintiff’s profession should not be made, it being only requisite to make a simple statement, that he exercised it, without alleging that he was “qualified,” or had “taken a degree.” (5)

But if the matter be actionable *per se*, an averment of the plaintiff’s profession, &c. may be introduced; and a statement that the matter was published “of and concerning him,” “and of and concerning him in his profession,” &c. will answer, for the averment is divisible. (6)

The declaration must shew by a *colloquium* or otherwise, that the libel was composed and published “of and concerning the plaintiff.” And where an inducement of extrinsic matter is necessary, it must not only be shewn, that the imputation related to the plaintiff’s character, but it must also be charged, that it had reference to such extrinsic matter; as (in regard to the instances just put) that it was published “of and concerning the plaintiff’s said evidence in the said suit,” &c., or “of and concerning him in his said profession,” &c. (7)

Where the declaration averred, that defendant published of and concerning plaintiff the following false, &c. matter, without alleging that the matter was of and concerning plaintiff; and then set out the libel, which did not appear on the face of it to relate to the plaintiff, and there was no innuendo to connect it with him: — It was held, that it was bad even after verdict, and a *venire de novo* was awarded. (8)

Where a declaration for libel stated, that the defendant published of and concerning the plaintiff a false, scandalous, malicious, and defamatory libel, containing among other things, the false, scandalous, malicious, defamatory, and libellous matter following — and then proceeded to set out the particular

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Effect of the words “of and concerning.”

Where distinct allegation requisite, that the plaintiff was in his profession, trade, or business.

It must appear that the libel was composed and published “of and concerning the plaintiff.”

Setting out the particular matter complained of, without alleging such matter

(1) *Rex v. Horne*, Cowp. 673. *Teesdale v. Clement*, 1 Chitt. 603. *Shepherd v. Bliss*, 2 Stark. 510.

(2) *Cox v. Thomason*, 2 C. & J. 361.

(3) 3 B. & C. 113. 4 D. & R. 670. 1 Chitt. Pl. 403.

(4) Com. Dig. Action upon the Case for Defamation (G. 3.). *Todd v. Hastings*, 2 Saund. 307. (n.) n. 1. *Craft v. Boite*, 1 ibid. 243. n. 3. *May v. Brown*, 3 B. & C. 135.

(5) *Hartley v. Herring*, 8 T. R. 131. *Smith v. Taylor*, 1 N. R. 196. *Jones v. Stevens*, 11 Price, 235.

(6) *Lewis v. Walter*, 3 B. & C. 138. n. *Rex v. Holt*, 5 T. R. 436. *Spall v. Massey*, 2 Stark. 559.

(7) 1 Saund. 242. (b.) n. 3. 1 Stark. Slander, 2d ed. 383.

(8) *Clement v. Fisher (in error)*, 7 B. & C. 459., et vide *Rex v. Marsden*, 4 M. & S. 164.

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to be of and concerning the plaintiff.

The libellous matter must be set out in *hæc verba*.

Only requisite to set out enough of the libel to comprise the substance of the charge.

If separate passages be set out, they should be described as separate.

When index contains *per se*, libellous matter.

Insufficient averments.

matter complained of, without alleging such matter to be of and concerning the plaintiff; but it appeared on the face of it to relate to him:—It was held sufficient on special demurrer. (1)

Where a declaration for a libel after an inducement, that one W.C. had been tried and convicted of murder, and was about to be hanged for such crime, alleged, that the defendant published the libel of and concerning the plaintiff, without averring, that it was published of the plaintiff, and of and concerning the matters stated in the indictment:—It was held, nevertheless, to be sufficient. (2)

The libel itself must be set out in *hæc verba*, and the declaration must profess so to set forth the matter; and an averment that the libellous or slanderous matter was "to the effect following" (3), to the "tenor," "tenor and effect," or "in substance as follows" (4), would be bad.

It is no objection, that a part only of one sentence in a letter is inserted in a count for libel, if it appear that enough is set out to comprise the substance of the charge made by the defendant against the plaintiff. (5)

A libel charged plaintiff with being the most artful scoundrel that ever existed, and with being insolvent; but the writer added, that he had never disclosed the matter, nor ever would, except to the person he addressed as his friend. This latter assertion was omitted in the declaration:—It was held, that the omission was not material. (6)

If separate passages of a libel are set out in one count of the declaration, they should be described as separate and distinct parts. (7)

In an action for a libel in a review, it is sufficient to set out the contents of an index (referring to an article in the body of the review) which is of itself a libel; and no reference need be made to the article itself, if the index contain, *per se*, *prima facie* libellous matter. (8)

A declaration, stating, that the defendant published of the plaintiff a false and malicious libel, purporting thereby that plaintiff's beer was of a bad quality, and deficient in measure, whereby he was injured in his credit and business, was held bad on general demurrer. (9)

So, also, where the record imputed to the plaintiff "mismanagement or ignorance," and the evidence was, that the expression in the libel (which had been destroyed) was "ignorance or inattention," it was held to be a fatal variance. (10)

Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references:—It was held, that these omissions altered the sense of the remainder, and that the variance was fatal. (11)

(1) *Jones v. Sheeham*, 1 Smythe (Irish), 205.

(2) *Cook v. Ward*, 4 M. & P. 99. 6 Bing. 409. In some cases defendants in actions for libels are let to plead after demurrer overruled. *Jones v. Sheeham*, 1 Smythe (Irish), 205.

(3) *Gouch v. Buxton*, 11 Mod. 78. 84. 15 Vin. Abr. Libel, 89. [E.]. *Newton (Sir John) v. Stubbs*, 3 Mod. 72. *Cook v. Cox*, 3 M. & S. 115. *Wood v. Brown*, 6 Taunt. 169.

(4) *Wright v. Clements*, 3 B. & A. 503.

Cook v. Cox, 3 M. & S. 110. *Fleet v. Phil*, 4 B. & C. 473. 6 D. & R. 528.

(5) *Rutherford v. Evans* (Clerk), 6 Bing. 451. 4 M. & P. 163. 4 C. & P. 74.

(6) *Ibid*.

(7) *Tabart v. Tipper*, 1 Camp. 352.

(8) *Buckingham v. Murray*, 2 C. & P. 46.

(9) *Wood v. Brown*, 6 Taunt. 169.

(10) *Brooks v. Blanshard*, 1 C. & M. 773. 3 Tyrw. 844.

(11) *Cartwright v. Wright*, 5 B. & A. 615. *Bell v. Byrne*, 13 East, 554. As to setting

Where that which is complained of in the declaration as a libel, does not upon the face of it, apply to the plaintiff and import a libel, it is necessary, by inducement, to state such facts as will support an innuendo, and shew the libellous application of the statement to the plaintiff. (1)

THE DECLARATION.

INNUENDO.

"An innuendo means nothing more than the words '*id est*,' '*scilicet*,' or 'meaning,' or 'aforesaid, as, explanatory of a subject-matter sufficiently expressed before; as such a one, meaning the defendant, or such a subject, meaning the subject in question.'" (2) It is only explanatory of some matter already expressed; it serves to point out where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add to, or enlarge, or change the sense of the previous words. (3)

Where an innuendo is requisite.

Where a declaration set out this libel—"Society of Guardians for the Protection of Trade against Swindlers and Sharpers, &c. I (meaning defendant) am directed to inform you that A. B. (plaintiff) is reported to the society as improper to be proposed to be balloted for as a member thereof" (thereby meaning that plaintiff was a swindler and sharper, and an improper person to be a member of the said society):—It was held, in arrest of judgment, that the innuendo could not be supported without a previous averment, that it was the custom of the society to designate swindlers and sharpers by the terms "improper persons to be members" of that society, and that it did not appear, that the society described in the libel, was the society described in the introductory part of the declaration, and that the defect was not cured by verdict. (4)

When innuendo not supported by the libels.

In an action for a libel, the declaration, after reciting that divers persons had been associated together under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers;" and that the defendant, under colour of being the secretary of the said society, had from time to time published, and was accustomed to publish, certain printed reports for the purpose of denoting to the members of the said society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be balloted for as members of the said society; set out the following libel of and concerning the plaintiff:—"Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I (meaning the defendant) am directed to inform you, that G. (meaning the plaintiff) and C. are reported to this society as improper to be proposed to be balloted for as members thereof" (meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society). After verdict for the plaintiff, and writ of error brought, it was held, that the innuendo was not warranted by the libel; and that the words of the libel, unexplained by introductory matter, were not actionable.

In *Gompertz v. Levy* (5) the declaration alleged, without any material introductory averment, that defendant published of and concerning plaintiff the false, scandalous, and defamatory libel following, viz.:—"Notice. Any

out divided sentences as if they followed continuously, vide 1 Stark. Slander, 2d ed. 380.

(1) *Hall v. Blandy*, 1 Y. & J. 480.

(2) *Per De Grey C. J. in Rez v. Horne*, Comp. 684.

(3) 1 Saund. 243, n. 4. *Huwkes v. Hawkey*, 8 East, 430, 431. *Roberts v. Camden*, 9 ibid. 95. It seems, to sustain an innuendo, that an "answer" in the libel mentioned, was an

answer to a bill in Chancery; an attested copy of the decree in that cause is admissible.

Ahern v. Maguire, 1 Armstrong & Macartney (Irish), 39.

(4) *Goldstein v. Foss (in error)*, 2 Y. & J. 146. 4 Bing. 489. 1 M. & P. 402. 6 B. & C. 154. 2 C. & P. 252.

(5) 9 A. & E. 282.

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person giving information where any property may be found belonging to H. G. (meaning the plaintiff), a prisoner in the King's Bench Prison, but residing within the rules thereof, shall receive 5 *per cent.* upon the goods recovered for their trouble, by applying at Mr. L., &c." (meaning the defendant, and meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention):—It was held on general demurrer, that the innuendo, unsupported by any prefatory averment, was too large, and that the words in themselves were not actionable.

Where an innuendo does not extend the sense of the words.

In libel, one of the counts set forth the following passage of a letter from the defendant to one P.:—"I have reason to suppose that many of the *flowers* of which I have been robbed, are growing upon your premises" (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.'s garden). The previous part of the letter stated, that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defendant's service in the same capacity, and had been discharged for dishonesty:—It was held on error, that the innuendo was not too large, and that the count was good. (1)

When the plaintiff will be bound at the trial to shew, that he ascribed to the words the right meaning.

In an action for a libel the declaration alleged, that the plaintiff was a barrister, and that the libel was published of and concerning the plaintiff, in respect of his said profession, and set out the libel as follows:—"Counsellor R. P. (thereby meaning the plaintiff)—this poor creature, who says he is a barrister, and may be so for aught we know, for he is sometimes seen walking about in a peruke in the hall of the Four Courts (meaning the king's courts at Dublin, commonly called the Four Courts; and meaning that the said plaintiff, as such barrister, had no employment whatever in his said profession)—this poor creature, we say, said that in the absence of Captain F. (the copper captain we suppose) he begged (he often does that) (thereby meaning that the said plaintiff was mean and contemptible, and in the habit of soliciting charity) to propose a resolution that the society could not consistently with their honour (the honour of radicals), continue to receive a paper remarkable for malicious slander against public men." Another count, to the words "this poor creature," added the innuendo (meaning that said plaintiff as such barrister was contemptible). Upon special demurrer, upon the ground that the innuendoes extended the sense of the alleged libel, and that it was not shewn to be applicable to the said plaintiff in his profession as a barrister, it was held, that the innuendoes did not extend the sense, as the words would admit of the construction put upon them, and were applicable to the plaintiff's profession; but that the plaintiff would be bound at the trial to shew, that he ascribed to the words the right meaning. (2)

When matter sufficiently explained to shew, that it was libellous of an attorney in his profession.

A declaration in libel stated, that the plaintiff was an attorney, and that certain orders had been made in the court of Queen's Bench for setting aside proceedings with costs, in an action in which the plaintiff was the attorney of the then defendant, and the defendant was the attorney of the then plaintiff, and that the costs had been ascertained and taxed by one of

(1) *Williams v. Gardiner (in error)*, 1 M. & W. 245.

(2) *Power v. Haydn*, 1 Smith & Betty (Irish), 386.

the masters; that sharp practice in the profession of an attorney is, and is considered to be disreputable practice, and discreditable to the attorney adopting it; yet that the defendant intending to cause it to be believed that the plaintiff had been guilty of such sharp practice as aforesaid in the said action, and had been reprimanded for it by the master, published of him the following false ironical and libellous matter: "An honest lawyer" (thereby meaning the plaintiff, and meaning to represent that he was not an honest lawyer). "A person of the name of C. B. &c. was severely reprimanded the other day by one of the masters of the Queen's Bench, for what is called sharp practice in his profession" (meaning and alluding to the plaintiff's practice with respect to the said orders, and that such practice was sharp practice as aforesaid):—It was held, that that part of the statement which imputed to the plaintiff sharp practice, was sufficiently explained by the introductory matter to shew, that it was libellous. (1)

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When written or printed matter in itself imports a libel on the plaintiff, no statement of extrinsic circumstances, by way of inducement, is necessary; and an innuendo improperly enlarging the sense will be rejected as surplusage. (2)

When statement of extrinsic circumstances need not be mentioned.

In *Clegg v. Laffer* (3) the defendant wrote concerning plaintiff, "he is so inflated with 300*l*. made in my service, God only knows whether honestly or otherwise, that," &c.:—It was held, without any preliminary averment to warrant an innuendo, that plaintiff had conducted himself in a dishonest manner in the defendant's service.

In an action for libel, the declaration stated, that the defendant falsely, &c. did publish, &c. of and concerning the plaintiff, the false, &c. matter following:—"Threatening letters. The Middlesex grand jury have returned a true bill against a gentleman of some property, named French" (meaning the plaintiff); and this the said plaintiff will verify; and that the said defendant thereby, then and there, meant to insinuate and have it understood that the said plaintiff had been suspected to have been, and had been guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one—Trotter, threatening to kill and murder the said—Trotter, a subject of this realm (with a view and intent to extort):—It was held, that this innuendo at the conclusion of the count was bad, there being no introductory averments to warrant it; but that the publication was libellous *per se*, and, therefore, that the innuendo might be rejected as surplusage. (4)

In an action for a libel in a foreign language, the original must be set out (5); and it seems to be necessary also to give a translation in English. (6) But provincial expressions in this country may be set forth without express explanation on the record. (7)

Libel in a foreign language.

(1) *Seem*, also, that the allegation, that the libel was ironical was sufficient, coupled with the innuendo to show, that the phrase "an honest lawyer" was used in a libellous sense. *Boydell v. Jones*, 4 M. & W. 446.

(2) *Harvey v. French* (in error), 2 Tyrw. 585. 1 C. & M. 11. 2 M. & Sc. 591.

(3) 3 M. & Sc. 727. 10 Bing. 250.

(4) *Harvey v. French*, 2 Tyrw. 505. 1 C. & M. 11. 2 M. & Sc. 591.

(5) *Zenobia v. Artell*, 6 T. R. 162. *Cook v. Cox*, 3 M. & S. 116.

(6) *Rez v. Goldstein*, 3 B. & B. 201. 10 Price, 88. 1 Saund. 242. (a.) n. (b.) 1 Stark. Slander, 2d ed. 368, 369.

(7) Com. Dig. Action upon the Case for Defamation (G. 6.). 1 Rol. Abr. Action sur Case (L.), 86.

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The publication of the libel by the defendant must be stated.

Averment of a malicious publication.

The publication of a libel must be stated in a declaration, but it may be collected from the whole of it, and need not be set forth in any technical form of words. (1)

The allegation that the defendant published a malicious, injurious, and unlawful advertisement, seems good, without the word "false." (2)

There should be an averment, that the defendant maliciously published the matter; but any equivalent expressions, as "wrongfully and falsely," &c. will, it seems, suffice. (3) The word "maliciously" appears to import, that the words were falsely uttered (4); but it is usual and better to state, that the matter was "falsely and maliciously" published, &c.

THE PLEADINGS.

General issue.

6. THE PLEADINGS.

The general issue of not guilty can be pleaded, but which, under Reg. Gen. Hilary Term, 4 Will. 4., operates "as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement."

"And no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration."

It should however be observed, that if the defence to the libel be, that it is a privileged communication, such defence is admissible under the plea of not guilty. (5)

Thus, in *Lillie v. Price* (6) it was holden, that in an action for libel, it is not necessary to plead specially, that the alleged libel was a privileged communication between attorney and client; but that defence is available under the plea of not guilty.

PLEA OF JUSTIFICATION.

Where the evidence will establish the plaintiff's guilt, or at least his culpable conduct.

If the evidence will either establish the plaintiff's guilt, or at least establish his culpable conduct, it seems in general advisable to plead a justification as generally, as may be admissible.

The defendant can justify the publication of a libel complained of as being true (7), but must state the particular and specific facts which establish the accuracy of the charge. (8) And where part of a publication consists of a report of judicial proceedings, and the rest of comment, since the separation and discrimination of each part is necessary for the purpose of defence, the defendant ought to take upon himself the burden of making it, in order, that the court may see, what part he means to justify; and the plea will be defective if it do not specifically point out, the exact parts which it is intended to justify, as being a correct report. (9) The plea of justification need not expressly deny the innuendoes and epithets contained in the

(1) *Baldwin v. Elphinston*, 2 W. Black. 1037.

(2) *Rowe v. Roach*, and *Same v. Hoar*, 1 M. & S. 304.

(3) *Craft v. Boite*, 1 Saund. 242. (a.) n. 2. 1 Stark. Slander, 2d ed. 493. 1 Chitt. on Pl. 390.

(4) *Sutton v. Johnstone*, 1 T. R. 493. 1 Stark. Slander, 2d ed. 436.

(5) *Wright v. Woodgate*, 2 C. M. & R. 577.

(6) 5 Dowl. P. C. 492.

(7) *Smith v. Richardson*, Willes, 20. 24. Com. 551. Barnes, 195. *Underwood v. Parks*, Str. 1200.

(8) Ibid. *Vessey v. Pike*, 3 C. & P. 512. 1 Saund. 130. n. 1. 243. (c.) n. 1. *Jones v. Stevens*, 11 Price, 235. 1 Stark. Slander, 2d ed. 465.

(9) *Stiles v. Nokes*, 7 East, 492.

declaration; for if the fact be justified, the motive, intention, and manner are immaterial. (1)

THE PLEADINGS.

A plea, stating that the libellous matter complained of "is true in substance and effect," means, that it is true in every material particular; and if the defendant do not prove such statement to be true, the plea will not be proved, although he prove facts of the same description. (2)

Where the libellous matter "is true in substance and effect."

Where, therefore, to a declaration for a libel, imputing to the plaintiff various acts of barbarous cruelty to his horse, and, amongst others, with knocking out an eye, the defendant pleaded pleas of justification; first, that the charge was true in all its particulars; and, secondly, that it was true in substance and effect; and the jury found, that the first plea was true with the exception of two statements containing particulars of aggravated cruelty to the horse, and that the eye was not knocked out; and that the second was true in substance and effect, and gave a shilling damages, subject to the opinion of the court as to the propriety of their verdict: — It was held, that such verdict was right, as the justification was not proved. (3)

In a letter written by a Roman Catholic bishop to a priest in his diocese, he designated the plaintiff, who was a Roman Catholic priest, as "a degraded wretch, and excommunicated;" that "he was running all over the country like the spirit of darkness, seeking whom he might devour." The letter also desired the priest, to whom it was addressed, to warn his flock to have no communication with the plaintiff: — It was held, that this letter was a libel, and that a plea of justification to the whole of the libel, which in substance stated, that the plaintiff had been guilty of a breach of ecclesiastical discipline for which he had been excommunicated, was no answer to the declaration, the excommunication stated in the plea, being merely a suspension of ecclesiastical privileges, while that in the libel affected the civil rights of the plaintiff; and also, that as the part of the libel which described the plaintiff as a degraded wretch, and as running over the country, &c., was not justified by any part of the plea; it was defective in purporting to answer the whole declaration, and leaving a part unanswered. (4)

When plea defective in purporting to answer the whole declaration, and leaving a part unanswered.

Where a ship was advertised for freight and passengers, and the defendant published, that she was unseaworthy, and had been bought by Jews to take out convicts. Upon action brought, it was pleaded to the entire declaration, that the allegation of unseaworthiness was true, which was held insufficient. (5)

It is essential, that a special plea, justifying the publication of slanderous matter, should admit the libel complained of; and it should not be extended to the justification of more than the matter to which, in the commencement of his plea, the defendant professes to plead. (6) Care should therefore be taken to confine the plea in the introductory part to the exact portions of the libel which can be, and afterwards are justified. In enumerating such portions, it is not usual to set out and repeat the matter *in hæc verba*, viz. as to the following parts of the said supposed libel, to wit, &c., the

Special plea of justification should admit the libel, but should not extend to more than the defendant professes to plead to.

(1) *Astley (Bart.) v. Younge*, 2 Burr. 807. (4) *Crotty v. M^r Mahon*, 1 Jones (Irish), 1 Stark. Slander, 2d. ed. 476. 1 Chitt. Pl. 465.
 497. (5) *Ingram v. Lawson*, 5 Bing. N. C. 66.,
 (2) *Weaver v. Lloyd*, 4 D. & R. 230. 2 *vide etiam* 6 *ibid.* 212.
 B. & C. 678. 1 C. & P. 295. (6) *Clarkson v. Lawson*, 6 Bing. 266. 587.
 (3) *Ibid.* 2 B. & C. 678.

THE PLEAD-
INGS.

Justification
that the libel-
ous matter was
communicated
by a third per-
son, cannot be
supported.

Publication of
proceedings in
courts of
justice.

Proceedings at
a police office,

before magis-
trates,

or under a
commission of
lunacy.

said defendant says, &c.; but a general reference to such parts of the libel as are justified may be sufficient, if the court can see with certainty, what parts are referred to. (1) But it is sufficient, generally speaking, that the substance of the libel should be justified and proved. (2)

In an action for the publication of a libel reflecting on the character of an individual, the defendant cannot justify the publication by pleading, that the libellous matter was communicated to him by a third person, whose name he disclosed at the time of publication. (3)

Whether the publication of defamatory matter, embodied in the proceedings of a court of justice, is privileged, has never been expressly decided;—the inclination of the courts however seemingly appears to be against the privilege. (4) But the publication of proceedings before a magistrate cannot be justified on the ground of its being a correct report of such proceedings, where the matter brought before him, is not in his judicial character, or in the discharge of his magisterial functions. (5)

It is no justification of an action for a libel in a newspaper, that the matter complained of is a true, fair, just, and correct report and account of proceedings which took place at a public police office in the course of a preliminary inquiry, openly and publicly conducted before a justice, upon a criminal charge against the plaintiff, although published with no scandalous, defamatory, unworthy, or unlawful motive, but merely as public news. It seems, however, that it is lawful to publish in a newspaper, the result of what a justice may think fit to do upon a matter of criminal charge previous to trial, if the publication contain no statement of the evidence, nor any comments upon the case. (6)

A plea to a libel in a newspaper, which reported the proceedings before a magistrate, alleged that the several matters and things in the supposed libels contained were true:—It was held bad, because it was uncertain, whether it meant that the report in the newspaper was a true report of the proceedings, or that the facts mentioned in it were true; and if the latter were the meaning, then the plea was much too general. (7)

The defendant published an account of the proceedings under a commission of lunacy, which the plaintiff had attended as a witness, and stated, that the plaintiff's testimony, "being unsupported by that of any other person, failed to have any effect on the jury." "The object was to set aside a will." "Mr. Jervis commented with cutting severity on the testimony of Mr. O." (the plaintiff):—It was held, that the whole taken together was a libel, and that a plea justifying only the words, "Mr. Jervis commented with cutting severity on the testimony of Mr. O.," was ill. (8)

(1) *Per Le Blanc J.* in *Stiles v. Nokes*, 7 East, 507. *Per Tindal C. J.* in *Clarkson v. Lawson*, 6 Bing. 593.

(2) *Per Littledale J.* in *Flint v. Pike*, 4 B. & C. 483. 6 D. & R. 533. *Edwards v. Bell*, 1 Bing. 403.

(3) *De Crespigny (Sir W.) v. Wellesley*, 2 M. & P. 695. 5 Bing. 392.

(4) *Stiles v. Nokes*, 7 East, 493. *Carr v. Jones*, 3 Smith, 491. 503. *Lewis v. Clement*, 3 B. & A. 702. *Lewis v. Walter*, 4 ibid. 605. 613. *Duncan v. Thwaites*, 3 B. & C. 556. 583. *Flint v. Pike*, 4 ibid. 473.

476. 481., sed vide *Curry v. Walter*, 1 Esp. N. P. C. 456. 1 B. & P. 525. *Rex v. Wright*, 8 T. R. 293. *Stiles v. Nokes*, 7 East, 504. *Rex v. Fisher*, 2 Camp. 563., ante, 2329.

(5) *McGregor v. Thwaites*, 3 B. & C. 34. 4 D. & R. 695. *Rex v. Lee*, 5 Esp. N. P. C. 123.

(6) *Duncan v. Thwaites*, 5 D. & R. 447. 3 B. & C. 556.

(7) *Ibid.*

(8) *Roberts v. Brown*, 10 Bing. 519. 4 M. & Sc. 407.

The plea will be bad, if it shew a publication of words substantially different from those laid in the declaration. (1)

THE PLEADINGS.

In an action for a libel, which purported to be a speech of counsel at the trial of the plaintiff on a criminal charge, the declaration stated, after setting out the speech, that a witness was called, who proved all that had been stated by counsel, and that the defendant was immediately after that, acquitted upon a defect in proving some matter of form. The plea stated, that in fact such a speech was made, and that the witness called, proved all that had been so stated; but it did not set out the evidence, or justify the truth of the charges made in the counsel's speech; the court held the plea to be insufficient (2), because publishing the mere result of evidence could not be justified.

Publication of words substantially different from those in the declaration.

A plaintiff cannot, upon the trial of an action for a libel, object, that a plea of justification is insufficient; because, however insufficient it may be, the defendant is entitled to a verdict on that plea if it be proved, as the plaintiff should have demurred. (3)

Plaintiff cannot upon the trial, object that a plea of justification is insufficient.

Where the first and second counts of a declaration alleged "the composing and publishing of two libels," and the defendant in his pleas of justification stated, that "the libels so set forth were one and the same supposed libel, and not other and different supposed libels:"—It was held, that such pleas were bad on special demurrer, because it was impossible to say with truth, that the two libels alleged to have been severally composed and severally published were one and the same libel. (4)

Where it cannot be said that the two libels alleged to be composed and published were one and the same libel.

A justification merely in the words of the libel, where it is general in its terms, is not sufficient; it ought to state the particulars. (5)

Justification in the words of the libel is insufficient.

The justification of a libel must state issuable facts, not general charges of misconduct. A libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, and excessive bills of costs, in the business he had conducted for the defendant: a plea in justification, repeating the same general charges, without specifying the particular acts of misconduct, was, upon demurrer, held insufficient. (6)

Issuable facts must be stated.

Where a libel was justified, because there was reason for thinking the imputation was true from what had been said, the plea was held bad on demurrer, as it should have stated, what had been said, and by whom. (7)

A plea of justification for slandering the plaintiff as a justice of the peace, "of pocketing fines of prisoners whom he had convicted," should state the names of the parties convicted, and of whom the plaintiff had received the fines. (8)

Accord and satisfaction is a good defence to this action if pleaded; and where the plaintiff had agreed not to bring the action, in consideration of the defendant destroying certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed, Lord Ellenborough admitted this in evidence as accord and satisfaction. (9)

Accord and satisfaction.

(1) *McPherson v. Daniels*, 10 B. & C. 263. *Johns v. Gittens*, Cro. Eliz. 239. *Gastrell v. Townsend*, *ibid.* *Billingham v. Mynors*, *ibid.* 153. *Drake v. Corderoy*, Sir W. Jones, 307. *Craft v. Boite*, 1 Saund. 244. (2) *n.* *Per Tindal C. J.* in *Clarkson v. Lawson*, 6 Bing. 593.

(2) *Lewis v. Walter*, 4 B. & A. 605. *et vide Mountney v. Walton*, 2 B. & Ad. 673.

(3) *Edmonds v. Walter*, 3 Stark. 7. 2 Chitt. 291., *et vide Clement v. Lewis*, 10 Price, 181.

(4) *Edmonds v. Walter*, 3 Stark. 7.

(5) *J'Anson v. Stuart*, 1 T. R. 748.

(6) *Holmes v. Catesby*, 1 Taunt. 543.

(7) *Lane v. Howman*, 1 Price, 76.

(8) *Newman v. Bailey (Clerk)*, 2 Chitt. 665.

(9) *Lane v. Applegate*, 1 Stark. 97.

THE PLEADINGS.**DEMURRER.**

Statement of cause of demurrer.

In an action for a libel, it is not a sufficient statement in the margin, of the cause of demurrer to a plea, that it is no justification of the libel. (1) But it is sufficient to state, that the pleas are bad for the causes specifically assigned on the demurrer. (2) And in stating the grounds of demurrer, it is sufficient to insert them in the margin, without stating, that the party demurring intends to rely on those grounds. (3)

THE EVIDENCE.**7. THE EVIDENCE.**

Province of judge and jury.

In an action of libel, the judge is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but the proper course is for him to define, what is a libel in point of law, and to leave it to the jury to say, whether the publication in question falls within that definition, and, as incidental to that, whether it is calculated to injure the character of the plaintiff. (4)

Judgment of Lord Denman in *Baylis v. Lawrence*.

On the trial of an issue of not guilty in an action for libel, it is no misdirection, if the judge leave to the jury the question, whether or not the publication be libellous, without stating his own opinion as to the particular publication, or defining what generally constitutes a libel: thus, in *Baylis v. Lawrence* (5) Lord Denman stated, "I have always followed the practice adopted in this case by Lord Abinger, leaving the jury to say whether, under all the circumstances, the publication amounts to a libel. That practice is analogous to the enactments of stat. 32 Geo. 3. c. 60. The statute, indeed, is applicable only to criminal cases; but it was a declaratory act; and the importance of declaring the law existed only in the case of criminal libels. The act therefore furnishes clear evidence that the judge is not, in civil cases, bound to state his opinion, whether the publication be libellous or not; and this agrees with the late decision of the court of Exchequer in *Parmiter v. Coupland*. (6) There is, indeed, one case in which a pure question of law may arise. If the judge and jury think the publication libellous, still if, on the record, it appear not to be so, judgment must be arrested."

What plaintiff must prove under plea of not guilty. Inducement is admitted, if it be not traversed.

It is incumbent on the plaintiff to prove, on the plea of not guilty, the publication of the libel complained of, and that it was published maliciously, and in the sense imputed by the declaration.

By the modern rules of pleading in actions for libel, all the inducement is admitted, if it be not traversed. (7)

Statements made in a libel, have the effect of dispensing with proof by the plaintiff of facts so stated, if they become necessary to support his case. (8)

Not necessary to prove the truth of averments in the

It is not necessary to give evidence to prove the truth of averments in the declaration, which accord with statements in the publication;—thus, in an action for a libel on the plaintiff in his office of overseer of a

(1) *Ross v. Robeson*, 1 Gale, 102. 3 Dowl. P. C. 779.

(2) *Berridge v. Priestley*, 5 Dowl. P. C. 306.

(3) *Groves v. Brown*, 14 Leg. Obs. 13. cit. Tidd's N. P. 652.

(4) *Parmiter v. Coupland*, 6 M. & W. 105.

(5) 11 A. & E. 920.

(6) 6 M. & W. 105.

(7) *Fradley v. Fradley*, 8 C. & P. 572.

(8) *Jones v. Stevens*, 11 Price, 235.

common field, charging him with embezzlement, or not giving a proper account of the public property, the plaintiff proved the libel, and that he was overseer; and it appeared from the testimony of his own witnesses, that he was not entrusted, as such overseer, with the receipt of money, or that any particular confidence was necessarily reposed in him by virtue of his employment, which appeared to be a somewhat humble one. It was objected that he should have proved, that it was an office of trust and confidence as alleged, and that therefore the action could not be supported:—It was held, that as the libel in its terms imported, that it was an office of trust and confidence, and charged a fraudulent abuse of it, it was therefore not necessary to give any proof of the allegation in the declaration. (1)

THE EVIDENCE.
declaration, which accord with statements in the publication.

In a declaration for a libel, it was averred that plaintiff, before &c., was lawfully possessed of a certain message, with the appurtenances, called or known by the names of the Camden Arms Tavern, &c., and had, before &c., sold the same to the defendant. The libel stated, "He, plaintiff, obtained 500*l.* from me for the good-will of the Camden Arms, &c.:"—It was held, that the words sufficiently admitted the possession by plaintiff. (2)

Counsel ought not to be instructed to make a particular detail of circumstances, unless they are prepared to give some evidence in support of the statement. (3)

Counsel should not, without evidence, make a particular detail of circumstances.

In opening a case of libel with respect to a check, in which the defendant pleaded a justification, that the imputations of the libel were true, the plaintiff's counsel made a full opening of the facts as to the check which he stated the plaintiff to have paid, but adduced no evidence on this part of the plaintiff's case:—It was held, that the defendant's counsel was entitled to call for the production of the check on a notice to produce, without shewing that it was in the plaintiff's possession in any other way than by the opening of his own counsel; and if the check was not produced, secondary evidence was admissible. (4)

Where possession of an instrument will be assumed, from the statements of counsel.

The libel must be produced; and, previously to its being read, the publication of it by the defendant must be proven.

PUBLICATION OF LIBEL.

In *Rex v. Burdett* (5) Mr. Justice Holroyd thus expressed himself, as to the evidence which was requisite to prove the fact of publication:—"In 5 Co. Rep. 126. (a.) it is laid down, that a scandalous libel may be published *traditione*, when the libel, or any copy of it, is delivered over to scandalise the party. So that the mere delivering over, or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel; and that I take to be the sense in which the word 'publishing' is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet the meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law a publishing. Lord Chief Justice De Grey in *Baldwin v. Elphinstone* (6) states, that a written libel may be published in a letter to a third person, and states two instances from Rastall's Entries (7) of charges of constructive publications by delivering letters to A. and B., and by fixing

Judgment of Mr. Justice Holroyd in *Rex v. Burdett*.

(1) *Bagnall v. Underwood*, 11 Price, 621.

(5) 4 B. & A. 143.

(2) *Gould v. Hulme*, 3 C. & P. 625.

(6) 2 W. Black. 1037.

(3) *Duncombe v. Daniell*, 8 *ibid.* 222.

(7) Action on Case, 13.

(4) *Ibid.*

THE EVIDENCE. them on the door of St. Paul's church. The mere delivery or fixing them, with the intent to scandalise, is itself considered to be a publishing; and in prosecutions for libels it is never made a matter of inquiry, whether either the witness, who purchased the libel at a defendant's shop, or any other person, read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases, the fact of delivering it to the purchaser, is alone relied upon, as proof of the publication in the county, without any proof of its being read there or elsewhere."

When defendant by his plea admits the publication.

What is sufficient evidence to go to a jury of publication.

If, in an action for libel, the defendant by his pleading admit the publication, the plaintiff is still at liberty to shew the manner of the publication, with a view to the amount of damages. (1)

In an action against A. for publishing a libel, evidence sufficient to go to a jury is furnished by proof, that a libel was actually published; that it was a printed paper, since destroyed; that it corresponded with a printed paper produced; and that A. printed a paper corresponding with that produced, and sent 300 to a shop, from whence a person actually publishing the libel procured it; and that the libel was, on that occasion, taken from a parcel apparently containing 300. (2)

Stat. 6 & 7 Will. 4. c. 76. s. 6.

By stat. 6 & 7 Will. 4. c. 76. s. 6. no person can print or publish any newspaper before there shall be delivered at the stamp office, or to the proper officers, a declaration in writing containing the correct title of the newspaper; a true description of the house or building wherein such newspaper is intended to be printed and published; and the true name, addition, and place of abode of the printer and publisher, and of every proprietor resident out of the United Kingdom, and also of every proprietor resident in the United Kingdom, if not exceeding two, exclusive of printer and publisher, but if exceeding two, then of such two proprietors, the amount of whose respective shares shall not be less than the share of any other proprietor resident in the United Kingdom, exclusive of the printer and publisher, specifying the amount of their shares. This declaration is to be signed by printer, publisher, and the named proprietors resident in the United Kingdom.

Sect. 8.

By sect. 8. all such declarations shall be filed and kept, as the commissioners of stamps and taxes shall direct, for the safe custody thereof; and copies thereof, certified to be true copies, shall respectively be admitted in all proceedings civil and criminal whatsoever, touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration, and of their continuance respectively in the same condition down to the time in question, against every person who shall have signed such declaration, unless it shall be proved, that previous to the publication in question on such trial, such person became lunatic; or did sign and make a declaration, that he had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners, &c.; or unless it shall be proved, that, previous to such occasion, a new declaration of the same or a similar nature respectively, or such as may be required by law, was duly signed and

(1) *Vines v. Serell*, 7 C. & P. 163.

(2) *Johnson v. Hudson*, 7 A. & E. 233.

made, and delivered to the commissioners of stamps respecting the same newspaper, in which the person sought to be affected on such trial did not join.

THE EVIDENCE.

It is likewise enacted, that after production of the declaration, and a newspaper intituled as therein mentioned, it shall not be necessary to prove the purchase of the paper; and that service of process at the place of printing or publishing mentioned in the declaration shall be deemed sufficient.

It is doubtful, whether statutory proof of publication of a newspaper is admissible to prove publication by a plaintiff. (1)

In an action for a libel against the printer of a newspaper, one of the proprietors of a newspaper is a competent witness for the defendant, as he is not liable for contribution. (2)

Proprietor of a newspaper competent as a witness, in an action against his printer.

In order to shew, that a defendant had caused and procured a printed libel to be inserted in a newspaper, a reporter to a public newspaper proved, that he had given a written statement to the editor of the newspaper, the contents of which had been communicated by the defendant for the purpose of such publication, and that the newspaper then produced, was exactly the same, with the exception of one or two slight alterations not affecting the sense:—It was held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant, but that the newspaper could not be read in evidence without producing the written account delivered by the witness to the editor. (3)

What a reporter publishes in consequence of what passes with the defendant, is a publication by defendant.

A libellous paper in the handwriting of the defendant, found in the house of the editor of a newspaper in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased and are omitted in the newspaper, provided the passages erased do not qualify the libel. (4)

When alterations by an editor, of a libellous article, will not discharge the original writer.

In an action for a libel against church-rates written by the defendant, and published in the True Sun newspaper, the MS. in the handwriting of the defendant, addressed "to the editor of the True Sun," and sent to the True Sun office, is evidence to shew, that the defendant intended the article to be published in that newspaper. The plaintiff may also for the same purpose give in evidence handbills on the same subject, published by the defendant about the same time; and to shew, that the libel was published with an intent to injure the plaintiff, evidence may be given, that one of the handbills was carried backwards and forwards before his door. (5)

Sending an article to a newspaper, is evidence of publication.

In an action on the case for a libel in a newspaper, the plaintiff cannot give evidence of the contents of a placard pasted in the window of a third person, although the placard states what will appear in the defendant's newspaper respecting the plaintiff, and that which it foretold does appear accordingly. (6)

Contents of a placard pasted in the window of a third person, foretelling what will appear in a newspaper.

In an action for a libel contained in a newspaper, the defendant has a right to have read as part of the plaintiff's case another part of the same newspaper referred to in the libel complained of. (7)

Defendant entitled to have every part of a newspaper read, when put in evidence by the plaintiff.

A newspaper may be read in evidence, though not stamped according to the act. (8)

Unstamped newspaper may be given in evidence.

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| (1) <i>Watts v. Fraser</i> , 7 A. & E. 223. | (5) <i>Bond v. Douglas</i> , 7 C. & P. 626. |
| (2) <i>Moscatti v. Lawson</i> , 7 C. & P. 32. | (6) <i>Raikes v. Richards</i> , 2 ibid. 562. |
| (3) <i>Adams v. Kelly</i> , R. & M. 157. | (7) <i>Thornton v. Stephen</i> , 2 M. & Rob. |
| (4) <i>Tarpley (Clerk) v. Blabey</i> , 2 Bing. N. C. 437. 7 C. & P. 395. | 45. <i>Cooke v. Hughes</i> , R. & M. 112. |
| | (8) <i>Rex v. Pearce</i> , Peake's N. P. C. 106. |

THE EVIDENCE.

PERIODICALS.

When publication consists of merely selling a few copies.

Purchasing copies before as well as after action brought.

The author liable for the publication of a MS. in a periodical.

Libel bought in the shop of a bookseller.

CARICATURES.

LETTERS.

Must be addressed to a third person.

Effect of post-mark.

If the publication of a libel consist in merely selling a few copies of a periodical, in which, *inter alia*, it is contained, one question for the jury is, Did the parties know what it was they were selling? (1)

In an action for a libel in a weekly periodical publication, a witness was allowed to prove a purchase of a copy after the action brought as well as before; for, although not evidence for the purpose of aggravation, it was to shew, that the paper was deliberately circulated. (2)

If A. send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and it be printed and published in that publication, A. is the publisher, and liable to an action. (3)

If a libel be bought in the shop of a bookseller from a person in the shop acting as a servant to the bookseller, it will be *prima facie* evidence of a publication by the bookseller. (4)

A person who, having a copy of a libellous caricature, shews it to another on being requested so to do, is not thereby liable to an action for maliciously publishing. (5)

The libel in a private letter must be proved to have been addressed to a third person, not to the party himself. (6) Therefore, a libellous letter addressed to the party himself is not actionable. (7)

Although the letter containing the libel be addressed to a third person, there is a publication of it, if the plaintiff open it; and it seems, the means by which the libel goes beyond the person to whom it is addressed, is not material; if it go beyond him in any way, the publication is complete. (8)

In an action for a libel contained in a letter, proof that it was written by the defendant's daughter, who was authorised to make out his bills and write his general letters of business, is not sufficient, unless it can be shewn that such libel was written with the knowledge of, or by the procurement of, the defendant. (9)

Neither can the daughter be called as a witness to prove by whose direction such letter was written. (10)

The transmission of a letter by the defendant to his correspondent abroad is a sufficient publication by the defendant. (11)

In an action for a libel contained in a letter written by the defendant to the plaintiff, proof that the defendant knew that letters sent to the plaintiff were usually opened by his clerk, is evidence to go to a jury of the defendant's intention, that the letter should be read by a third person, which would amount to a publication. (12)

If a letter containing a libel have the post-mark on it, that is *prima facie* evidence of its having been published. (13)

A letter written by the defendant, and containing a libel, was dated in Essex, and addressed to a person in Scotland. It was proved to have been in the Colchester post-office, and, after being marked there, to have been

(1) *Chubb v. Flannagan*, 6 C. & P. 431.

(2) *Plunkett v. Cobbett*, 5 Esp. N. P. C. 136.

(3) *Burdett v. Cobbett*, 5 Dow. 301.

(4) *Rez v. Almon*, 5 Burr. 2686.

(5) *Smith v. Wood*, 3 Camp. 323.

(6) *Phillips v. Jansen*, 2 Esp. N. P. C. 624.

(7) *Ahern v. Maguire*, 1 Armstrong & Macartney (Irish), 39.

(8) *Ibid*.

(9) *Harding v. Greening*, 1 Moore, 477. Holt's N. P. C. 531.

(10) *Ibid*.

(11) *Ward v. Smith*, 6 Bing. 749. 4 M. & P. 595. 4 C. & P. 302.

(12) *Delacroix v. Thevenot*, 2 Stark. 63.

(13) *Shipley v. Todhunter*, 7 C. & P. 680.

forwarded to London on its way to Scotland. It was produced at the trial with proper post-marks, and with the seal broken, but not by the party to whom it was addressed:—It was held sufficient *prima facie* evidence of a publication in Essex, and that it had reached its address in Scotland. (1)

If a letter from the defendant be read, which refers to an account of the transaction to which the libel relates, and which has appeared in a newspaper, that newspaper may be given in evidence. (2)

An information for a libel stated, that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard it was asked, if the prosecutor had not received a certain warning. The prosecutor stated, that he understood such question to refer to the letters, and that he should not have understood the meaning of the placard, if he had not received the letters:—It was held, that the letters might be read in evidence as explanatory of the paper, that placard, without proof of the handwriting. (3)

In an action for a libel written in a disguised hand, it was proposed to put into the hands of the jury a book containing entries, which the witness swore, he saw the defendant make at the time, in order that the jury might compare these entries with the libel:—but it was held, that it could not be done. (4)

And the witness having stated, that he believed the libel to be in the handwriting of defendant, although somewhat disguised, a letter, which he also stated to be the defendant's letter but not disguised, was offered in evidence, on the ground, that it referred to some of the subjects mentioned in the libel. It was objected to, on the ground, that it would have the same effect, and was evidently offered for the same purpose, as the book which had been rejected:—It was held, that the letter must be received in evidence, and could not be withdrawn from the consideration of the jury. (5)

On the trial of an action against the publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are receivable as evidence to shew the *animus* with which the libel was published, and that the publisher considered it as applying to the plaintiff. (6)

In an action for libel, a letter written to the defendant, containing a statement of the facts upon which he founded his charges, is receivable in evidence on his behalf, to shew the *bona fides* upon which he acted. (7)

In cases of libel, a subsequent publication brought out even after issue joined, may be evidence to shew the motives of the party (8), such as, that the libel was circulated deliberately. (9)

THE EVIDENCE.

Newspaper may be given in evidence if referred to in a letter.

PROOF OF HANDWRITING.

When proof dispensed with.

Letters in the handwriting of the defendant, and book of entries made out by the defendant rejected, when offered for the object of comparison.

QUO ANIMO.

Publications of libels.

Libel circulated after issue joined.

(1) *Warren v. Warren*, 4 Tyrw. 850. 1 C. M. & R. 250.

(2) *Weaver v. Lloyd*, 1 C. & P. 296. 4 D. & R. 230. 2 B. & C. 678. A notice to produce "the several letters written in the year 1839" is too general. *Ahern v. Maguire*, 1 Armstrong & Macartney (Irish), 39.

(3) *Rex v. Slaney*, 5 C. & P. 213.

(4) *Waddington v. Cousins*, 7 ibid. 595.

(5) *Ibid.*

(6) *Chubb v. Westley*, 6 ibid. 436.

(7) *Blackburn v. Blackburn*, 1 M. & P. 33. 63. 4 Bing. 395. 3 C. & P. 146.

(8) *Macleod v. Wakley*, 3 C. & P. 311.

(9) *Plunkett v. Cobbett*, 5 Esp. N. P. C. 136., vide etiam *Finnerty v. Tipper*, 2 Camp. 72. *Stuart v. Lovell*, 2 Stark. 93. *Wakley v. Johnson*, R. & M. 422. *May v. Brown*, 3 B. & C. 113. *Tarpley (Clerk) v. Blabey*, 2 Bing. N. C. 437.

THE EVIDENCE.

In *Barwell v. Adkins* (1), which was an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a second paragraph subsequently published in the same paper, in which the libellous charge was re-asserted, for the purpose of shewing the defendant's intention; and in leaving the case to the jury, the judge told them to take the two paragraphs with them, and to give the plaintiff such damages, as they considered him entitled to under the circumstances. An application for a new trial on the ground of misdirection was refused.

Identification of the person with the subject of the libel.

Proof that the plaintiff had been made the subject of laughter at a public meeting, is admissible as identifying his person with the subject of a libel, and as proof of the consequences, which had necessarily resulted to him from its application. (2)

Evidence of personal malice inadmissible.

In an action for a libel against the publisher of a magazine, evidence of the writer's personal malice is not admissible (3); and letters written by the defendant to the plaintiff, but not relating to the libel, are not admissible to shew personal malice in the defendant. (4)

In an action for libel, general evidence, that the plaintiff has been in the habit of libelling the defendant is inadmissible (5); and the plaintiff cannot give in evidence other libels published concerning him by the defendant, unless they directly refer to the libel set out in the declaration (6), either in bar of the action, or in mitigation of damages. (7)

WHEN JUSTIFICATION PLEADED.

Any thing may be given in evidence which will destroy the plaintiff's cause of action.

In actions on the case, any thing may be given in evidence under the general issue, which will destroy the plaintiff's cause of action. (8)

In an action for a libel, a plea justifying a charge of having disclosed confidential communications made to the plaintiff as an attorney, may be supported by proof of the disclosure of communications made to him by his clients, as are not of that strictly privileged character, which would prevent his examination as a witness. (9)

Where evidence sufficient, although it do not justify certain terms in the alleged libel.

To an action for libelling plaintiffs in their business of sellers of medicine, by publishing that defendants had crushed the Hygeist system of wholesale poisoning pursued by the scamps and rascals, the defendants pleaded and proved the conviction of two of the vendors of plaintiff's pills for manslaughter:—It was held, that the plea was sufficient and sufficiently proved, though it did not justify the terms "scamps and rascals," and though one of the victims died, notwithstanding he had taken fewer pills than the vendor recommended, it appearing that a larger number would only have accelerated his death, and that it was not necessary for defendants to shew, they had completely crushed the system. (10)

To support a charge of forgery, the same evidence must be given, as would be requisite to secure a criminal conviction.

In an action for libel, to support a plea of justification stating, that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for the defendant, the same evidence must be given, as would be necessary to convict the plaintiff, if he were on trial for those offences; but if the evidence fall short of satisfying the jury, that the

(1) 1 M. & G. 807.

(2) *Cook v. Ward*, 4 M. & P. 99. 6 Bing. 409.

(3) *Robertson v. Wylde*, 2 M. & Rob. 101.

(4) *Ahern v. Maguire*, 1 Armstrong & Macartney (Irish), 39.

(5) *Wakley v. Johnson*, R. & M. 422. *Finnerty v. Tipper*, 2 Camp. 76.

(6) *Finnerty v. Tipper*, 2 Camp. 72.

(7) *Moy v. Brown*, 4 D. & R. 670. 3 B. & C. 113.

(8) *Barber v. Dixon*, 1 Wils. 45.

(9) *Moore v. Terrell*, 1 N. & M. 559. 4 B. & Ad. 871.

(10) *Morrison v. Harmer*, 3 Bing. N. C. 759.

strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages (1); and the same observations apply to a libel, in which the defendant justifies, that the plaintiff was guilty of bigamy. (2)

If, in justifying a libel, that the plaintiff was guilty of "polygamy" in marrying three wives, who were all living at the same time, the defendant plead, that the plaintiff was guilty of "polygamy" in marrying three persons named, who were all living at the same time, it is sufficient proof of the marriages to shew the actual marriages as to two, and reputation and cohabitation as to the third; because, if by the term "polygamy" the offence of bigamy be meant, the substance of the issue is made out by proof of the two marriages; and if by the term "polygamy," the mere fact of these marriages is meant, as distinct from the crime of bigamy, evidence of reputation and cohabitation is receivable. (3)

The defendant had pleaded truth in justification of a libel, part of which alleged, that a physician refusing to act with plaintiff, also a physician, had "honourably and faithfully discharged his duty to his medical brethren:"—It was held, that it was not competent to the defendant to offer in evidence, the opinion of medical witnesses on this head. (4)

In an action for libel imputing to the plaintiff, a medical attendant of a poor law union, that he had neglected two pauper patients, the defendant justified, that the imputations were true:—It was held, that the book in which the plaintiff under the order of the poor law commissioners made entries as to the cases of the pauper patients, was not admissible in evidence in his favour. (5)

If, in a case of libel, the defendant in his plea state certain specific facts on which he justifies the publication, a letter written by the plaintiff, which does not go to prove any of the specific facts alleged in the plea, is not admissible in evidence for the defendant. (6)

A libel contained in an advertisement by two tradesmen in partnership, stating, that they deemed it necessary to caution their friends against a fraudulent representation, that any part of their business had been removed, it being obvious, that their concern was still carried on solely at No. 9. Mansion House Street, and that they had no connexion with a shop recently opened in another place, under circumstances grossly misrepresented and highly discreditable, with a view of defrauding them of a part of their business; is not justified by proof, that the person alluded to (who had been for several years in partnership with them) had issued a bill, in which, after thanking his friends for their favours during his residence at No. 9. opposite the Mansion House, he stated, that he had removed his establishment to another place, where the business would be carried on under the firm of R. R. C. and Co., and, in addition to this, had put over his shop door "R. R. C. and Co., removed from opposite the Mansion House." (7)

Evidence shewing the occasion of writing a document, which, if *bond fide*, is not a libel, because a privileged official communication, is admissible

THE EVIDENCE.

Justification of bigamy requires the same proof as will support an indictment for bigamy.

A charge of polygamy may be justified by a proof of bigamy.

When opinions respecting character inadmissible.

When a medical book of a poor law union inadmissible.

Letters when not proving any specific fact alleged in the plea, are inadmissible.

Where charge of fraud and swindling, not justified by proof.

WHEN NO JUSTIFICATION FLEADED.
Privileged of-

(1) *Chalmers v. Shackell*, 6 C. & P. 475.

(2) *Willmetts v. Harmer*, 8 ibid. 695.

(3) Ibid.

(4) *Ramadge v. Ryan*, 9 Bing. 333. 2 M. & Sc. 421.

(5) *Meyrick v. Wakley*, 8 C. & P. 283.

(6) *Moscatti v. Lawson*, 7 ibid. 32.

(7) *Chubb v. Flannagan*, 6 ibid. 431.

THE EVIDENCE.

social commu-
nication.

Fair criticism.

under the general issue to shew, that the writer believed the facts stated therein to be true, although no justification was pleaded. (1)

In an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to shew, that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. (2)

Illegal trade.

The plaintiff alleged, that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade by publishing, that the bitters were made to adulterate porter, *per quod* the plaintiff was ruined: — It was held, that, under the general issue, the defendant might give in evidence, that the plaintiff's trade was illegal, and that his bitters had been condemned in the court of Exchequer. (3)

When negli-
gence cannot
be shewn.

In an action for a libel, which is only libellous on a man in the execution of his office, where the plaintiff has stated by way of inducement his due discharge of his duties, the defendant cannot on the general issue give evidence of negligence in discharging them in answer to that declaration. (4)

When evidence
cannot be given
to shew, that
the allegations
in the libel are
false.

Under the plea of "not guilty" to a declaration for a libel, the plaintiff cannot give evidence to shew, that the allegations in such libel are false; nor can he offer subsequent declarations by the defendant, to shew what motives the libel was published, where the intention of such publication is not equivocal. (5)

DAMAGES.

Printing a libel
with a view to
disprove the
imputation of
having intended
to promulgate it.

It is no answer to a charge of criminal publication of a libel to shew, that the defendant had been told that it was libellous, and not fit to be disseminated generally in the neighbourhood, and that he printed it with a view to disprove the imputation of having intended to promulgate a libel. These facts, if the composition be a libel, so far from constituting a defence, are in aggravation rather than in mitigation of his guilt. (6)

Other papers
which are in
themselves li-
bels, may be
given in evi-
dence.

In an action for a libel, other papers, which are in themselves libels on the plaintiff, may be given in evidence to increase the damages. (7)

Where plaintiff
does not prove
himself to be a
member of the
profession in
which he is
libelled.

The declaration in an action for libel alleged that the plaintiff was a medical practitioner, and stated the libel to have been published of and concerning him in his said practice. No evidence was given of any license or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "physician extraordinary to several ladies of distinction," and "doctor, or rather quack." — It was held, that this did not withdraw the claim of damages in the medical capacity from the consideration of the jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character. (8)

In a joint ac-
tion by two
partners, da-
mages cannot
be given for
their private
feelings.

In a joint action of libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or business. (9)

(1) *Fairman v. Ives*, 1 D. & R. 252. 5 B. & A. 642. *Blake v. Pilford*, 1 M. & Rob. 198. *Pattison v. Jones*, 8 B. & C. 578.

(2) *Tabart v. Tipper*, 1 Camp. 350.

(3) *Manning v. Clement*, 7 Bing. 362. 5 M. & P. 211.

(4) *Dance v. Robson*, M. & M. 294.

(5) *Stuart v. Lovell*, 2 Stark. 93.

(6) *Rex v. Shipley*, 4 Doug. 73.

(7) *Lee v. Huson*, Peake's N. P. C. 923. *sed vide Cook v. Field*, 3 Esp. N. P. C. 133.

(8) *Long v. Chubb*, 5 C. & P. 55.

(9) *Haythorn v. Lawson*, 3 ibid. 196.

It seems, that the proprietor of a newspaper, convicted and fined for the publication of a libel in the paper, inserted without his knowledge and consent by the editor, cannot recover against the editor the damages sustained by such conviction. (1)

Where a jury were directed to find whether a libel was a privileged communication, and if so, whether it was attended with express malice; and they found for the plaintiff, with damages, but that the defendant was not actuated by express malice:—It was held, that the verdict was right, and that the plaintiff was entitled to retain his damages. (2)

If, in an action for libel, the defendant by his pleading admit the publication, the plaintiff will be at liberty to shew the manner of the publication, with a view to the amount of damages. (3)

In an action for a libel, the defendant may on the general issue prove in mitigation of damages any ground of suspicion short of facts which would, if pleaded, have amounted to a complete justification. (4)

But it seems, that in an action for a libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, and the plaintiff in consequence is not prepared with evidence to answer the defendant's proof. (5)

In *Leicester (Earl of) v. Walter* (6) the defendant proved under the general issue, in mitigation of damages, that before and at the time of the publication of the libel the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that, on account of this suspicion, his relation and acquaintances had ceased to associate with him. And in *Wyatt v. Gore* (7) the defendant under the general issue proved, that the substance of the libel charged in the declaration had been previously published in a newspaper; and it was held not to be requisite to lay a basis for this evidence by producing the newspaper.

In mitigation of damages in an action for a libel, the defendant was allowed, under the general issue, to shew, that he copied the statement from another newspaper; but was not allowed to shew, that it appeared concurrently in several other newspapers. (8)

In an action for a libel, the defendant may in mitigation of damages give in evidence other libels published recently before by the plaintiff of the defendant, with the view of shewing a provocation by the plaintiff; and a witness may be also asked, whether the plaintiff has not previously published attacks on the defendant; but the judge will caution the jury not to consider one libel as a set-off against the other (9); he may also shew, that the plaintiff had used expressions calculated to provoke him, both in writing and verbally (10): but in order to the admission in evidence of libels by

THE EVIDENCE.

Proprietor of a newspaper cannot, for the publication of a libel, recover the damages against his editor.

Plaintiff entitled to retain his damages, although the jury find that there was no express malice.

ADMISSIBLE AND INADMISSIBLE EVIDENCE IN MITIGATION OF DAMAGES. When defendant admits the publication, Suspicion short of facts.

Statement copied from another paper.

Provocation by plaintiff.

(1) *Colburn v. Patmore*, 1 C. M. & R. 73. 4 Tyrw. 677.

(2) *Blackburn v. Blackburn*, 4 Bing. 395. 1 M. & P. 33. 63. 3 C. & P. 146.

(3) *Fines v. Serell*, 7 C. & P. 163.

(4) *Knobell v. Fuller*, Peake's Add. Cas. 139., sed vide *Underwood v. Parks*, Str. 1200. *Mullett v. Hulton*, 4 Esp. N. P. C. 248. *Bamer v. Merle*, cit. 2 Camp. 253, 254.

(5) *East v. Chapman*, 2 C. & P. 570. M. & M. 46.

(6) 2 Camp. 251.

(7) *Holt's N. P. C.* 299.

(8) *Saunders v. Mills*, 6 Bing. 213. 3 M. & P. 520.

(9) *Watts v. Fraser*, 7 C. & P. 369.

(10) *Tarpley (Clerk) v. Blabey*, ibid. 395. 2 Bing. N. C. 437.

THE EVIDENCE. the plaintiff in mitigation of damages, it must be shewn with precision, that such libels relate to the libels by the defendant. (1)

Where a libellous letter refers to a newspaper as containing the slanderous matters imputed to the plaintiff, the defendant may give the newspaper in evidence in mitigation of damages under the general issue. (2)

No fact admissible which would be evidence to prove a justification. Facts, not amounting to a justification.

The defendant cannot give evidence of any fact in mitigation of damages which would be evidence to prove a justification of any part of the libel; he ought to justify as to that part (3); and evidence of facts, though not amounting to a justification, cannot be received to negative the presumption of malice, and mitigate the damages. (4)

Correctness of the report of a coroner's inquest.

In an action for a libel contained in a report of a coroner's inquest, evidence of the correctness of the report is admissible under the general issue in mitigation of damages; but no evidence of the truth or falsehood of the facts, stated at the inquest, is admissible, as it must be strictly confined to what took place there. (5)

Corporate commissioners.

Where a libel purported to be a report of what occurred before one of his majesty's commissioners of inquiry respecting corporations, it was held, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but that he might give such evidence in mitigation of damages:—and that, if he did so, the plaintiff might give evidence in reply, to shew the inaccuracy of the report. (6)

Repetition of common rumours.

Evidence to prove that a libel was merely a repetition of common rumours which were prevalent at the time of the facts imputed to the plaintiff, and on which the libel was founded, is inadmissible for the purpose of reducing the damages. (7)

Libel having appeared in other papers.

In an action for a libel published in a newspaper, the defendant cannot go into evidence in mitigation of damages to shew, that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages; but the defendant may shew, that he copied the libel from another newspaper, and omitted several passages contained in that newspaper, which reflected on the character of the plaintiff. (8)

RIGHT OF COUNSEL TO BEGIN AND REPLY—PAYMENT OF MONEY INTO COURT—STATUTE OF LIMITATIONS—ENTRY OF VERDICT—NEW TRIAL—COSTS—ATTACHMENT—JUDGMENT.
Judgment of Chief Justice Tindal in *Carter v. Jones*.

8. RIGHT OF COUNSEL TO BEGIN AND REPLY—PAYMENT OF MONEY INTO COURT—STATUTE OF LIMITATIONS—ENTRY OF VERDICT—NEW TRIAL—COSTS—ATTACHMENT—JUDGMENT.

In *Carter v. Jones* (9) Chief Justice Tindal said, "A resolution has been recently come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant."

In an action for a libel, where the general issue is pleaded, and also special pleas in justification, the plaintiff may in the outset give all the evi-

(1) *Tarpley (Clerk) v. Blabey*, 7 C. & P. 395.
2 Bing. N. C. 437.

(2) *Mullett v. Hulton*, 4 Esp. N. P. C. 248.

(3) *Vessey v. Pike*, 3 C. & P. 512.

(4) *Waithman v. Weaver*, D. & R. N. P. C. 10.

(5) *East v. Chapman*, M. & M. 46. 2 C. & P. 570.

(6) *Charlton v. Watton*, 6 C. & P. 385.

(7) *Waithman v. Weaver*, 11 Price, 257.

(8) *Creery v. Carr*, 7 C. & P. 64.

(9) 1 M. & Rob. 281.

dence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant; but he is not entitled to give part of such evidence in the first instance, and reserve the remainder for reply to the defendant's case. (1)

RIGHT OF
COUNSEL TO
BEGIN AND RE-
PLY, &c.

If, in an action for libels, two distinct charges be made against the plaintiff, which the defendant justifies as true, and at the trial the plaintiff's counsel makes a full opening of the facts as to both charges, but goes into evidence to disprove the pleas as to the first charge only, he will not be entitled to contradict the allegations in the pleas as to the second charge by evidence in reply. (2)

WHEN EVI-
DENCE IN REPLY
WILL NOT BE
ALLOWED.

Under stat. 3 & 4 Will. 4. c. 42. s. 21. the defendant cannot pay money into court.

PAYMENT OF
MONEY INTO
COURT.

By the Statute of Limitations (21 Jac. 1. c. 16.), if the cause of action did not accrue at any time within six years next before the commencement of the plaintiff's action, the action cannot be sustained. But such statute must be pleaded specially.

STATUTE OF
LIMITATIONS
(21 Jac. 1.
c. 16.).

In *Empson v. Fairfax* (3), which was an action of case for publishing a libel, the defendant pleaded, 1. not guilty; 2. justification, that the supposed libel was true; replication, *de injuriâ*: the publication was proved, and the defendant offered no evidence; but the jury found for the defendant on the first issue:—It was held, that in default of directions to the contrary from the judge, the verdict should be entered on the *postea* for the defendant on the first issue, and for the plaintiff on the second, such entries not being necessarily inconsistent; because, the verdict was, "not that there was no publication, but that there was no libel;" and that the plaintiff should have his costs of the second issue.

ENTRY OF
VERDICT.

Where a libel in a newspaper stated, "About five years ago, he (the plaintiff) had a house in O. Street, P. Square, and some time prior to that, he had one in M. Square, in both of which he contrived," &c.; and a count in the declaration purported to set out the whole of this passage, but omitted the words "of" and "which:"—It was held, that the variance was fatal; but the plaintiff was allowed to enter a verdict on other counts, to which the defendant had only pleaded the general issue, and which set out the above passages correctly. (4)

If there be a plea of not guilty with a justification, and the jury find for the defendant on the general issue, they should be discharged from finding on the special pleas. (5)

Where defendants justified and proved the truth of a libel, charging the plaintiff with having acted in a grand swindling concern at Manchester, but omitted any justification of the following passage:—"As we have already stated, Clarke had been at Leeds for one or two days before his arrival in this town, and is supposed to have made considerable purchases there; it is hoped, however, that the detection of his plans in Manchester will be learnt in time to prevent any very serious losses from taking place." "We have already stated, that Clarke referred Mr. Norris to a stockbroker in London, a Mr. Peacock we believe, to whom Mr. Norris wrote for information respect-

(1) *Browne v. Murray*, R. & M. 254.
& C. not S. P. 4 D. & R. 830.

(4) *Cooke v. Smith*, M'Clel. 250.

(5) *Robertson v. M'Dougall*, 4 Bing. 670.

(2) *Duncombe v. Daniell*, 8 C. & P. 222. 675. 1 M. & P. 692. 3 C. & P. 259.

(3) 8 A. & E. 296.

**RIGHT OF
COUNSEL TO
BEGIN AND RE-
PLY, &C.**

ing Clarke's circumstances. He received a reply from Mr. Peacock, stating that Mr. Clarke had been introduced to him by a very respectable party; that he had sold stock for Clarke amounting to 1700*l.*, and had introduced him to Messrs. Jones, Lloyd, and Co., with whom he had opened an account by depositing 2000*l.* We believe there is not the slightest reason to doubt the truth of Mr. Peacock's statement; and the probability is, that Clarke had been furnished with the stock, and an introduction had been obtained to the stockbroker for the purpose of giving colour to his proceedings here and in Yorkshire:—"and a jury having found for the defendants on the part of the libel which was justified, the court refused to enter a verdict for the plaintiff on the passage not justified. (1)

NEW TRIAL.
When a new trial will not be granted, on the ground of surprise.
COSTS.

Where a verdict is for a sum less than 20*l.*, unless practice or fraud on the part of the plaintiff be shewn, the court will not disturb the verdict on the ground of surprise. (2)

By stat. 3 & 4 Vict. c. 24., if in any action of trespass on the case, the plaintiff recover less damages than 40*s.*, he will not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever. (3)

ATTACHMENT.

In an action for a libel contained in the recitals of a deed of settlement of a joint stock company, it was agreed, that the defendant should cancel the deed containing the offensive expressions, and prepare a new deed; and the terms of the agreement were embodied in an order of Nisi Prius, which was subsequently made a rule of court:— It was held, that the defendant having shewn himself desirous of obeying the order *bond fide*, but not having been enabled to do so, was not liable to an attachment. (4)

**Judge can cer-
tify under stat.
3 & 4 Vict.
c. 24. s. 2.**

In an action for libel, the judge has power to certify, under stat. 3 & 4 Vict. c. 24. s. 2., that the grievance for which the action was brought was wilful and malicious.

The words of the statute "wilful and malicious" import *personal malice* and ill-will to the plaintiff, as contradistinguished from the malice in law which is essential to sustain an action for libel. (5)

JUDGMENT.

An executor can, under stat. 17 Car. 2. c. 8. s. 1., enter up judgment on a verdict obtained by his testator in an action for a libel.

The judgment is, that the plaintiff recover his "damages" or his "damages and costs;" or, if the verdict be for the defendant, then "that the plaintiff take nothing by his writ, and that defendant go thereof without day," and also that the defendant "recover against the plaintiff the costs and charges he has expended in his defence."

**CRIMINAL IN-
FORMATION.**

GENERALLY.

DEFINED.
Informations analogous to declarations.

9. CRIMINAL INFORMATION.

I. Generally.

Criminal informations are analogous to declarations for the redress of a personal injury, except that the latter are at the suit of a subject for the

(1) *Clarke v. Taylor*, 2 Bing. N. C. 654.

(2) *Branedon v. Didsbury*, 9 Dowl. P. C. 199.

(3) *Vide* stat. 3 & 4 Vict. c. 24., *ante*, 228.

(4) *Clare v. Blakesley*, 8 Dowl. P. C. 835.

(5) *Foster v. Pointer*, 8 M. & W. 895.

satisfaction of a private wrong; and the former are in the name of the king, for the punishment of offences affecting the interests of the public. (1)

CRIMINAL INFORMATION.

Criminal informations (2), if exhibited in the name of the king, are of two kinds — first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general.

Informations exhibited in the name of the king.

Secondly, those in which, though the king is the nominal prosecutor, yet the relation is by some private person or common informer, and they are filed by the king's coroner and attorney in the court of King's Bench, usually called the master of the crown office, who is for this purpose the standing officer of the public. (3)

Informations in which the king is nominal prosecutor.

Informations in the name of the master of the crown office against private individuals, divide themselves into two classes, those filed against private individuals, and those which are granted against magistrates.

Informations in the name of the master of the crown office.

The court upon motion supported by affidavits, and not sufficiently answered by the party accused, will grant leave to file a criminal information, in case of all offences below the degree of felony, and which do not so immediately affect the security of the government, as to require the interference of the attorney general, but which are important in themselves, and in their consequences materially affecting the public welfare. (4)

Cases in which permission will be granted to file an information.

In order to maintain an application for a criminal information, the party applying must leave himself wholly in the hands of the court, and in no way make libellous attacks on the other side. (5)

If the subject of the application be a libel upon an individual, charging him with a particular offence, the court will always require the prosecutor to deny the charge upon oath, before the information will be granted (6); and where the affidavit of the prosecutor explicitly denies the charge imputed to him in the libel, he is not disentitled to a criminal information against the publisher, although it appears upon his own affidavit, or upon other affidavits brought forward by him, that in another transaction, unconnected with that charge, his conduct was censurable. (7)

Denial of charge.

But the prosecutor is not required to deny the charge upon oath, if it be general, or against a public body of men. (8)

Where a rule *nisi* for a criminal information for a libel was discharged, on an affidavit made by a person who swore to the truth of the libel, but who was in consequence subsequently indicted for perjury, and upon the bill being found, absconded; the court, upon affidavits, that the former affidavit was entirely untrue, granted another rule *nisi* for a criminal information, and made it absolute. (9)

When rule discharged upon a person swearing falsely to the truth of the libel.

An information will lie for libelling magistrates in the discharge of their duty (10); or against a corporation for entering libellous reflections in their

Libelling or obstructing magistrates. Libels in corporation books.

(1) Jacob's Diet. tit. Information.

(2) 4 Black. Com. 308.

(3) 1 Stephens's Corporation Acts, 2d ed. 539.

(4) Hawk. b. ii. c. 26. 2 Hale, 151. 5 Bac. Abr. Informations (A, B.), 402—410. A justice of peace out of sessions, before information filed, or indictment found, has jurisdiction in the first instance, to issue his warrant to apprehend a party charged on oath with publishing a libel, and require him to find bail; and, in default of sureties, to commit him to prison to abide his trial.

Butt v. Conant (Knight), 4 Moore, 195. 1 B. & B. 548. Gow, N. P. C. 84.

(5) *Regina v. Nottingham Journal (Proprietors of)*, 9 Dowl. P. C. 1042.

(6) *Rez v. Miles*, Doug. 283.

(7) *Rez v. O'Brien*, 1 Cooke & Alcock (Irish), 128.

(8) *Rez v. Williams*, 5 B. & A. 595. 1 D. & R. 197.

(9) *Rez v. Eve*, 1 N. & P. 229.

(10) *Rez v. Darby*, Carth. 14. 5 Bac. Abr. Informations (B.), 408.

CRIMINAL INFORMATION.

Publishing proceedings before commissioners, injurious to the character of another.

When information will be granted for the protection of the family of a person, to whom individually it would be refused.

Information will not be granted for light or trivial causes.

Action commenced against the accused.

Giving another into custody, is not such an election of a remedy, as to preclude the party from applying for an information.

Information

books respecting the issue of a trial, and the administration of public justice (1); or for bribery at a corporation election. (2)

In *Rex v. O'Brien* (3) a criminal information was granted for publishing in a newspaper, a report of evidence reflecting upon the character of an individual, voluntarily given before commissioners appointed to inquire into the state of municipal corporations, the inquiry being *ex parte*, and the publication being attributed to malicious motives.

In *Regina v. Gregory* (4) it appeared, that libels were published, alleging that the Marquis of Blandford, then married and having children, had, at the time of such marriage, a former wife living, and issue by her; and that their claim to succeed him was in a course of litigation, the result of which would be, to annul the present marriage, and bastardise the children.

Upon these facts a criminal information was moved for; and the marquis, his eldest son, his wife's brother, and other persons, made affidavit in support of the rule. The marquis admitted, that he had cohabited with the lady said to be his first wife, but his marriage with her, and all the other material statements in the libels, were negatived. An affidavit was made in answer, not confirming those statements, but throwing great blame on the marquis's conduct in his connection with the lady alluded to:—It was held, that although the marquis himself might be too much inculpated to demand a criminal information, the rule should nevertheless be made absolute for the protection of his family.

The court will not entertain an application for a criminal information on light or trivial grounds, or when imputations are not made individually on the person applying for the information, but will leave him to his remedy by action or indictment. (5)

The court will not interpose, if the applicant have commenced an action against the accused. And if an action be depending, they will require a positive engagement that all proceedings be suspended (6), unless under special circumstances. (7)

In *Regina v. Gwilt* (8) it appeared, that the defendant threatened to assault the prosecutor the first time they met in the street; to which the prosecutor answered, that he would give the defendant into custody, if he did so. On their meeting afterwards in the street, the defendant assaulted the prosecutor, who thereupon called a policeman and gave the defendant into custody, but without warrant, the policeman thinking it unnecessary, though he had not witnessed the assault, and the defendant was locked up at the station house till he gave bail to appear before a police magistrate. He appeared accordingly, but the prosecutor declined to press the charge there, saying he should take another remedy; and he afterwards moved for a criminal information:—It was held, that the prosecutor could not be considered as having elected his remedy in the first instance, so as to preclude himself from moving for an information.

In *Regina v. Collinridge* (*Editor of Southern Advertiser*) (9) Lord Denman

(1) *Rex v. Watson*, 2 T. R. 199. Hawk. b. ii. c. 26.

(2) *Rex v. Plympton*, 2 Ld. Raym. 1377. Hawk. b. ii. c. 26. 5 Bac. Abr. Informations (B.), 407.

(3) 1 Cooke & Alcock (Irish), 128.

(4) 8 A. & E. 907.

(5) *Regina v. Mead*, 4 Jur. 1014.

(6) *Rex v. Phillips*, C. T. H. 241.

(7) *Rex v. Sparrow*, 2 T. R. 198. *Rex v. Fielding*, 2 Burr. 719. Hawk. b. ii. c. 26. 1 Stephens's Corporation Acts, 2d ed. 540.

(8) 11 A. & E. 587.

(9) The Times, Nov. 6. 1841.

CRIMINAL INFORMATION.

will not be granted, except upon such evidence, as would warrant a grand jury in finding a true bill.

Judgment of Lord Denman in *Regina v. Collinridge*.

Prosecutor cannot use a statement in the defendant's affidavits to supply a defect in his own.

When rule *nisi* has been discharged, from the perjury of the defendant's witnesses.

Application for an information must be made within a reasonable time.

is reported to have said, "It was an invariable rule in this court, upon such subjects never to grant a criminal information upon materials which would not be sufficient to justify a grand jury in finding a bill of indictment for the same offence. If the evidence now presented to the court were to be laid before a grand jury, they would certainly be bound to throw out a bill founded upon such testimony. He, Lord Denman, totally dissented from the doctrine, that a *prima facie* case was sufficient to justify this court in putting into exercise an inquisitorial power, for the purpose of calling upon any individual to clear himself from any particular imputation. Such a practice, if ever introduced, would produce the most dangerous consequences, and would therefore never receive any sanction from the court. The court always act upon the principle that, in such cases, the party applying for the extraordinary interposition of the court in their favour, must entitle themselves to it in the first instance, or should not receive it at all. No opportunity was ever allowed for mending the evidence in such cases." (1)

It is also a principle, that the prosecutor cannot use a statement in the defendant's affidavits to supply a defect in his own, where the latter are so imperfect, that the court, if aware of their defectiveness, would not have granted a rule *nisi*. (2)

D. obtained a rule *nisi* for a criminal information against the publishers of a libel, on his affidavit, that the imputation in the libel was false. The court discharged the rule on the sole affidavit of S., who deposed, that the imputation was true. Afterwards S. made declarations and depositions in an ecclesiastical suit, but not apparently material to such suit, contradicting his affidavit in all particulars. D. then indicted S. for perjury, and the bill was found, but S. left the country. In the term after S. had made the declarations and depositions, and after he had gone away, D. obtained another rule for a criminal information against the publishers, on affidavit of the above facts, and of his innocence as before. In answer, affidavit was made that S. gave the information, after the publication, voluntarily, and that the deponent then and now believed such information to be true; but no affidavit was made as to information or belief at the time of publication. The court under the peculiar circumstances made the rule absolute. (3)

The application to the court must be made within a reasonable time, or the delay must be satisfactorily accounted for. But under special circumstances, the court will allow a motion for a criminal information to be made within the last four days of term, although the cause did not arise within the term. (4)

Where a libel appeared in May, and the party libelled first heard of the libel in July, but did not apply to the publisher till November, nor move for a criminal information till January:—It was held, that the application was too late. (5)

A rule for a criminal information will not be granted, when a whole term

(1) In an indictment for libel, the proprietor of a newspaper is *prima facie* answerable for what appears in it; but the presumption arising from proprietorship may be rebutted, and an exemption established. *Rex v. Fisher*, M. & M. 433.

(2) *Regina v. Baldwin*, 8 A. & E. 168.

(3) *Rex v. Eve*, 5 *ibid.* 780.

(4) *Evatt v. Kelly*, 1 Jebb & Symes (Irish) 28.

(5) *Rex v. Murray*, 1 Jur. 37.

CRIMINAL INFORMATION.

has been allowed to intervene between the facts alleged, and the application to the jurisdiction of the court (1); neither will it be granted on the last day of term. (2)

II. The Affidavit.**THE AFFIDAVIT.**

The application is for a rule to shew cause why a criminal information should not be filed against the party complained of, and must be founded upon an affidavit, disclosing all the material facts of the case.

How intituled.

The affidavits upon which the rule *nisi* is moved for, must not be intituled in any cause (3); but the affidavit, upon showing cause, must be intituled, "*The King v. —.*" (4)

Joint information.

When a joint information is intended to be filed against various persons, the application should be joint against all in the first instance. (5)

Substance of affidavit.

The affidavits must charge the defendant with such a crime, as will justify the court in interfering, and establish the innocence and motives of the applicant. (6)

Where a rule for a criminal information was obtained against the proprietor of a newspaper, and the affidavit of the applicant shewed, that the alleged libel, among other things, charged the applicant with writing in a rival newspaper, but did not negative any knowledge of the articles, the court discharged the rule (7):—in fact, as previously observed, the affidavit should disclose facts equally cogent, as those which would warrant a grand jury in presenting a bill of indictment. (8)

Affidavits made use of on a former motion, cannot be used in a subsequent stage of the same cause. Impertinent and censurable statements.

Affidavits made use of on a former motion, will not be allowed to be used in a subsequent stage of the same cause, unless notice of intention to rely on them be served on the opposite party. (9)

A magistrate, applying for a criminal information for slanderous words addressed to him in the execution of his duty, made an affidavit as to the subject of complaint, in which he stated the defendant to be, a shuffling and litigious person, and related a former dispute between him and his son, involving circumstances discreditable to the defendant. The latter statement was made, professedly, in explanation of some words used by the defendant on the occasion when he spoke those more particularly complained of, but it did not bear upon the merits of the complaint:—It was held, that the above statements were impertinent and censurable; but the court did not, therefore, reject the affidavit; and it noticed the statement as shewing, unfavourably to the prosecutor, the spirit in which he had probably acted, when the alleged offence took place. (10)

(1) *Regina v. Hext*, 4 Jur. 339.

(2) *Exp. Tunner*, 3 *ibid.* 10.

(3) *Rex v. Harrison*, 6 T. R. 60. *Rex v. Robinson*, *cit. ibid.* 642.

(4) *Rex v. Jones*, Str. 704. If an affidavit purport to be sworn before a commissioner by A. B. of C. D., in the parish of E. and county of F., and the jurat state the affidavit to be sworn "at C. D. aforesaid:" *quare*, Whether the jurat be insufficient, as not stating the county in which the oath is taken? *Rex v. Burn*, 7 A. & E. 190.

(5) *Rex v. Heydon*, 3 Burr. 1270.

(6) *Rex v. Miles*, Doug. 284. *Rex v. Haswell*, *ibid.* 387. *Rex v. Williams*, 1 Burr. 407. *Rex v. Davie*, Doug. 588.

(7) *Rex v. Taylor*, 1 Jur. 52.

(8) *Rex v. Willett*, 6 T. R. 294. *Rex v. Williamson*, 3 B. & A. 583.

(9) *Regina v. Darling*, 1 Crawford & Dix (Irish), 101.

(10) *Rex v. Burn*, 7 A. & E. 190.

The prosecutor need not by his affidavit exculpate himself from charges of a general nature contained in the alleged libel, although he must deny all the specific charges therein. But the court will not permit the prosecutor to file supplemental affidavits for the purpose of answering charges contained in the answering affidavits of the defendant. (1)

The absence of a statement of the rank of life of the parties to the affidavits to ground a motion for a criminal information, is a substantial defect, and may be taken advantage of, upon shewing cause against the conditional order. (2)

In moving for a criminal information for libel, a prosecutor need not adopt the statutory mode of proof (3); but it is not sufficient to produce an affidavit, stating merely, that the defendant on &c. printed and published a libel in a newspaper called &c., a copy of which libel is hereunto annexed, and to annex such copy. (4)

CRIMINAL INFORMATION.

Prosecutor need not exculpate himself from charges of a general nature.

Absence of the statement of the rank of life of the parties, is a substantial defect.

Prosecutor need not adopt the statutory mode of proof.

III. Filing Information — Enforcement of Appearance — Making Default — Bill of Exceptions — Verdict — Judgment — Costs.

When the rule is made absolute, the information is filed at the crown office, upon the prosecutor's entering into the usual recognisances for costs.

When the information is filed, process issues to compel the appearance of the defendant, if an appearance be not already entered for him.

He then either pleads to the information, or applies to quash it; and, on issue joined, the proceedings are brought to trial. (5)

Where a rule for a criminal information was enlarged, on condition, that the defendant would appear and plead immediately, in the event of its being made absolute: — It was held, that he was entitled to reasonable time. (6)

Where a defendant makes default in the performance of an undertaking, made on his behalf by his counsel in open court, the court will make an order directing the performance of such undertaking, which will be enforced by attachment. (7)

A bill of exceptions cannot be taken at the trial of an information for a libel. (8)

It may be stated, that, with respect to criminal cases (9), it has been enacted by stat. 32 Geo. 3. c. 60., the jury can give a general verdict of guilty or not guilty upon the whole matter put in issue, and are not required or directed by the court to find the defendant guilty, merely on the proof of the publication, and of the sense ascribed to the same in the indictment or information: but, that the court may give their opinion and direction to the jury on the matter in issue, as in other criminal cases; and that the jury may, in their discretion, find a special verdict; and also that

FILING INFORMATION — ENFORCEMENT OF APPEARANCE — MAKING DEFAULT — BILL OF EXCEPTIONS — VERDICT — JUDGMENT — COSTS.

FILING INFORMATION.
ENFORCEMENT OF APPEARANCE.

MAKING DEFAULT.

BILL OF EXCEPTIONS.

VERDICT.

Stat. 32 Geo. 3. c. 60.

Sec. 2.

Sec. 3.

Sec. 4.

(1) *Regina v. Furdus*, 1 Crawford & Dix (Irish), 170.

(2) *Regina v. Harrison*, 1 Jebb & Symes (Irish), 422.

(3) *Vide* stats. 38 Geo. 3. c. 78. and 6 & 7 Will. 4. c. 76.

(4) *Regina v. Baldwin*, 8 A. & E. 168.

(5) 1 Stephens's Corporation Acts, 2d ed. 544.

(6) *Regina v. Muntz*, 2 Jur. 538.

(7) *Regina v. Devereux*, 1 Crawford & Dix (Irish), 157.

(8) *Rex v. M'Donnell*, 1 Hudson & Brooke (Irish), 439.

(9) *Levi v. Milne*, 4 Bing. 195.

CRIMINAL INFORMATION.**JUDGMENT.**

When the court will refuse to pass judgment on an indictment for a libel.

COSTS.

When costs will not be ordered to be paid by the attorney.

Affidavit containing slanderous matter.

the defendants, if found guilty, may move in arrest of judgment, as they might have done, before the passing of the foregoing statute.

In an indictment for libel, the defendant pleaded guilty, and entered into his own recognisance to appear and receive judgment when called upon to do so, and not to be called upon at all, if he discontinued to publish libels on the prosecutor. (1) And, upon a subsequent application, the court refused to pass judgment, unless the prosecutor produced an affidavit, stating, that the defendant had, since the trial, published libels respecting him. (2)

The court will not award costs to be paid by the attorney prosecuting a rule for a criminal information, where no circumstance appears making him personally a party to such rule; although his conduct may have been such, that the court would otherwise have entertained an application against him.

Thus, in *Regina v. Thomas* (3) the court refused to make an order for costs to be paid by the attorney, where the information had been moved for against magistrates, for refusing to examine witnesses on a charge of perjury, although the charge had been instituted before them by the attorney, as was alleged, from improper motives and without authority from the supposed prosecutor, and had entirely failed; and although the magistrates had been served with a notice of motion for a criminal information, purporting (but not proved) to have been signed by the attorney, and an affidavit of the service was made by a person describing himself as clerk, in his support of a rule for a criminal information.

If an affidavit to support a rule for a criminal information contain matter slanderous of the defendant, the court will in some cases discharge the rule without costs. (4)

Before the defendant could instruct his London solicitors to plead to the information, the prosecutor had obtained a rule calling upon him to shew cause, why the prosecutor should not be at liberty to enter an appearance and sign judgment. The court made the rule absolute, but awarded costs against the prosecutor. (5)

(1) *Regina v. Richardson*, 8 Dowl. P. C. 511.

(2) *Ibid.*

(3) 7 A. & E. 608.

(4) *Rex v. Byrne*, 6 Dowl. P. C. 36.

(5) *Regina v. Muntz*, 2 Jur. 538.

MALICIOUS ARREST.

1. WHERE THE ACTION CAN BE MAINTAINED, pp. 2265, 2266.

GENERALLY — *Arresting for a larger sum than due* — *Defect of jurisdiction* — *Averment of malicious arrest satisfied by proof of a detainer* — *Responsibility for the acts of an attorney.*

2. WHERE THE ACTION CANNOT BE MAINTAINED, pp. 2266, 2267.

Acting under the advice of counsel — *Acting under mistake and without malice* — *Where no actual arrest was made* — *Action terminated by a stet process* — *When money owed by the arrested, but who has a set-off.*

3. DECLARATION — PLEADINGS, pp. 2067, 2268.

FORM OF ACTION — PARTIES — REQUISITE AVERMENTS — PLEADINGS.

4. EVIDENCE, pp. 2268—2273.

PROOF OF THE ARREST — CIVIL PROCESS — CRIMINAL PROCESS — WANT OF PROBABLE CAUSE — *Arrest after release* — *Where no debt until time of credit has expired* — *Arresting upon the balance when mutual accounts exist* — *Refusing to sign a discharge of a debt, when legally tendered* — JUSTIFICATION — PROBABLE CAUSE — *Arrest of privileged person* — *Plaintiff arrested on a bill of exchange, can give any evidence, that would be admissible in an action on the bill* — TERMINATION OF SUIT — ACTIONS AGAINST ATTORNEYS.

5. LIMITATION OF ACTION — PAYMENT OF MONEY INTO COURT — DAMAGES — COSTS, p. 2273.

1. WHERE THE ACTION CAN BE MAINTAINED.

WHERE THE ACTION CAN BE MAINTAINED. GENERALLY.

Analogous to an action for a malicious prosecution, an action can be maintained for maliciously arresting or holding a party to bail, either where there is not any debt due, or where the party is held to bail for a larger sum than is really due.

In an action for a malicious arrest, the question is, whether the original plaintiff had a probable cause of action for the amount for which he held the party to bail, and not whether he had probable cause of action in the particular form of action brought? Thus, where A. had a good cause of action on a covenant for a sum of 1150*l.* against B. and C. separately, but not jointly, and he sued B. and C. jointly, and arrested B. in that action, for 1150*l.*, it was held, that an action for a malicious arrest would not lie by B. against A. (1)

In considering whether there was probable cause for an arrest, the judge will not take expressions of general malice into his consideration, as tending to shew a want of probable cause. (2)

By a *cognovit* A. confessed the action, and that B. had sustained damage to the amount of 3000*l.*; and agreed, that in case A. should make default in payment of 259*l.* on the 7th of May, B. should be at liberty to enter up

Arresting for a larger sum than due.

(1) *Whalley v. Pepper*, 7 C. & P. 506.

(2) *Ibid.*

**WHERE THE
ACTION CAN BE
MAINTAINED.**

judgment for 3000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1650*l.* due to B. A. not having paid the 259*l.* on the 7th of May, B. entered up judgment, and sued out execution for 3011*l.*, indorsed with a direction to the sheriff, requiring him to levy 196*l.*, and A. was arrested and detained in prison for that sum :—It was held, that A. might maintain an action against B. for having caused him to be arrested for a larger sum than he ought. (1)

Where A. arrested B. for 20*l.*, knowing, that upon the balance of their mutual dealings there was but 5*l.* due to him :—It was held, that the arrest was malicious, and without any probable cause. (2)

**Defect of juris-
diction.**

An action was also held to lie for holding to bail in an inferior court, when no more than 90*s.* was due. (3)

**Responsibility
for the acts of
an attorney.**

So, where an inferior court had no jurisdiction over the cause. (4)

In an action for maliciously arresting the plaintiff, and taking him in execution at the defendant's suit, when it was to be inferred from circumstances, that he knew of the plaintiff's having been discharged under the Insolvent Act, it seems, that the defendant is liable, although the plaintiff was taken in execution at the instance of defendant's attorney, and without the knowledge or assent of the defendant. (5)

2. WHERE THE ACTION CANNOT BE MAINTAINED.

**WHERE THE
ACTION CANNOT
BE MAINTAINED.
Acting under
the advice of
counsel.**

If a party having laid his case fairly before counsel, act *bond fide* upon the opinion given, he is not liable to an action for acting *bond fide* upon that opinion, however erroneous it may be. But it is otherwise, when he does not act *bond fide* on the opinion, but arrests, though he believes that he has no cause of action (6); and whether he did so or not, is a question of fact for the jury. (7)

**Arrest from in-
direct motives.**

If the defendant, though advised by a competent person that he has a good cause of action, believes that he must fail, and yet arrests the plaintiff from indirect motives, there is no probable cause.

**Acting under
mistake and
without malice.**

The plaintiff was arrested by the indorsee of a bill of exchange purporting to be drawn on him and accepted by him, but the acceptance was not his :—It was held, that this was not sufficient in an action for a malicious arrest, the defendant having acted under mistake, and without malice. (8)

Where a cause (in which the defendant has been arrested) is referred to arbitration, and the award is given in favour of the defendant, he cannot on that ground maintain an action against the plaintiff for a malicious arrest. (9)

In an action for maliciously holding to bail, when less than 10*l.* was due, it was held, that it could not be sustained, unless it was proved, that the plaintiff knew the fact to be so. (10)

(1) *Wentworth v. Bullen*, 9 B. & C. 693. *Higgins' case*, Cro. Jac. 320. *See v. Allen*, 1 Stark 502.

(2) *Austin v. Debnam*, 4 D. & R. 653. 3 B. & C. 139.

(7) *Ibid.*

(8) *Spencer v. Jacob*, M. & M. 180.

(3) *Smith v. Cattle*, 2 Wils. 376.

(9) *Habershon v. Trosby*, Peake's Add. Cas.

(4) *Goslin v. Wilcock*, *ibid.* 302.

Arun- 181., et vide *Thompson v. Atkinson*, 6 B. & C.

dell v. White, 14 East, 216.

193.

(5) *Jones v. Nicholls*, 3 M. & P. 12.

(6) *Ravenga v. Mackintosh*, 2 B. & C. 34.

(10) *Jackson v. Burleigh*, 3 Esp. N. P. C.

A. by mistake sued out a bailable writ against B., and gave it to C. an officer to be executed, who stated to B. he had a writ against him, but upon B. denying that he owed the money, C. did not take him into actual custody. On inquiry, the mistake was discovered, and B. was told he need give himself no further trouble in the matter; however, he afterwards put in bail above, and incurred an expense of 14*l.*: — It was held, that he could not maintain an action against A. for a malicious arrest. (1)

WHERE THE ACTION CAN- NOT BE MAINTAINED.

Where no actual arrest was made.

Where an officer told the plaintiff, that he had a writ against him at the suit of the defendant, and did not touch him, but took his word that he would put in bail, and the plaintiff, giving him a small gratuity, asked him to go to his attorney and desire him to put in bail, which he did, and bail was put in; Lord Tenterden said, "the very strong inclination of my opinion, however, is, that this is not a sufficient arrest" to sustain the action for a malicious arrest. (2)

An officer who had a writ against a man sent to him to say so, and asked him to appoint a time to come to his office and execute a bail bond, which he did: — It was held, not to constitute an arrest so as to support an action for a malicious arrest, although the original plaintiff had no cause of action. (3)

An allegation, that the defendant maliciously caused the plaintiff to be arrested and to be detained in prison until, in order to procure his release, he was forced to procure bail, is not a divisible allegation; and if a giving of bail be proved, but no evidence of any arrest, it is not sufficient. (4)

Where the original action is put an end to by a *stet processus* by consent of the parties, no action for a malicious arrest can be supported. (5)

Action terminated by a *stet processus*.

An action cannot be maintained for a malicious arrest by A. against B., if A. owed B. the sum for which he was held to bail, although B. was indebted to A. to a larger amount. (6)

When money owed by the arrested, but who has a set-off.

In *Wilkinson v. Mawbey (Bart.)* (7) the declaration averred, that the defendant had no cause of action against the plaintiff for which the latter was liable to be held to bail, and at the trial it was proved, that the plaintiff owed the defendant at the time of the arrest 12*l.*; and a verdict was given for the plaintiff; but the court of King's Bench set it aside, on the ground that the plaintiff had not proved the injury complained of in his declaration.

3. DECLARATION — PLEADINGS.

In *Morgan v. Hughes* (8) Mr. Justice Ashhurst said, "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other."

DECLARATION — PLEADINGS. FORM OF ACTION.

The form of action for a malicious arrest is trespass on the case. (9)

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|---|--|
| (1) <i>Bieten v. Burridge</i> , 3 Camp. 139. | (5) <i>Wilkinson v. Howel</i> , M. & M. 493. |
| (2) <i>George v. Radford</i> , M. & M. 244. | (6) <i>Brown v. Pigeon</i> , 2 Camp. 594. <i>Wetherden v. Embden</i> , 1 <i>ibid.</i> 295. |
| (3) <i>Berry v. Adamson</i> , 6 B. & C. 528. 9 D. & R. 558. 2 C. & P. 503., vide etiam <i>Small v. Gray</i> , <i>ibid.</i> 605. | (7) 1 <i>ibid.</i> 297. |
| (4) <i>Ibid.</i> | (8) 2 T. R. 225. |
| | (9) <i>Ante</i> , 1003—1005. tit. CASE. |

**DECLARATION
—PLEADINGS.****PARTIES.**

If A. wilfully and maliciously cause B., an attorney in practice, to be arrested on mesne process, A. knowing him to be an attorney, an action on the case lies against A. for causing this arrest; and the fact of A. having a good cause of action against B. for a large sum, will be no ground of defence; and the attorney of A. may be joined in the action, if, besides acting as attorney, he co-operated with A. in causing the arrest. (1)

**REQUISITE
AVERMENTS.****Plaint in
sheriff's court.**

In an action for a malicious arrest, it is necessary to state the writ. (2)
Where the declaration alleged a plaint against the defendant at the sheriff's court in London, it was held to be supported by proof of a plaint before one of the sheriffs. (3)

Where the plaintiff alleged, that he was arrested under and by virtue of a plaint for debt in the sheriff's court, it was held to be proved by evidence, that the plaint was entered, and that the officer in consequence arrested the plaintiff, having first received a paper in the nature of a warrant containing the parol directions of the sheriff, which were good by custom, although stat. 12 Geo. 1. c. 29. requires an affidavit of debt, which had been made. (4)

**Legal descrip-
tion of a non-
suit.**

The declaration in setting out the termination of the original suit alleged "that the said plaintiffs did not prosecute their said suit, but therein made default, whereupon, &c.:" — It was held, that the allegation amounted to a legal description of a nonsuit, and was not supported in proof by a rule to discontinue, and that the variance affecting the evidence of malice or want of probable cause was fatal; and the allegation being of a totally different matter, it was not like a mistake in setting out a written instrument, and amendable within stat. 9 Geo. 4. c. 15. (5)

PLEADINGS.**Plea of not
guilty.**

In case for a malicious arrest, the plea of "not guilty" puts in issue merely the malicious act without probable cause, and the averment of the discontinuance of the suit is a material allegation, which should be denied specially. (6)

EVIDENCE.**4. EVIDENCE.****PROOF OF THE
ARREST.
CIVIL PRO-
CESS.**

In an action for a malicious arrest, the plaintiff must prove the affidavit made by the defendant, either by means of the affidavit itself, or proof of an examined copy. (7) He must also prove an examined copy of the writ and return, and produce and prove the warrant of the sheriff made by virtue of the writ, and the arrest and detention under it. The official return made by the sheriff is evidence of the fact for either party (8); but the bare production of the writ by a person who received it in a letter will not entitle the plaintiff to have it read. (9) But it is otherwise, after proof of the affidavit to hold to bail, and of the warrant founded upon the writ. (10)

Where the declaration stated, that the defendant had sued out the writ, which he had caused to be indorsed for bail by virtue of an affidavit for

(1) *Whalley v. Pepper*, 7 C. & P. 506.(2) *Gadd v. Bennett*, 5 Price, 540.(3) *Arundell v. White*, 14 East, 216., post, 2272.(4) *Ibid.*(5) *Webb v. Hill*, M. & M. 253. 3 C. & P. 485.(6) *Watkins v. Lee*, 5 M. & W. 270.(7) *Lloyd v. Harris*, Peake's N.P.C. 231. *Webb v. Herne*, 1 B. & P. 281. 2 Esp. N. P. C. 671.(8) *Gyfford v. Woodgate*, 11 East, 297., contra *Lloyd v. Harris*, Peake's N.P.C. 231.(9) *Jackson v. Burleigh*, 3 Esp. N. P. C. 34.(10) *Ibid.*

that purpose filed : — It was held, that a copy of the affidavit was admissible in support of this allegation. (1)

In case against a judgment creditor for maliciously suing out an *alias fieri facias*, after a sufficient execution levied upon the plaintiff's goods under the first *fieri facias* : — It was holden, that the sheriff's returns indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case), wherein the sheriff stated, that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned, credence being due to the official acts of the sheriff between third persons. (2)

In an action for a malicious arrest on a charge of felony, it is not necessary for the plaintiff to give in evidence the whole of the proceedings before the magistrates. (3)

To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to shew, that the charge was taken down in writing and acted upon by the magistrate ; but it is necessary the jury should be satisfied, that it was made to the magistrate with a view to induce him to entertain it as a charge of felony. (4)

In an action for charging plaintiff with a felony maliciously, and without reasonable or probable cause, it was held, that the judge was warranted in leaving to the jury, instead of deciding himself, the existence of probable cause upon the following state of facts — the plaintiff, a servant, being discharged from service on a Friday, took away with her from her master's house a trunk and bag the property of her master. The master wrote to her the next day, demanding his property, and threatening to proceed criminally on the Monday morning if it were not restored ; the plaintiff being absent from home when the letter was delivered, no answer was returned ; whereupon the master, the same day, Saturday, had her taken into custody, but when she was brought before the magistrates on Monday declined to make any charge. (5)

In an action against defendant for taking plaintiff to a police office, and causing him to be imprisoned without reasonable or probable cause, on a charge, that he uttered menaces against the defendant's life : — It was held, that it was not for the judge alone to determine, whether the menaces justified the charge, but that it should have been left to the jury to determine, whether the defendant believed the menaces before the judge decided, whether or not there was reasonable and probable cause for the charge. (6)

In an action on the case for laying a complaint before a magistrate of threatening language, in consequence of which the plaintiff was taken into custody and imprisoned till he found bail ; it appeared that the threat was used in consequence of a private dispute, and was not uttered to the defendant, but related to him by a servant, who gave evidence of it before a magistrate : — It was holden, that the question for the jury was, whether

EVIDENCE.

Credence given to the official acts of the sheriff between third persons.

CRIMINAL PROCESS.

Not requisite that the charge should be taken down in writing.

False charge of felony before a magistrate.

Charge of uttering menaces.

(1) *Crook v. Dowling*, 3 Doug. 75.

(2) *Gyfford v. Woodgate*, 11 East, 297.

(3) *Biggs v. Clay*, 3 N. & M. 464.

(4) *Clarke v. Postan*, 6 C. & P. 423.

(5) *McDonald v. Rooke*, 2 Bing. N. C.

217.

(6) *Venefra v. Johnson (Clerk)*, 3 M. & Sc. 847. 10 Bing. 301. 6 C. & P. 50.

EVIDENCE.

the defendant acted *bond fide* upon the threat mentioned to him, or merely used it as a pretext for accomplishing his own private purposes? (1)

DEPOSITIONS.

Where in case for a malicious charge of felony the plaintiff puts in, to prove a formal part of his case, the defendant's and another person's depositions before the magistrates, the defendant has a right to use his own deposition as evidence in the cause, but not that of the other deponent. (2)

Where evidence was given of the loss of the warrant, parol evidence of its contents was admitted without proof of the information. (3)

An allegation, that the plaintiff wrongfully and without reasonable cause imposed the crime of felony on the plaintiff, cannot be supported but by evidence, that the defendant went before a magistrate and made a charge of felony. (4)

The magistrate, in cases of criminal process, or his clerk, should be served with a *subpoena duces tecum* to produce the proceedings.

If the information be laid by the defendant, his taking the oath and handwriting should be proved, as also the issuing the warrant to the constable, &c.; the warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under the warrant, and his ultimate discharge must also be shewn. (5)

WANT OF PROBABLE CAUSE.

Malice must be proved by the plaintiff in an action for a malicious arrest. (6)

In an action for a malicious arrest, the jury may imply malice from the absence of reasonable or probable cause. But this is an inference not of law but of fact, which the jury are not bound to draw (7); and presenting to the jury the absence of such cause as conclusive evidence of legal malice is a misdirection. (8)

Arrest after release.

It is evidence of malice, that the defendant sued out the writ after a release of the debt. (9)

Where no debt until time of credit has expired.

So where there could be no debt until the period of credit had expired, it was held, that till then, there could be no reasonable cause for arresting the debtor. (10)

Arresting above the balance when mutual accounts exist.

If one of two parties, between whom there are transactions of mutual accounts, arrest the other for the whole amount due on one side, without deducting what is due on the other, the arrest is malicious. (11)

Refusing to sign a discharge of a debt, when legally tendered.

In an action for maliciously refusing to sign an authority to the sheriff to discharge a defendant out of custody, on tender of the debt and costs, the refusal to sign the discharge, is *prima facie* evidence of malice, in the absence of any circumstances to rebut the presumption (12); and a defendant "is not bound to pay money to the sheriff, but to the party." (13)

(1) *Venafra v. Johnson*, 3 M. & Sc. 847.
10 Bing. 301. 6 C. & P. 50.

(2) *Jackson v. Bull*, 2 M. & Rob. 176.

(3) *Newsam v. Carr*, 2 Stark. 70.

(4) *Blizard v. Kelly*, 2 B. & C. 283.

(5) *Bristow v. Heywood*, 1 Stark. 48. 4 Camp. 214., sed vide *Watkins v. Lee*, 5 M. & W. 270.

(6) *George v. Radford*, 3 C. & P. 464.

(7) *Mitchell v. Jenkins (Clerk)*, 2 N. & M. 301. 5 B. & Ad. 588.

(8) *Ibid.*

(9) *Waterer v. Freeman*, Hob. 267.

(10) *Day v. Picton*, 10 B. & C. 190.

(11) *Austin v. Debnam*, 3 B. & C. 159.

(the question of malice in this case was left to the jury), vide etiam *Dr. Turlington's case*, cit. 4 Burr. 1996. *Dronefield v. Archer*, 5 B. & A. 513. *Barclay v. Hunt*, 4 Burr. 1996., contra *Brown v. Pigeon*, 2 Camp. 594.

(12) *Crozer v. Pilling*, 4 B. & C. 26.

(13) *Morton's case*, 2 Show. 139.

EVIDENCE.

A. arrested B. for money paid to his use on the 10th of December, and was ruled to declare on the 17th; a declaration was filed on the 24th; and the action was discontinued upon payment of costs on the 31st: — It was held, in case for a malicious arrest, that this was a sufficient *prima facie* evidence of malice, and want of probable cause. (1)

Where the defendant held the plaintiff to bail, when she was liable as administratrix only, it was held to be such evidence of malice, that the court refused to disturb a verdict with 5s. damages (2), although no evidence was offered on the trial of malice express or implied.

The first action being *non prossed* is not of itself evidence of malice. (3)

A. having by his laches lost all right of action on a note indorsed by B., arrests B., and afterwards discontinues the action; these circumstances do not of themselves so exclude all probable cause as to afford a presumption of malice. (4)

In an action for arresting a party and holding him to bail, without a reasonable or probable cause, whatever was admissible in evidence to defeat the action on which the arrest took place, is also admissible on the question of the right of the party arrested to recover for the injury sustained. (5)

In an action for maliciously holding to bail, it is not sufficient to prove, that the writ was sued out after payment of the debt, if the circumstances afford no inference of malice; but in such case, evidence of actual malice must be given. (6)

An action will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt, at least unless malice be averred (7); because the plaintiff ought to have inquired at the time when he paid the debt, whether any writ had been sued out, and offering to pay whatever costs were incurred thereby, to have requested a countermand, which he might take to the sheriff; in fact, as Mr. Justice Heath has observed (8), "This action is founded on mere nonfeasance; and no case or precedent has been cited to shew, that such an action was ever maintained; all the cases of arrests and holding to bail without cause are founded on malice." (9)

In an action on the case against a party for causing the arrest of a person privileged from arrest (*e. g.* a witness attending on his *subpoena*, or a practising attorney), thereby putting him to the expense of finding bail, and procuring his discharge by order of a judge, the plaintiff must shew, that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognised the circumstances accompanying it, and also knew, that the party arrested was privileged at that time. (10)

In an action for maliciously holding the plaintiff to bail on a bill of ex-

JUSTIFICATION.
PROBABLE
CAUSE.Maliciously
holding to bail.Arrest of a
privileged per-
son.

A plaintiff ar-

(1) *Nicholson v. Coghill*, 6 D. & R. 12. 4 B. & C. 21.

(2) *Fletcher v. Webb*, 11 Price, 382.

(3) *Sinclair v. Eldred*, 4 Taunt. 7.

(4) *Bristow v. Heywood*, 1 Stark. 48. 4 Camp. 213.

(5) *Haddan v. Mills*, 4 C. & P. 486.

(6) *Gibson v. Chaters*, 2 B. & P. 129., et
vide Silverides v. Bowley, 1 Moore, 92.

(7) *Scheibel v. Fairbairn*, 1 B. & P. 388.

(8) *Ibid.*

(9) *Vide etiam Page v. Wiple*, 3 East, 317. *Lewis v. Morris*, 4 Tyrw. 914. *Saxon v. Browne*, 6 A. & E. 652. *Heywood v. Collinge*, 9 *ibid.* 268.

(10) *Stokes v. White*, 4 Tyrw. 786. 1 C. M. & R. 223.

EVIDENCE.

rested on a bill of exchange, can give any evidence that would be admissible in an action on the bill.

change, it was held, that whatever was admissible in the action on the bill, was also admissible in that action; that the judgment in the original action might not be sufficient; and then the plaintiff would be entitled to shew, that the defendant, at the time of the action brought, was the holder of the bill as indorsee, after it was once due; and that the bill was a mere accommodation bill, and that the defendant, therefore, had no right of action against the plaintiff on it. (1)

In *Norrish v. Richards* (2) it was held, that in actions commenced in any of the superior courts, the plaintiff may, since the rule, Hilary Term, 2 Will. 4. s. 35., declare at any time before the end of a year from the return of the writ, unless the defendant shall have signed judgment of *non pros.* for want of the plaintiff's declaring before the end of the second term; and this, whether the action be commenced by serviceable or bailable process. This applies also to causes removed by the defendant from inferior courts by *habeas corpus* (though the cause was commenced below, and removed, before the rule came into operation), except that, as judgment of *non pros.* cannot be signed in such causes, the plaintiff cannot be out of court till the expiration of the year. And, consequently, an action for malicious arrest cannot be commenced in any of the above cases, till a year has elapsed from the return of the writ. (3)

TERMINATION OF SUIT.

If no declaration be filed or delivered within a year after the return of the writ, it will be considered a termination of that suit. (4)

It is said, that proof of an order made by a judge to stay proceedings is insufficient, although the costs have been taxed and paid. (5)

Sheriff's court.

Where it appeared to be the practice in the sheriff's court in London, upon the abandonment of a suit by the plaintiff, to make an entry in the minute book, of "withdrawn by the plaintiff's order," opposite to the entry of the plaint: — It was held, that proof of such an entry was sufficient to prove the determination of the suit. (6)

Suit terminated by rule of court.

An action may be brought to recover damages for a malicious arrest, where the suit is terminated by a rule of court; and that rule is evidence of the termination of the suit (7), although such rule may have been obtained merely on the oath of the plaintiff, who would, by its admission, be in effect giving evidence in his own cause. (8)

Acceptance of debt and costs under a judge's order or rule of reference.

Where in case for a malicious arrest, the declaration alleges certain facts, "whereupon and whereby the suit was ended and determined," the plaintiff cannot shew any other determination of the suit than the mode stated; and the acceptance of the debt and costs in satisfaction of the action under a judge's order or a rule of reference, is a sufficient determination of the suit. (9)

WHAT IS NOT A TERMINATION OF THE SUIT.

A judge's order to stay proceedings in the first suit, on payment of costs, and proof of such payment, is not sufficient evidence, that the first suit is at

(1) *Haddan v. Mills*, 4 C. & P. 487.

(2) 3 A. & E. 733.

(3) *Quare*, Whether such action lies, where the suit alleged to have determined has been removed by *habeas corpus* at the instance of the defendant? *Ibid.*

(4) *Pierce v. Street*, 3 B. & Ad. 397.

(5) *Kirk v. French*, 1 Esp. N. P. C. 80.

(6) *Arundell v. White*, 14 East, 216., ante, 2268.

(7) *Brook v. Carpenter*, 3 Bing. 297. 11 Moore, 59.

(8) *Ibid.*, vide etiam *Bristow v. Heywood*, 1 Stark. 48. 4 Camp. 213.

(9) *Combe v. Capron*, 1 M. & Rob. 398.

an end. (1) Thus, in *Combe v. Capron* (2) Mr. Justice Patteson said, "The mere acceptance of the debt and costs, without the intervention of the court, is not what can properly be called a determination of the suit."

The allegation that the defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy, &c.," is not supported by a proof of a rule to discontinue on payment of costs, and proof of payment of such costs: — but the court will not reject the allegation of the judgment of *non pros.*, as, without that, it could not be shewn how the suit was terminated. (3)

The plaintiff, on the 6th of February, took out a rule to discontinue his action upon payment of costs, to be taxed by the master; and on the 7th an appointment was made by the master, but the costs were not taxed and paid until the 11th of March. On the 29th of January preceding, the defendant in that action sued out a writ against the plaintiff for a malicious arrest, and filed his bill on the 8th of February; and it being objected, that the latter action was brought before the first was discontinued: — It was held, that it was not; and that when the judgment of discontinuance was entered, it had relation back to the day when the original rule to discontinue was taken out. (4)

In an action against an attorney for a malicious arrest, the jury must be satisfied of the absence of any just demand on the part of his client, and also that the attorney knew there was not any such demand; and applying the law for some purpose of his own, or for some other ill purpose which the law calls malicious, committed the injury complained of by the plaintiff. Under such circumstances, it is not necessary to prove malice in the ordinary sense of the word; any improper or sinister motive will be sufficient. (5)

ACTIONS
AGAINST AT-
TORNEYS.

5. LIMITATION OF ACTION — PAYMENT OF MONEY INTO COURT — DAMAGES — COSTS.

Under stat. 21 Jac. 1. c. 16. the action must be brought within six years next after the cause of action.

By stat. 3 & 4 Will. 4. c. 42. s. 21. money cannot be paid into court in an action for a malicious arrest.

The plaintiff must prove the arrest, and the expenses to which he was subjected; but he cannot, it is said, recover any damages for extra costs. (6)

In the calculation of damages, in an action for maliciously holding to bail, the plaintiff is entitled to recover not merely the taxed costs, but the costs as between attorney and client. (7)

If two are found guilty, it must be of joint acts, and the damages must be joint.

Under stat. 3 & 4 Vict. c. 24. the plaintiff will not be entitled to costs unless he recover 40s. (8)

LIMITATION OF
ACTION —
PAYMENT OF
MONEY INTO
COURT — DA-
MAGES — COSTS.

STATUTE OF
LIMITATIONS.

PAYMENT OF
MONEY INTO
COURT.

DAMAGES.
COSTS.

(1) *Kirk v. French*, 1 Esp. N. P. C. 80.,
et vide *Harvey v. Morgan*, 2 Stark. 19.

(2) 1 M. & Rob. 398.

(3) *Webb v. Hill*, 3 C. & P. 485. M. &
M. 253.

(4) *Brandt v. Peacock*, 3 D. & R. 2. 1
B. & C. 649.

(5) *Stockley v. Carter*, 8 C. & P. 11.

(6) *Sinclair v. Eldred*, 4 Taunt. 7. *Webber*
v. Nicholas, R. & M. 419.

(7) *Sandback v. Thomas*, 1 Stark. 306.
Gould v. Barratt, 2 M. & Rob. 171.

(8) *Antè*, 228.

MALICIOUS PROSECUTION.

1. GENERALLY, pp. 2274—2276.

Judgments of Lords Mansfield and Loughborough in Johnstone v. Sutton — Distinction between an action of trespass, or false imprisonment, from an action for a malicious prosecution — Malice inferred from want of probable cause — After verdict the presumption is, that such parts of the declaration as ought to have been proved were proved — Question of probable cause is a mixed proposition of law and fact.

2. WHERE THE ACTION CAN BE MAINTAINED, pp. 2276, 2277.

Indictment returned ignoramus; or a flaw in the indictment — Illegal issue of a warrant — Impleading in the ecclesiastical court — Fiat of bankruptcy — Fictitiously suing out two executions — Inferior officer against his superior officer — A governor suspending an inferior civil officer — Malice in the prosecutor — Filing criminal information — Opinion of counsel.

3. WHERE THE ACTION CANNOT BE MAINTAINED, pp. 2278, 2279.

Where probable cause exists — Conviction unappealed against — Evidence sufficient to cause the jury to deliberate — Where bill of indictment has not been found — To sustain the averment of malice, the charge must be wilfully false — Mutual assaults — What is not a malicious prosecution under stat. 7 & 8 Geo. 4. c. 29. s. 49. — Persons bound over to prosecute — Information under the excise laws — Defending a vexatious ejectment.

4. THE DECLARATION, pp. 2279—2282.

PARTIES — REQUISITE AVERMENTS — FATAL VARIANCE — PLEADINGS.

5. EVIDENCE, pp. 2282—2288.

PROBABLE CAUSE — Incumbent on the plaintiff to prove the want of probable cause — Judgment of Lord Tenterden in Blachford v. Dod — Judgment of Mr. Justice Parke in Mitchell v. Jenkins — WANT OF PROBABLE CAUSE — Prosecutor abandoning the prosecution, without giving any evidence — MALICE is a question of fact for the jury — Facts that will establish malice — JUSTIFICATION — PROBABLE CAUSE — Effect of pleading "not guilty" — Circumstances tending to disprove the malice of the defendant, should be produced — Sentence of conviction by sub-commissioners of the excise laws — Charge of felony — Fiat of bankruptcy — Character of the plaintiff — Incompetency of arbitrator — Where the information must be proved in the regular way — IDENTITY OF THE PROSECUTOR — When fact of prosecution and acquittal must be proved by the record — Order of the judges forbidding the issue of copies of indictments — Fiat of bankruptcy — TERMINATION OF ACTION OR INDICTMENT — Effect of nolle prosequi.

6. LIMITATION OF ACTION — PAYMENT OF MONEY INTO COURT — DAMAGES — COSTS, pp. 2288, 2289.

1. GENERALLY.

GENERALLY.

The foundation of an action for a malicious prosecution is the malice of the defendant, either express or implied (1); and whatever engines of the law malice may employ to compass its evil designs against innocent and un-

(1) *Purcell v. Macnamara*, 9 East, 157. 361.

GENERALLY.

offending persons, whether in the shape of indictment or information (1), which charge a party with crimes injurious to his fame and reputation, and tend to deprive him of his liberty; or whether such malice be evinced by malicious arrests, or by exhibiting groundless accusations merely with a view to occasion expense (2) to the party, who is under the necessity of defending himself against them, the action on the case affords an adequate remedy to the party injured.

In *Johnstone v. Sutton* (3) Lords Mansfield and Loughborough reported, "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action [malicious prosecution]. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal.

"The essential ground of this action is, that a legal prosecution was carried on without a probable cause. We say this emphatically — the essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied.

"From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

"From the most express malice, the want of probable cause cannot be implied. A man, from a malicious motive, may take up a malicious prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action.

"After a verdict, the presumption is, that such parts of the declaration, without proof of which, the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. In this case, to support the verdict, there was nothing necessary to be proved, but that there was no probable cause, from whence the jury might imply malice, and might imply that the defendant knew there was no probable cause.

"The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds v. Kennedy*." (4)

"This action ought not to be maintained, without rank and express malice and iniquity" (5); the grounds of it are, "upon the plaintiff's side innocence, upon the defendant's malice." (6)

Where the prosecution was, under stat. 7 & 8 Geo. 4. c. 30. s. 6., for maliciously and feloniously obstructing a mine, and the plaintiff was acquitted, on the ground, that he committed the obstruction under a claim of right by his employer, and by such employer's direction; and it was proved at the trial, that there had been disputes between the employer and the defendant on the subject before the obstruction, and that the defendant knew from the

Judgments of Lords Mansfield and Loughborough in *Johnstone v. Sutton*.

Distinction between an action of trespass or false imprisonment, from an action for a malicious prosecution.

Malice inferred from want of probable cause.

After verdict the presumption is, that such parts of the declaration as ought to have been proved were proved.

Question of probable cause is a mixed proposition of law and fact.

The grounds of the action are the plaintiff's innocence and the defendant's malice.

(1) *Moore v. Shutter*, 2 Show. 302.

(2) *Jones v. Gwynn*, Gilb. 185. 10 Mod. 148. 214.

(3) (*In error*), 1 T. R. 544.

(4) 1 Wils. 232. *Candell v. London*, 1 T. R. 520. n.

(5) *Per* Holt C. J. in *Savill v. Roberts*, 12 Mod. 208.

(6) *Per* Parker C. J. in *Jones v. Gwynn*, 10 ibid. 217. *Malitia* is an abstract of *malus*, which imports what is wicked. Among the Romans it signified a mixture of hatred and fraud.

GENERALLY.

plaintiff that the obstruction was effected in assertion of his employer's alleged right:—It was held, that the judge was not justified in nonsuiting, or directing a verdict for the defendant on the ground that he had reasonable or probable cause; but that the question was for the jury (1); Lord Denman observing, "Malice is a question which must go to the jury. The question, whether there be or be not reasonable or probable cause, may be for the jury or not, according to the particular circumstances of the case." (2)

In actions against magistrates, the question is, whether the justice had any probable cause for convicting.

In an action against a magistrate for a malicious conviction, the question is not, whether there was probable cause in fact for convicting, but whether he had any probable cause for convicting; and for this purpose, what passed before him upon the hearing is not only proper, but essential evidence, with a view to the question of malice. (3)

2. WHERE THE ACTION CAN BE MAINTAINED.

WHERE THE ACTION CAN BE MAINTAINED.

There are three sorts of actions, any of which would be sufficient ground to support an action for a malicious prosecution:—1. "the damage to a man's fame, as if the matter whereof he is accused be scandalous; 2. where a man is put in danger to lose his life, or limb, or liberty; 3. damage to a man's property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused." (4)

Indictment returned *ignoramus*; or a flaw in the indictment.

An action for a malicious prosecution lies, where a bill of indictment has been preferred and returned *ignoramus* (5); where an indictment has been preferred *coram non judice* (6); and where the plaintiff has been acquitted on a defect in the indictment. (7)

Indictment for perjury.

An action lies for the malicious prosecution of a bad indictment for perjury; therefore, where, in such action, the perjury was assigned upon evidence given before the sheriff's secondary on an inquisition of damages, and the writ of inquiry was directed to be returned into the Common Pleas instead of the King's Bench:—It was held to be no objection in arrest of judgment. (8)

Where upon an indictment for a malicious prosecution for perjury, it appeared that part of the affidavit on which perjury had been assigned was falsely sworn to, but that there was no probable cause for some assignments of perjury on some of the transactions contained in the affidavit:—It was held, that the action was maintainable (9), for there being no probable cause for some of the charges in the indictment, it was preferred without probable cause. (10)

Illegal issue of a warrant.

Though it may be trespass in the magistrate to grant an illegal warrant, yet an action on the case may be supported against the person who causes and procures such warrant to issue, if it be done maliciously, and without reasonable or probable cause. (11)

(1) *James v. Phelps*, 11 A. & E. 483., vide etiam *Taylor v. Willans*, 2 B. & Ad. 845. S. C. nom. *Willans v. Taylor*, 6 Bing. 183.

(2) Vide *Blachford v. Dod*, 2 B. & Ad. 179. *Davis v. Hardy*, 6 B. & C. 225.

(3) *Burley v. Bethune*, 5 Taunt. 580.

(4) *Per Holt C. J. in Savile v. Roberts*, 1 Ld. Raym. 374.

(5) *Payn v. Porter (Clerk)*, Cro. Jac. 490. *Anon* 2 Rol. 188.

(6) 1 Rol. Abr. Action sur Case (P.), 112.

(7) *Wicks v. Fentham*, 4 T. R. 247. *Jones v. Gwynn*, Gilb. 185.

(8) *Pippet v. Hearn*, 1 D. & R. 266. 5 B. & A. 634.

(9) *Reed v. Taylor*, 4 Taunt. 616.

(10) *Ibid.*

(11) *Elsee v. Smith (in error)*, 1 D. & R. 97. 2 Chitt. 304.

Maliciously impleading and causing another to be excommunicated in the ecclesiastical court (1), whereby he was taken upon an *excom. cap.* and imprisoned, until he procured himself to be absolved, is actionable.

WHERE THE ACTION CAN BE MAINTAINED.

Falsely and maliciously suing out a fiat of bankruptcy against another (2), which was afterwards superseded (3), is also actionable; and it cannot be objected, at least after verdict, that it is not averred in the declaration, that the plaintiff had not at any time committed an act of bankruptcy.

Impleading in the ecclesiastical court.

Fiat of bankruptcy.

In *Waterer v. Freeman* (4) the defendant sued out a *fi. fa.* upon a judgment given against the plaintiff for the defendant in an action of trespass, under which the sheriff took goods of the plaintiff to the value of the damage, and returned that the goods remained in his hands for want of purchasers; and that the defendant, well knowing this, to the intent to vex the plaintiff, sued out another *fi. fa.*, under which the sheriff levied the money on other goods of the plaintiff, and paid it over to the defendant. After not guilty pleaded, and a verdict for the plaintiff, it was holden on motion in arrest of judgment, that the action was maintainable, Chief Justice Hobart observing, "that the plaintiff was twice vexed and grieved, and that wilfully by the defendant, who had first one execution inchoate, which he ought to have followed, knowing it, and not to have taken another, for else he might take twenty executions."

Vexatiously suing out two executions.

An action for a malicious prosecution lies by an inferior against a superior officer. Thus, A. a captain in the navy was accused by his commander-in-chief of neglect of duty, disobedience of orders, &c. A. having been tried by a court-martial, was honourably acquitted, after which he brought an action in the court of Exchequer against his commander for a malicious prosecution; and a verdict having been found for the plaintiff, the court refused to arrest the judgment. (5)

Inferior officer against his superior officer.

An action on the case will lie against a governor for maliciously, and without any probable cause, suspending a person from a civil office. (6)

A governor suspending an inferior civil officer.

This action is maintainable, though malice be expressly proved in the prosecutor; therefore an affidavit stating such express malice is not a ground to set aside a nonsuit. (7)

Malice in the prosecutor.

A rule for a criminal information obtained by the plaintiff in an action for the malicious prosecution of an indictment, and made absolute, is no bar to such action, although the indictment was against the plaintiff and another person. (8)

Filing criminal information.

In an action for a malicious prosecution, it is no answer, that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect, or the opinion ill founded. (9)

Opinion of counsel.

(1) *Hocking v. Matthews*, 1 Vent. 86.

(2) *Chapman v. Pickersgill*, 2 Wils. 145.

(3) *Whitworth v. Hall*, 2 B. & Ad. 695., post, 2285., vide etiam *Smith v. Bromhead*, 7 T. R. 300.

(4) Hob. 205. 266. 1 Brownl. 12.

(5) *Sutton v. Johnstone (in error)*, 1 T. R. 591. 1 Bro. P. C. 76., ante, 2032. tit. IMPRISONMENT.

(6) *Sutherland v. Murray (General)*, cit. 1 T. R. 538.

(7) *Hall v. Graham*, Ridg. Lapp, & Sch. 469.

(8) *Caddy v. Barlow*, 1 M. & R. 275., et vide *Rex v. Sparrow*, 2 T. R. 198.

(9) *Hewlett v. Cruchley*, 5 Taunt. 277.

WHERE THE ACTION CANNOT BE MAINTAINED.

2. WHERE THE ACTION CANNOT BE MAINTAINED.

Where probable cause exists.

An action for a malicious prosecution cannot be maintained, though the accusation turns out to be unfounded, if the prosecutor can shew probable cause for the prosecution. (1)

Conviction unappealed against.

A person convicted of a trespass under the Game Act (1 & 2 Will 4. c. 32.), underwent the sentence of imprisonment under that conviction, and did not appeal against it:—It was held, that that conviction was an answer to an action against the informer for a malicious prosecution, it being evidence of probable cause. (2)

Evidence sufficient to cause the jury to deliberate.

If a party be indicted for a felony, though he be acquitted without calling witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, or that the evidence was sufficient to cause the jury to pause. (3)

Where bill of indictment has not been found.

Where the bill has not been found by the grand jury, an action cannot be supported without evidence of express malice, as well as of the want of probable cause. (4)

To sustain the averment of malice, the charge must be wilfully false.

Where a person lost a bill of exchange, which he supposed to have been stolen, and went before a magistrate, and related the circumstances of the loss, and the magistrate granted his warrant to apprehend A. B. on a charge of having "feloniously stolen, taken, and carried away" the bill of exchange (language which the complainant did not use, when he laid his information), and upon subsequent investigation of the case it turned out to be no felony:—It was held, that case would not lie for maliciously procuring the magistrate to grant his warrant; because, to sustain the averment of malice, the charge must be wilfully false. (5)

Mutual assaults.

If A. strike B., and B. return the blow, on which A. indicts B. for an assault, the bare fact of A. having struck the first blow is not sufficient to support an action for a malicious prosecution. (6)

What is not a malicious prosecution under stat. 7 & 8 Geo. 4. c. 29. s. 49.

If C. be intrusted to receive money for A., with written directions for its application, and C. write a letter to A., stating, that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C. under the statute 7 & 8 Geo. 4. c. 29. s. 49. not malicious. (7)

Persons bound over to prosecute.

Where the defendant went merely as a witness to support a charge preferred by another, and the magistrate bound the witness over to appear as a witness on the trial, &c., an action is not maintainable against him (8):—but if the jury believe that a person caused himself to be bound over to prosecute by making the charge maliciously, an action can be maintained. (9)

In an action for a malicious prosecution against A. and B., if it appear that both A. and B. entered into a joint recognisance to prosecute and give evidence, but that A. only employed the attorney, and that B. attended before the magistrate and the grand jury at the request of the attorney, the judge will direct the acquittal of B. (10)

(1) *Arbuckle v. Taylor*, 3 Dow, 160.

(2) *Mellor v. Baddeley*, 2 C. & M. 675. 4 Tyrw. 962. 6 C. & P. 374.

(3) *Smith v. Macdonald*, 3 Esp. N. P. C. 7.

(4) *Byne v. Moore*, 1 Marsh. 12. 5 Taunt. '87.

(5) *Cohen v. Morgan*, 6 D. & R. 8.

(6) *Fish v. Scott*, Peake's N. P. C. 184.

(7) *Eagar v. Dyott*, 5 C. & P. 4.

(8) *Ibid*.

(9) *Dubois v. Keats*, 11 A. & E. 329.

(10) *Eagar v. Dyott*, 5 C. & P. 4.

An action will not lie against a person (1) exhibiting an information for intention to land goods without paying duty, if the goods be condemned by the sub-commissioners, though the commissioners of appeal reverse the condemnation; for the judgment of the sub-commissioners shews, that there was a foundation for the information.

An action will not lie to recover damages (2) sustained by the plaintiff in defending a vexatious ejectment brought against him by the defendant, in which the nominal plaintiff had been *non prossed*. (3)

WHERE THE ACTION CANNOT BE MAINTAINED.

Information under the excise laws.

Defending a vexatious ejectment.

4. THE DECLARATION.

The form of action for a malicious prosecution is an action of trespass on the case. (4)

This action may be brought against one person; and when it is brought against two or more defendants, although a conspiracy be alleged in the declaration, and a verdict be found for all the defendants except one, yet the plaintiff will be entitled to judgment. (5)

A husband can maintain an action for the malicious prosecution of his wife, the expenses of which he had defrayed. (6)

In an action on the case against parish officers, for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labour, the conviction being afterwards quashed, it is not necessary, that the convicting magistrate should be made a defendant under stat. 24 Geo. 2. c. 44. (7)

It is requisite to aver in the declaration every allegation proper to support the action, viz. that the defendant falsely, maliciously, and without any reasonable or probable cause, caused the defendant to be indicted, and to state the trial and acquittal (8); and as an action for malicious prosecution cannot be maintained till the prosecution be terminated, such fact must appear upon the declaration. (9)

If the declaration allege, that the plaintiff was discharged by the grand jury's not finding the bill, it will shew a legal end to the prosecution (10); but it has been held, that the want of this averment is cured by verdict (11), because it will be presumed, that it has been proved at the trial.

Care must be taken in framing the declaration so as to avoid any objection being raised on the ground of a variance; but as a general principle, a statement of the substance of the charge seems sufficient: thus, where the

THE DECLARATION.

FORM OF ACTION.

PARTIES.

Husband on behalf of his wife.

Parish officers.

REQUISITE AVERMENTS.

(1) *Reynolds v. Kennedy*, 1 Wils. 232.

(2) *Purton v. Honnor*, 1 B. & P. 205.

(3) Under what circumstances an action will lie for a malicious and vexatious suit, vide *Martin v. Lincoln*, Bull. N. P. 13.

(4) *Vide antè*, 1005. tit. CASE.

(5) *Price v. Crofts*, Sir T. Raym. 180.

Pollard v. Evans, 2 Show. 50., vide etiam *Subley v. Mott*, 1 Wils. 210.

(6) *Smith v. Hixon*, Str. 977. C. T. H. 54.

(7) *Simpkin v. French*, 12 Price, 394.

(8) *Carman v. Trueman (in error)*, 1 Bro. P. C. 101.

(9) *Fisher v. Bristow*, Doug. 215. An

action for abusing the process of the court in order illegally to compel a party to give up his property, is not a malicious prosecution, nor a malicious arrest; and it is not necessary either to aver or prove the determination of the suit which that process had commenced, or the want of probable cause. *Grainger v. Hill*, 4 Bing. N. C. 212.

(10) *Morgan v. Hughes*, 2 T. R. 225.

(11) 1 Saund. 228. (a.) *Wine v. Ware*, 1 Sid. 15. *Amey v. Long*, 9 East, 473. *Pippet v. Hearn*, 5 B. & A. 634.

THE DECLARATION.

declaration professed to set out the substance of the indictment, and in specifying the goods and their value, used the words *valoris* for *valentie*, it was held, that the variance was not material. (1)

Where the declaration was, "that the plaintiff by a jury of the county of — was duly and in a lawful manner acquitted;" and by the record it appeared, "that the jury found the plaintiff not guilty; and upon that judgment was entered, that the plaintiff should go thereof acquitted:"—It was holden sufficient, by construing the words "*reddendo singula singulis*," that the plaintiff was duly acquitted by the jury—i. e. found not guilty of the facts; and in a lawful manner acquitted—i. e. by the judgment of acquittal pronounced by the court. (2)

An averment in a declaration of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *videlicet*. (3)

Charge of assault.

The declaration averred, that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence; the charge made was for assaulting and striking; the warrant produced recited the charge to be for assaulting and beating:—It was held, that this was no material variance. (4)

Where, in an action for a malicious prosecution, the record in setting out the indictment stated the words to be, "then and there did make an assault;" and in the indictment they were stated as "did then and there make an assault:"—It was held to be no variance, and even if it were, that it might be altered before trial. (5)

Inferior court.

In an action on the case for a malicious prosecution in an inferior court, having no jurisdiction, a *scienter* in the defendant, that the court had no jurisdiction, should, it seems, be averred. (6)

Common barrator.

Where it was stated in the declaration, that the plaintiff had been indicted as a common barrator before certain justices *ad diversa felonias &c., necnon ad pacem conservandam assignat*; and defendant, having demanded oyer of the indictment, it was certified to have been taken before certain justices *ad pacem conservandam &c. assignat*:—It was holden, that the action lay on the ground, that the justices mentioned in the indictment were not justices of another nature or power than those, which were mentioned in the declaration; both were justices of the peace, and such as had power to receive such manner of indictment. But "if the declaration had mentioned justices of assize, and the certificate had been of a thing taken before the justices of gaol delivery, the variance would have been fatal, for they are distinct in power." (7)

Description of the court.

A declaration for maliciously indicting at the general quarter sessions, instead of general sessions, was held good, the word "quarter" being only surplusage. (8)

After verdict, in an action for a malicious prosecution for perjury, it is no objection to the description of the court in which the indictment was

(1) *Johnson v. Browning*, 6 Mod. 216.
 (2) *Hunter v. French*, Willes, 517.
 (3) *Pope v. Foster*, 4 T. R. 590., sed vide *Purcell v. Macnamara*, 9 East, 157.
 (4) *Byne v. Moore*, 5 Taunt. 187. 1 Marsh. 12.

(5) *Freeman v. Arkell*, 3 D. & R. 669. 2 B. & C. 494. 1 C. & P. 137.
 (6) *Goslin v. Wilcock*, 2 Wils. 302.
 (7) *Barnes v. Constantine*, Yelv. 46., vide stat. 3 & 4 Will. 4. c. 42. s. 23., ante, 1805—1813.
 (8) *Busby v. Watson*, 2 W. Black. 1050.

found, that the names of the justices before whom the session of oyer and terminer was held were not set out; and it seems sufficient to allege, that at such a session the defendant maliciously indicted the plaintiff for wilful and corrupt perjury, without describing more particularly the circumstances under which the alleged perjury was supposed to have been committed. (1)

THE DECLARATION.

In an action on the case against parish officers, for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labour, the conviction being afterwards quashed, it was averred in the declaration, that the conviction was quashed on the 22d day of April at the general quarter sessions of the peace held on that day; and the proof by the order for quashing the conviction shewed, that it was not a general but an adjourned sessions—the variance was held not to be such, as to furnish grounds for setting aside the verdict. (2)

Act of vagrancy.

A declaration which alleges, that the defendant charged the plaintiff with felony, is supported by evidence, that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them. (3)

Felony.

If the plaintiff in his declaration set forth the indictment, which contains several charges, it is sufficient to prove that some of them were maliciously preferred, although there were good grounds for the rest. (4)

Where in an action for a false return to a *fiery facias*, the declaration stated, that the plaintiff in Trinity Term, 2 Geo. 4., recovered &c., “as it appears by record,” and the proof was of a judgment in Easter Term, 3 Geo. 4.:—It was holden (5), that this was not any variance; for that the averment, “as appears by the record,” was surplusage, and might be rejected, inasmuch as the judgment was not the foundation of, but inducement to, the action.

The declaration in an action for a malicious prosecution for felony must state, that the prosecution is at an end; and alleging that the plaintiff was discharged from his “imprisonment” is not sufficient. (6)

FATAL VARIANCE.

If in an action for a malicious prosecution there be an allegation in the declaration, that the person prosecuted was “acquitted by a jury in the court of our lord the king, before the king himself at Westminster, before the chief justice,” it will not be supported by a record, from which it appears, that the trial took place before the chief justice at Nisi Prius. (7)

If, in an action for a malicious prosecution, in which the plaintiff charges the defendant with having imputed to him the crime of felony, by reason of which he was imprisoned, it appear on production of the information before the justice that there was no charge of felony, though the warrant was to arrest the plaintiff for felony, such evidence will not support the declaration, and the plaintiff will be nonsuited. (8)

A., the servant of B., stated before a magistrate, that C. came into the yard of his employer, and took from a stable there two geldings, the pro-

(1) *Pippet v. Hearn*, 1 D. & R. 266. 5 B. & A. 634.

(2) *Simpkin v. French*, 12 Price, 394.

(3) *Davis v. Noake*, 6 M. & S. 29. 1 Stark, 317.

(4) *Reed v. Taylor*, 4 Taunt. 616.

(5) *Stoddart v. Palmer*, 3 B. & C. 2.

(6) *Morgan v. Hughes*, 2 T. R. 225.

(7) *Woodford v. Ashley*, 11 East, 508. 2

Camp. 193.

(8) *Leigh v. Webb*, 3 Esp. N. P. C. 165.

THE DECLARATION.

perty of B., and rode them away, though he was told that he must not:— It was held, that this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having feloniously stolen and ridden away with two geldings. (1)

Where a declaration against the marshal for an escape alleged that S. S. was arrested and gave bail, that afterwards bail above was put in before a judge at chambers, "as appears by the record of the recognisance," that S. S. surrendered in discharge of the bail, and afterwards escaped:— It was holden (2), that the plaintiff was bound to prove, that bail above was put in as alleged, and that the averment was not made out by the production of the filazer's book, the entry therein importing, that the recognisance was taken before a single judge, or by an examined copy of the entry of the recognisance of bail, stating that the recognisance was taken before the court at Westminster.

PLEADINGS.

The pleadings in an action of case having previously experienced attention, re-iteration will therefore be useless. (3)

It may however be observed, that the defence of probable cause ought not to be specially pleaded, as it is admissible in evidence under the general issue of "not guilty."

**Replication to
plea in ma-
licious prosecu-
tion.**

In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff, being a trader, and being indebted to the defendant in the sum of 100*l.*, became a bankrupt, wherefore defendant sued out the commission; the plaintiff replied *de injuriâ &c. absque tali causâ*; and the defendant having demurred, assigning for cause, that the plaintiff by his replication had attempted to put in issue three distinct facts, viz. the act of bankruptcy, the trading, and the petitioning creditor's debt, the court held, that these three facts, connected together, constituted but one entire proposition, and that the replication was therefore good. (4)

EVIDENCE.

**PROBABLE
CAUSE.**

5. EVIDENCE.

The usual defence to this action is, that the defendant had no reasonable or probable grounds of suspicion against the plaintiff. It is not necessary, that these grounds should be legal grounds; for if it can be inferred from the circumstances of the case, that the defendant was not actuated by any improper motive, but an honest desire to bring a supposed offender to justice, it will be a sufficient answer to this action (5), because such circumstances tend to disprove that, which is of the essence of the action, viz. the malice of the defendant in preferring the charge.

In *James v. Phelps* (6) Mr. Justice Coleridge said, "In *Delegal v. Higley* (7) the court of Common Pleas held, that the reasonable and probable cause must be that, which exists in the mind of the party at the time of the act in question."

It lies on the plaintiff to give evidence of malice in the defendants, either

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| (1) <i>Milton v. Elmore</i> , 4 C. & P. 456 | <i>Regil v. Green</i> , 1 M. & W. 328. Tidd's N. P. 426. |
| (2) <i>Bevan v. Jones</i> , 4 B. & C. 403. | |
| (3) <i>Antè</i> , 1025. tit. CASE. | (5) <i>Coxe v. Wirrall</i> , Cro. Jac. 198. |
| (4) <i>O'Brien v. Saxon</i> , 2 B. & C. 908. | (6) 11 A. & E. 489. |
| <i>Robinson v. Raley</i> , 1 Burr. 316., sed vide | (7) 3 Bing. N. C. 950. |

express, or to be collected from circumstances shewing plainly the want of probable cause, and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. (1)

This rule seems to be founded upon the principles of policy and convenience, because the prosecutor should be protected in his legal proceedings, however malicious his private motives may have been, provided he had probable cause for preferring the charge. (2) This protection appears to be not only one of convenience but of justice, or even of necessity, when it is considered how often it happens, that the facts upon which a prosecution is properly founded are confined to the knowledge of the prosecutor alone; and if this proof were not to be required on the part of the plaintiff, every prosecutor would in such case be left exposed to an action, against which he might have no defence, if malice were to be inferred from the apparent want of probable cause. (3)

In *Blachford v. Dod* (4) Lord Tenterden observed, "It is difficult to lay down any general rule as to the cases where the opinion of a jury should or should not be taken. I have considered the correct rule to be this—if there be any fact in dispute between the parties, the judge should leave that question to them, telling them, if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant."

The following judgment of Mr. Justice Parke in *Mitchell v. Jenkins* (5), affords an illustration of the law of evidence as applicable to the question of malice:—"I have always understood, since the case of *Johnstone v. Sutton* (6), which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution, or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved: that is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say, whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge. I can conceive a case where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear, that the set-off did exist, the arrest would not be malicious. The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against

EVIDENCE.

Incumbent on the plaintiff to prove, the want of probable cause.

Judgment of Lord Tenterden in *Blachford v. Dod*.

Judgment of Mr. Justice Parke in *Mitchell v. Jenkins*.

(1) *Parcell v. Macnamara*, 9 East, 361. 1 Camp. 199., et vide *Sykes v. Dunbar*, ibid. 202. n. *Wallis v. Alpine*, ibid. 204. n. *Parrott v. Fishwick*, 9 East, 362. n.
 (2) *Coken v. Morgan*, 6 D. & R. 8. *Johnstone v. Sutton*, 1 T. R. 520. *Savil v. Roberts*, 1 Salk. 14. 5 Mod. 394. 405. *Hocking v. Matthews*, 1 Vent. 86.
 (3) *Sykes v. Dunbar*, 1 Camp. 202. n., vide etiam *McDonald v. Rooke*, 2 Bing. N. C. 217. *Broad v. Ham*, 5 ibid. 722.
 (4) 2 B. & Ad. 184.
 (5) 5 ibid. 594.
 (6) 1 T. R. 510.

EVIDENCE.

an individual, but of *malus animus*, and as denoting, that the party is actuated by improper and indirect motives. That would not be the case where there being an unsettled account, with items on both sides, one of the parties, believing *bond fide*, that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared, that a less sum was due; nor where a party made such an arrest, acting *bond fide* under a wrong notion of the law, and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute."

WANT OF PROBABLE CAUSE.

Prosecutor abandoning the prosecution, without giving any evidence.

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved, that the defendant was actuated by malicious motives in preferring the bill, although some evidence must still be given of the want of probable cause, slight evidence will be sufficient. (1)

Where the defendant had preferred three bills of indictment against the plaintiff on the same charge, one of which had been found on his own testimony, and he abandoned the last indictment at the time of trial, after it had been pending three years:—It was held to be sufficient *prima facie* evidence of the want of probable cause. (2)

Malice, is a question of fact for the jury.

The existence of malice is a question of fact for the jury (3); but there may be cases so circumstanced, that though the courts might not go so far as to infer malice in point of law without the aid of a jury, yet they would leave it to the jury to imply malice. (4)

FACTS THAT WILL ESTABLISH MALICE.

Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication of the proceedings, can be adduced to prove malice. (5)

It seems, also, that the plaintiff may give in evidence the proofs relied upon by the defendant on the trial of the charge. (6)

Where the prosecution was against the plaintiff and another, the plaintiff may, as part of the *res gesta* and to shew the *animus* of the defendant, give in evidence misconduct in the transaction against the other party indicted. (7)

In an action by A. for the malicious prosecution by C. of an indictment against A. and B., evidence of the misconduct of C. towards B. after his apprehension, tending to show the bad motives of C., is admissible. (8)

Crassa ignorantia will amount to malice.

Where the defendant, a bank inspector, had procured the plaintiff, a tradesman, to be taken into custody on a charge of having in his possession a forged bank note, without legal excuse, because he had refused, after paying the amount to the person to whom he paid it away, to deliver it up to the inspector; Lord Ellenborough held, that the pressing a commitment under such circumstances was such *crassa ignorantia*, that it amounted to malice. (9)

JUSTIFICATION.
PROBABLE CAUSE.

In an action on the case for a malicious prosecution, the plea of "not guilty" puts in issue the fact of the prosecution, and want of probable

(1) *Per Le Blanc J.* in *Incedon v. Berry*, 1 Camp. 203. n.

(2) *Willans v. Taylor*, 6 Bing. 183.

(3) *Johnstone v. Sutton*, 1 T. R. 543.

(4) *Brooks v. Warwick*, 2 Stark. 389.

(5) *Chambers v. Robinson*, Str. 691.

(6) Bull. N. P. 13, 14.

(7) *Caddy v. Barlow*, 1 M. & R. 275.

(8) *Ibid.*, et vide *Rex v. Sparrow*, 2 T. R. 198.

(9) *Brooks v. Warwick*, 2 Stark. 389.

cause (1); but in an action for malicious proceeding to outlawry, the plea of not guilty puts in issue the existence of probable cause only, and not the reversal of the outlawry. (2)

Any circumstances which tend to disprove the malice of the defendant in preferring the charge should be produced. The ordinary defence to the action is, that the defendant had reasonable or probable grounds of suspicion against the plaintiffs; but in the first instance it is requisite for the plaintiff to adduce some positive evidence arising out of the circumstances of the prosecution, to shew that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge, for the prosecution may have been commenced and abandoned from the purest and most laudable motives. (3)

In an action against a revenue officer for prosecuting a suit under the excise laws, the sentence of conviction by the sub-commissioners is *prima facie* evidence of probable cause. (4)

Where a party has been charged with felony, it is material to prove, that a felony has been committed (5), and also circumstances tending to throw a suspicion upon the plaintiff (6); but it seems to be a good defence to prove reasonable grounds for suspecting the guilt of the plaintiff, although no felony was committed. (7)

In *Johnson v. Browning* (8), where it appeared, that no one was present at the time of the supposed robbery but the wife of the defendant in the action, Lord Holt admitted evidence of what she swore at the trial of the indictment; but it is obvious, that this was done under the impression, that it was incumbent on the defendant to establish the fact of probable cause, although no evidence was given to establish the negative.

In an action for maliciously suing out a fiat of bankruptcy, it must be averred and proved, that the commission was superseded before the commencement of the action; and if this fact be not proved, the plaintiff ought to be nonsuited, though it may not be averred in the declaration, and though the defendant, who might have demurred for the omission, had not done so. (9)

In an action for maliciously suing out a commission of bankruptcy, the plaintiff, after proving the commission and adjudication, and that it was afterwards superseded by the defendant, proved also, that in an action of trespass by him against the defendant for taking goods, under which the defendant justified as assignee, a verdict was given for plaintiff; he also proved a removal of goods, which under the circumstances could not amount to an act of bankruptcy, but which in the absence of any other was presumed to have been relied on as the act of bankruptcy:—It was held, that it was sufficient evidence on the part of the plaintiff of want of probable cause to call upon the other party to prove the affirmative. (10)

In an action for a malicious prosecution, where the defendant gives evi-

EVIDENCE.

Effect of pleading "not guilty."

Circumstances tending to disprove the malice of the defendant, should be produced.

Sentence of conviction by sub-commissioners of the excise laws.

Charge of felony.

Fiat of bankruptcy.

(1) *Cotton v. Browne*, 4 N. & M. 831. 3 A. & E. 312. 1 H. & W. 419. *Houndsfield v. Drury*, 3 P. & D. 127.

(2) *Drummond v. Figou*, 2 Bing. N. C. 114. 2 Scott, 228. Tidd's N. P. 375.

(3) *Parcell v. Macnamara*, 9 East, 361. *Sykes v. Dunbar*, cit. ibid. 363., ante, 2022. tit. IMPRISONMENT.

(4) *Hall v. Graham*, Ridg. Lapp, & Sch. (Irish), 469.

(5) *Johnson v. Browning*, 6 Mod. 216.

(6) *Knight v. Jermin*, Cro. Eliz. 134. *Pain v. Rochester*, ibid. 871.

(7) *Johnson v. Browning*, 6 Mod. 216., vide etiam *Samuel v. Payne*, Doug. 360. *Ledwith v. Catchpole*, Cald. 291.

(8) 6 Mod. 216.

(9) *Whitworth v. Hall*, 2 B. & Ad. 695., ante, 2377.

(10) *Cotton v. James*, 1 ibid. 128.

EVIDENCE.

Character of the plaintiff.

dence of probable cause, a witness may be asked, whether the plaintiff was not a man of notoriously bad character. (1) But in an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to shew, that the plaintiff's character was suspicious, and that his house had been searched on former occasions. (2)

Incompetency of arbitrator.

But although such evidence affords no presumption of probable cause in this particular instance, yet it is matter admissible in mitigation of damages.

Where a cause has been referred, and the arbitrator, upon the inspection of the plaintiff's books, and examination of the parties, finds that the plaintiff had no cause of action in an action for malicious prosecution, the arbitrator cannot be called as a witness to prove those facts. (3)

Where the information must be proved in the regular way.

If the declaration state, that the defendant made information upon oath, and that upon such information the magistrate granted the warrant, the information must be proved in the regular way, and a recital of it in the warrant is not sufficient. (4)

IDENTITY OF THE PROSECUTOR.

It is a question of fact for the jury to determine, who was the prosecutor. (5)

To establish the identity of the plaintiff with the "prosecuted," it can be shewn, that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it, paid the expenses, procured the attendance of witnesses, or was otherwise active in forwarding the prosecution.

Grand juror can prove the identity.

A grand juror has been allowed to prove, that the defendant was prosecutor, on the ground, that this was a question of fact, the disclosure of which did not involve a breach of the grand juror's oath (6); but yet it seems, that the witness must disclose the whole that passed, or the defendant would be precluded from ascertaining, upon cross-examination, the grounds from which the witness drew his general inference, that the defendant was the prosecutor. (7)

Name as prosecutor on the back of the indictment.

When the defendant merely acted as a magistrate, the proof of his name on the back of the indictment as prosecutor will not render him liable. (8)

Original bill of indictment.

The original bill of indictment should be procured, for although the names of the witnesses on the back of the bill are no part of the record, it is evidence, that they were sworn to the bill (9); but it may be proved, that the defendant was a witness without producing the bill (10), and the indorsement of the party's name as a witness on the bill is, as previously observed, no evidence that he was the prosecutor. (11)

When fact of prosecution and acquittal must be proved by the record.

If the prosecution was in the Queen's Bench, at the assizes or quarter sessions, the fact of prosecution and acquittal must be proved in the usual way by the production of the record or proof of an examined copy of it. (12)

In an action for a malicious prosecution for perjury in an answer in Chancery, the declaration stated, that, "at a session of the commission of oyer and

(1) *Rodriguez v. Tadmire*, 2 Esp. N. P. C. 721.

(2) *Newsam v. Carr*, 2 Stark. 69.

(3) *Habershon v. Trosby*, 3 Esp. N. P. C. 38. *Peake's Add. Cas.* 181.

(4) *Gregory v. Derby*, 8 C. & P. 749.

(5) *Rex v. Commerell*, 4 M. & S. 203. *Rex v. Inledon*, 1 *ibid.* 268.

(6) *Freeman v. Arkell*, 1 C. & P. 137. 2 B. & C. 494.

(7) 2 Stark. Ev. 3d ed. 678.

(8) *Girlington v. Pitfield*, 1 Vent. 47. *Rex v. Commerell*, 4 M. & S. 203.

(9) *Per Holt C. J. in Johnson v. Brown*, 6 Mod. 216.

(10) *Ibid.*

(11) *Girlington v. Pitfield*, 1 Vent. 47. Bull. N. P. 14.

(12) *Clayton v. Nelson*, Bull. N. P. 15. *Kirk v. French*, 1 Esp. N. P. C. 81. *Morrison v. Kelly*, 1 W. Black. 388.

terminer and general gaol delivery, held by adjournment at the new sessions' house at Green Street, in and for the county of the city of Dublin, to wit, on Saturday the 25th of June, 1825," the defendant maliciously, &c. preferred an indictment against the plaintiff, which was ignored by the grand jury:—It was held, that these averments were material, and that the proper evidence in support of them was the record of the indictment with a caption. Therefore, where the plaintiff's evidence at the trial was as follows—1. the attested copy of the indictment without any caption, indorsed thus—"No bill. For self and fellows, S. LAMPREY:" 2. an attested copy of an affidavit sworn in the cause in Chancery, in which the defendant stated his intention of preferring an indictment for perjury against the plaintiff, at the next commission of oyer and terminer and general gaol delivery, to be held in and for the county of the city of Dublin: 3. the parol evidence of a witness who saw the parties attending there on the prosecution:—It was held, that this evidence was insufficient to support the material averments as to the court before which the indictment was preferred, or the averment that the bill was ignored, which was essential to maintain this action, as showing the termination of the prosecution. (1)

In the 16 Car. 2. (2) the judges made the following order:—"That no copies of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery; for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the king upon just occasion." (3) But this order, is not necessary to make the record or an examined copy evidence, which is evidence *per se* (4): thus, in *Legatt v. Tollervey* (5) Lord Ellenborough said, "It is very clear, that it is the duty of the officer charged with the custody of the records of the court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the court, pursuant to the order which has long prevailed there, and with respect to the general records of the realm, upon application to the attorney general. But if the officer shall, even without authority, have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say, that such evidence shall not be received." "The order at the Old Bailey does not state that actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies."

In *Groenvelt v. Burrell* (6) Chief Justice Holt stated, "If A. be indicted of felony and acquitted, and he has a mind to bring an action, the judge will not permit him to have a copy of the record, if there was probable cause of the indictment; and he cannot have a copy without leave." Chief Justice Holt was also present at the trial of Lord Preston, but he there does not deny, that a party acquitted of felony has a right to a copy of an indictment for the purpose of using it in evidence, although he refused it to a prisoner about to take his trial for the offence charged in the indictment. In cases of misdemeanour it has been considered, that a party acquitted is entitled to a copy of the record. (7) So also of cases of summary convic-

Order of the judges forbidding the issue of copies of indictments.

(1) *Donnelly v. Molony*, Batty (Irish), 498.

(2) *Kelynge*, 3. cit. 14 East, 304.

(3) It is very questionable, whether the judges did not exceed their authority when they made this order; their power is to administer the law, not to alter it.

(4) *Jordan v. Lewis*, cit. 14 East, 305. n. Str. 1122.

(5) 14 East, 306.

(6) 1 Ld. Raym. 253.

(7) *Morrison v. Kelly*, 1 W. Black. 385.

EVIDENCE.

Plaintiff refused a copy of the indictment.

tions. (1) The distinction between such cases and those of indictments for felony seems to rest entirely on the order of the judges made at the Old Bailey as reported by Kelynge.

It is no objection, that no order of court, or fiat of the attorney general, allowing a copy of it to the party acquitted in a case of felony, is proved. (2) In fact, in *Rez v. Brangan* (3) Chief Justice Willes declared, that "every prisoner upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use they might think fit to make of it;"—but this has been denied in other cases. (4)

Acquiring copy of indictment improperly.

Where a party, acquitted upon an indictment for felony, obtained upon the fiat of the attorney general a copy of the record of acquittal, upon a representation that the judge had promised to grant it after the assizes, but which it appeared he had no authority to do, the court refused to restrain the party from making use of it. (5)

Fiat of bankruptcy.

Formerly, to prove that a fiat had been superseded, it was necessary to produce (6) the writ of *supersedeas* under the great seal; but now the chancellor's order has the effect of a *supersedeas*. It seems, that the mere order for annulling the fiat is not evidence of want of probable cause, as that may have proceeded on strict legal grounds. (7)

TERMINATION OF ACTION OR INDICTMENT.

Presentment in the ecclesiastical court.

Effect of *nolle prosequi*.

In an action for a malicious presentment in the ecclesiastical court, it must be shewn, that the presentment has been determined. (8)

It must appear, that the plaintiff was acquitted of the charge (9); it is not sufficient to prove, that the proceeding was stayed by the *nolle prosequi* of the attorney general (10); otherwise, if he had pleaded not guilty, and the attorney general had confessed it (11); and it is sufficient, that a party was acquitted upon a defect in the indictment. (12)

LIMITATION OF ACTION — PAYMENT OF MONEY INTO COURT — DAMAGES — COSTS.**LIMITATION OF ACTION.**

Stat. 21 Jac. 1. c. 16.

PAYMENT OF MONEY INTO COURT.

Stat. 3 & 4 Will. 4. c. 42. s. 21.

DAMAGES.

In a joint action, jury cannot assess several damages.

6. LIMITATION OF ACTION — PAYMENT OF MONEY INTO COURT — DAMAGES — COSTS.

If the action be not commenced within six years, the Statute of Limitations will apply. (13)

Stat. 3 & 4 Will. 4. c. 42. s. 21. forbids the payment of money into court in an action for a malicious prosecution.

In a joint action against several, the jury cannot assess several damages. (14)

A count for maliciously indicting the plaintiff for an assault, cannot be supported without proof of some consequential injury sustained by him. (15)

(1) *Rez v. Midlam*, 3 Burr. 1720.

(2) *Leggatt v. Tollervey*, 14 East, 302.

Jordan v. Lewis, Str. 1122.

(3) 1 Leach's C. C. 32.

(4) *Ibid.* n.

(5) *Browne v. Cumming*, 10 B. & C. 70.

(6) *Poynton v. Forster*, 3 Camp. 58.

(7) Respecting the effect of a mere *supersedeas*, vide *Hay v. Weakley*, 5 C. & P. 361.

(8) *Fisher v. Bristow*, Doug. 215.

(9) *Hunter v. French*, Willes, 517.

(10) *Goddard v. Smith*, 6 Mod. 262. 1

Salk. 21. The declaration alleged an acquittal, but the court held that the entry of a *nolle prosequi* did not amount to an acquittal.

(11) *Ibid.*

(12) *Wicks v. Fentham*, 4 T. R. 247.

(13) Stat. 21 Jac. 1. c. 16.

(14) *Lowfield v. Bancroft*, Str. 910. Bull. N P. 15. 94. (b.), contra *Lane v. Sandhu*, *ibid.* 15. Str. 79

(15) *Freeman v. Arkell*, 3 D. & R. 669. 3 B. & C. 494. 1 C. & P. 137.

The plaintiff can prove, in aggravation of damages, the length of his imprisonment, his expenses, situation, and circumstances (1):—in fact, the peril and jeopardy in which a man's life and liberty have been placed by a malicious prosecution; or the prejudice to his fame and reputation (2); or the expenses of conducting his defence (3); constitute a sufficient ground of action.

LIMITATION OF
ACTION—PAY-
MENT OF MONEY
INTO COURT—
DAMAGES—
COSTS.

In *Rex v. Prosser* (4), which was an indictment for perjury, the prisoner, after being acquitted of all the charges, brought an action against the prosecutor for a malicious prosecution. The prosecutor called in his defence a number of witnesses to prove that he had probable cause for many of the assignments of perjury; but on one upon which the plaintiff relied, no evidence was offered;—the jury, under the direction of Lord Mansfield, found a verdict for the plaintiff, and assessed the damages at 100*l*.

Under stat 3 & 4 Vict. c. 24. the plaintiff will not be entitled to costs unless he recover 40*s*. (5)

In the assessment of damages, the costs incurred by the plaintiff are to be estimated as between attorney and client. (6)

(1) 2 Stark. Ev. 3d ed. 685.

(4) Cit. in *Johnstone v. Sutton*, 1 T. R. 533.

(2) *Savil v. Roberts*, Bull. N. P. 13.

(5) *Antd*, 228.

(3) *Ibid*. 14. *Jones v. Gwynn*, 10 Mod.

(6) *Sandback v. Thomas*, 1 Stark. 306.,

214. *Savil v. Roberts*, 1 Salk. 15.

sed vide *Sinclair v. Eldred*, 4 Taunt. 7.

MANDAMUS.

1. DEFINED, pp. 2291, 2292.

Prerogative writ, and not a writ of right — Gives no right, not even a possessory right — Issued exclusively by the court of Queen's Bench — Writ of error.

2. WHEN THE WRIT WILL BE GRANTED OR REFUSED, pp. 2292—2309.

Granted for the benefit of the subject and advancement of justice — Defect of jurisdiction or form — Where justice impeded — DOUBTFUL CASES — To the lords of the treasury for the payment of a pension — Where a strong political necessity exists for the performance of an act — To ELECT — Stats. 11 Geo. 1. c. 4., 5 & 6 Will. 4. c. 76., and 7 Will. 4. & 1 Vict. c. 78. — To ADMIT — To RESTORE — To GRANT COMPENSATION UNDER STAT. 5 & 6 WILL. 4. c. 76. — To town clerks — Clerks to the justices — Chamberlains — Stewards of boroughs — Collectors of quay and harbour duties — Constables — To affix the corporate seal — RAILWAY COMPANIES — INLAND NAVIGATION COMPANIES — WATER COMPANIES — TRUSTEES OF SAVINGS' BANKS — WHEN THE WRIT WILL NOT BE GRANTED — Where another specific remedy exists — Quare impedit — "That which is likely to be done" — Liability to action — To execute one part of a power granted by statute — Ministerial officers — Private officers — Equitable right on a trust — Certiorari taken away — PAYMENT OF MONEY TO THE TREASURER OF A BOROUGH — JUDGE OF ASSIZE to grant a warrant of restitution under stat. 8 Hen. 6. c. 9. — Inns of court — Colleges of physicians and surgeons — Insurance company — Treasurer of a county — Officers of customs — Constables — Repairs of roads — Nuisance — Witnesses in India — INSPECTION AND PRODUCTION OF RECORDS.

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4. AFFIDAVIT AND RULE NISI, pp. 2318, 2319.

5. RULE ABSOLUTE, pp. 2320, 2321.

Matters of form must be discussed before the merits — Stats. 1 Will. 4. c. 21. s. 4 & 5. and 1 & 2 Will. 4. c. 58. s. 8.

6. SUBSTANCE, FORM, DIRECTION, AND DELIVERY OF THE WRIT, pp. 2321—2324.
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8. THE RETURN, pp. 2326—2330.
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10. COSTS, p. 2333.

1. DEFINED.

DEFINED.

In *Rex v. Barker* (1) Lord Mansfield stated, "A *mandamus* is certainly a prerogative writ, flowing from the king himself, sitting in this court, superintending the police, and preserving the peace of this country;" and runs into exclusive jurisdictions in the same manner as the writ of *habeas corpus*. (2)

Prerogative writ, and not a writ of right.

The writ is grounded on the oath of the party injured, shewing his rights, and the denial of justice below, whereupon the party complained of, is directed to shew why the writ should not issue. (3) This is substantially a civil remedy for the subject, and the king's name is only nominally used. The object of the writ is, not to supersede legal remedies, but only to supply the defect of them, by commanding the person to whom it is directed to do something which it is supposed he is bound by his duty to do, which the party prosecuting the writ has a right to have done, and for which the applicant has no other specific legal remedy, or that such other remedy has become obsolete. (4)

Object of the writ.

It may be stated as a general principle, that the writ is only granted for public persons, and to compel the performance of public duties. Thus, the court will not issue the writ to a trading corporation at the instance of one of its members, to produce their accounts, and to declare a dividend of their profits; nor will it be granted, if there be no *bond fide* question in contest. (5)

A *mandamus* gives no right, not even a right of possession, but puts a man in possession to enable him to assert his right, which in some cases he could not do without it; and his possession may afterwards be disputed by every man who has a right. (6)

Gives no right, not even a possessory right.

The power to issue the writ belongs exclusively to the court of Queen's Bench, and a writ of error does not lie on this proceeding; because, a writ of error is calculated to restore the party to something that is lost; the

Issued exclusively by the court of Queen's Bench. Writ of error does not lie.

(1) 1 W. Black. 352.

T. R. 385. *Rex v. Stafford* (*Marquess of*), 3 *ibid.* 652.

(2) *Rex v. Excise* (*Commissioners of*), 2 T. R. 385. *Rex v. Winchelsea* (*Corporation of*), 2 Lev. 86. 5 Bac. Abr. *Mandamus* (A.), 258.

(5) *Regina v. Blackwall Railway* (*Directors of*), 9 Dowl. P. C. 558.

(6) *Rex v. Dublin* (*Decan. et Capitul.*), Str. 538. *Rex v. Harris* (*Dr.*), 3 Burr. 1421. *Rex v. Marlborough* (*St. Mary's Parish*), 8

(3) 3 Black. Com. by Chitty, 112. 264.

(4) *Rex v. Excise* (*Commissioners of*), 2 Mod. 344. 2 Kyd on Corporations, 325.

DEFINED.

mandamus gives no right, not even a right of possession; so that, if the judgment should be reversed, still the same right would subsist in him, which makes the reversal signify nothing. (1)

This rule must be taken in a qualified sense, because, since stat. 9 Anne, c. 20., which allows special pleadings to a *mandamus*, it seems that a writ of error lies upon a judgment thereon, as it is in the nature of an action; and costs are given by the statute for that side which prevails; but upon an award of a peremptory *mandamus*, a writ of error will not lie, there being no plea to it, and therefore not in the nature of a judgment. (2)

2. WHEN THE WRIT WILL BE GRANTED OR REFUSED.**WHEN THE WRIT WILL BE GRANTED OR REFUSED.**

Granted for the benefit of the subject, and advancement of justice.

Writ will be granted when the applicant has been dispossessed of a right.

Defect of jurisdiction or form.

Enforcement of obedience to statutes and royal charters.

Where justice impeded.

The court of Queen's Bench enforces obedience to the common law, statute law, and charters of the crown, but cannot supply a *casus omissus*. (3)

The subject is entitled to the aid of a *mandamus* upon a proper case previously shewn to the satisfaction of the court of Queen's Bench, the essential object of "the writ" being to prevent disorder from a failure of justice and defect of police; and it is liberally interposed for the benefit of the subject and advancement of justice; the value of the matter, or the degree of its importance to the public police, is not scrupulously weighed; if there be a right and no other specific remedy, it will not be denied (4): in fact, "where there is a right to execute an office, perform a service, or exercise a franchise, more especially if it be in a matter of public concern, or attended with profit, and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the court will interpose by *mandamus* upon reasons of justice as the writ expresses — '*Nos A. B. debitam et festinam justitiam in hac parte fieri volentes, ut est justum*;' and upon reasons of public policy, to preserve peace, order, and good government." (5)

If there be either no jurisdiction, or the form of it be not pursued, the court will interpose as the general guardian of the rights of all men, and as the only remedy of which the nature of the case admits. (6)

Whenever a statute directs something to be done, the court will compel its performance, notwithstanding the existence of a penalty for the omission. (7)

Where a specific legal right as well as the want of a specific legal remedy are co-existent, and justice impeded, the court "will not be fettered in the exercise of its authority by being told that, in ancient times, such a writ would not have been granted" (8); and a *mandamus* being a prerogative writ, and not a writ of right, a discretionary power is vested in the court to exercise its authority. (9)

(1) *Rex v. Dublin (Decan'. et Capitul'.)*, Str. 543. Fortesc. 329.

(2) 1 Bro. P. C. 73., sed vide *Regina v. The Leicester and Northampton Union Canal Comp.* B. R. H. T. 1842. A bill has been introduced this session (1842) into parliament, to allow writs of error in all cases of *mandamus*.

(3) *Bagg's case*, 11 Co. 98. *Wheeler v. Trotter*, E. T. 8 Geo. 2.

(4) *Rex v. Baker*, 3 Burr. 1267.

(5) *Per* Lord Mansfield, *ibid.* 1266.

(6) *Rex v. Chester (Bishop of)*, 1 Wils. 206. *Regina v. Leeds (Mayor of)*, 11 A. & E. 512.

(7) *Rex v. Everet*, C. T. H. 261.

(8) *Per* Best J. in *Rex v. Fowey*, 2 B. & C. 584. *Rex v. Canterbury (Archbishop of)*, 8 East, 219.

(9) *Rex v. Excise (Commissioners of)*, 2 T. R. 385.

There must have been a direct refusal to do that, which it is the object of the *mandamus* to enforce, either in terms, or by circumstances, distinctly shewing an intention in the party not to do the act required. (1) The writ will sometimes be granted where doubts exist, whether it can be issued, in order that they may be considered on the return. (2)

WHEN THE WRIT WILL BE GRANTED OR REFUSED.

There must be a direct refusal.

DOUBTFUL CASES.

When doubts exist as to the validity of an election, an information will be granted to have the question discussed on the return.

Thus, in *Regina v. Smith* (3) the court having decided on an information in the nature of a *quo warranto* for usurping the office of treasurer of the county of the city of Dublin, that the defendant was not duly elected on account of the rejection by the lord mayor of certain votes, which, if allowed, would have then given the relator, the rival candidate, a majority; and judgment of ouster having been entered, the relator moved for a peremptory *mandamus* to the lord mayor, to take the proper steps to have him admitted; and at the same time the defendant moved for a peremptory *mandamus* to the lord mayor, to proceed to a new election. But the fact of there having been a valid election (which was assumed on the argument in the *quo warranto* case), being controverted on the present occasion, the court would not conclude the rights of either party, or of the electors, by granting a peremptory *mandamus* in either form, but issued a primary *mandamus*, directing the lord mayor to take the proper steps (specifying them) for admitting the relator, in order that the question as to the validity of the election might be raised on the return to the writ.

Where an application is made for a *mandamus*, and the question turns upon a custom which the litigant parties desire to be tried, the writ will be granted for that purpose, or the court will direct an issue to be tried, if grounds be shewn for the application. (4) But the writ will not be granted in opposition to a long continued usage, where the words of a charter are in any degree doubtful. (5)

A *mandamus* lies to the lords of the treasury under special circumstances for the payment of a pension: thus, in *Rex v. Lords Commissioners of the Treasury* (6) the court granted a *mandamus* on the application of W. C. Smyth to the lords commissioners, to make and issue a treasury minute or authority for the payment to Mr. Smyth of the arrears of a pension admitted to be held by them for his benefit; Mr. Justice Patteson observing, "This is not like *The Banker's Case*. (7) The proceeding there was not for a specific sum in the hands of a public officer, but for payment of an annuity, granted generally out of the hereditary revenue, to discharge a debt of the crown. Here the demand is not against the crown, but against public officers having money in their hands to be paid to an individual, and who seek to annex a condition to the payment."

To the lords of the treasury for the payment of a pension.

Judgment of Mr. Justice Patteson in *Rex v. Lords Commissioners of the Treasury*

Where there is a strong political necessity for an act to be done by an individual, or by an aggregate body, the court will require, that it shall be done; consequently, a *mandamus* will be granted, commanding those who by any statute, charter, or custom, have the nomination or appointment to a place or office in which the public interest is concerned, to fill it up when

Where a strong political necessity exists for the performance of an act.

To elect.

(1) *Rex v. Brecknock Canal Comp.* 3 A. & E. 217. *Rex v. Wilts Canal Nav.* *ibid.* 477.

(2) *Regina v. Heathcote* (Sir Gilbert), 10 Mod. 49.

(3) 1 Jebb & Symes (Irish), 460.

(4) *Rex v. London* (Bishop of), 1 T. R. 331.

(5) *Rex v. Chester* (Corporation of), 1 M. & S. 101.

(6) 4 A. & E. 286.

(7) 5 Mod. 29. S.C. nom. *Rex v. Hornby*, *Ibid.* 14 Howell's St. Tr. 1.

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vacant (1), or if it appear clearly, that the election was illegal, or a merely colourable and void election, the writ will be issued. But a *mandamus* will not lie to compel a corporation to elect members of an indefinite body. (2)

Stat. 11 Geo. 1.
c. 4.

Under stat. 11 Geo. 1. c. 4. the court of Queen's Bench had the power, where the election of mayor and other officers did not occur on the day prescribed by a municipal charter, to issue a writ of *mandamus* to assemble upon a day and at a time prefixed to such writ, to proceed to the election of a mayor or other officer, and to do every act necessary to be done in order to such election, or to signify to the court good cause to the contrary.

Stat. 5 & 6
Will. 4. c. 76.
Stat. 7 Will. 4.
& 1 Vict. c. 78.

This statute not applying to stat. 5 & 6 Will. 4. c. 76., it was enacted by stat. 7 Will. 4. & 1 Vict. c. 78. that the powers of the court of Queen's Bench under stat. 11 Geo. 1. c. 4. should be extended to all cases in which no election shall be made, either under stat. 5 & 6 Will. 4. c. 76., or 7 Will. 4. & 1 Vict. c. 78., of any mayor, alderman, councillor, or other corporate officer or other person, to any corporate office, on the day or within the time appointed for any such election under such statutes.

The time at which the election is to be holden under the foregoing statutes is not essential, but only directory; and if the election be fairly carried on, though at a different hour, yet such election is good, because the time is merely to prevent surprise. (3)

Void election.

The writ has been granted, where the affidavits disclosed, that an election *de facto* had taken place, but "upon looking into it there was good reason to think it void." Thus, the writ has been issued to proceed to an election of mayor (4), and to elect an officer under stat. 11 Geo. 1. c. 4., although there had been an election *de facto*.

But the fact of the election being void must be certain (5), because the court will only act upon the opinion, that the officer *de facto* has no shadow of right (6), consequently could not justify his possession (7); and therefore procrastination would be detrimental to public justice, because the office being vacant, no person can have any estate in it. (8)

If an alderman
be elected on
the 9th of No-
vember, pre-
viously to the
mayor, the
election of the
alderman will
be void.

By stat. 5 & 6 Will. 4. c. 76. s. 49. the council of every municipal borough are upon the 9th of November in every year to elect a mayor, and in case of a vacancy within the year, then another election is to be made within ten days after the vacancy. But by stat. 6 & 7 Will. 4. c. 105. s. 4. the mayor is to "continue in office for one whole year, and until his successor shall have accepted the office of mayor, and shall have made and subscribed the declaration required in that behalf."

In *Regina v. M'Gowan* (9) it appeared, that a town council on the 9th of November proceeded to the election of an alderman, previously to that of

(1) *Anon.* 2 Barnard. 236. *Rex v. Gram-pound (Mayor of)*, 6 T. R. 302. *Rex v. Fowey*, 2 B. & C. 596. 4 D. & R. 139.

(2) *Rex v. Fowey (Mayor of)*, 2 B. & C. 584. *Rex v. Eye (Corporation of)*, 1 ibid. 85. 4 B. & A. 271.

(3) By stat. 3 & 4 Vict. c. 47., that part of the stat. 9 Anne, c. 20. which prevents the re-election of mayors of parliamentary boroughs and other annual returning officers, has been repealed.

(4) *Rex v. Oxford (Corporation of)*, C. T. H. 178.

(5) *Aberystwith case*, Str. 1157.

(6) *Bossiny alias Tintagel case*, ibid. 1005. *Rex v. Cambridge (Mayor of)*, 4 Burr. 2008. *Rex v. Newsham, Sayer*, 211. *Rex v. Bedford Level*, 6 East, 356.

(7) *Scarborough case (Corporation of)*, Str. 1180.

(8) *Rex v. Cambridge (Mayor of)*, 4 Burr. 2011. 1 Stephens's Corporation Acts, 2d ed. 445.

(9) 11 A. & E. 869. 3 P. & D. 557.

mayor, in consequence of which it was holden, that such election of alderman was void.

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If a councillor of a corporation be ousted, and another elected in his stead, and such election be merely colourable, a *mandamus* will go to permit the ousted party to exercise his office, but not to restore him to his office; but if such ouster and election be *bond fide*, the court will not grant a *mandamus* in favour of the party displaced: because the proper proceeding is by *quo warranto* against the party holding the office *de facto*. (1)

When *mandamus* will go to permit an ousted party to exercise his office.

If there be no other adequate remedy, the writ will be issued.

If there be no other adequate remedy the court will issue the writ: thus, in *Regina v. Pembroke Ward (Alderman of)* it appeared, that at the election of town councillors, which took place in Pembroke on the 1st of November, 1838, three councillors, amongst whom was a gentleman named James Robinson Bryan, were elected for the ward in question. On the day of election it was observed, that Mr. Bryan was not rated, and that he was therefore not entitled to be on the burgess roll, although his name appeared upon the roll in fact; and as no person was qualified to be elected a town councillor unless he was entitled to be upon the roll, it was objected, that the election of Mr. Bryan was consequently void, and Mr. Bryan declined to accept the office (2), and the time limited to proceed to a new election had elapsed. Under the provisions of the Corporation Act, there was no method of procuring the vacancy to be filled up, except by the exigency of a *mandamus* directed to the alderman of the ward, and commanding him to fill up the vacancy by an election; in consequence of which, Mr. Justice Little-dale granted a rule. (3)

The writ has been granted to compel a mayor and capital burgess of a corporation to fill up two vacancies occasioned by the death of two capital burgesses, though there was a *quo warranto* information depending against the mayor, upon the principle, that public inconvenience had ensued in corporations from vacancies not being filled up in their different integral parts as they happened. (4)

Public inconvenience from official vacancies not being filled up.

If the office be full, or one for which a *quo warranto* may be brought, the writ will not be issued: thus, at the first election of councillors for a ward, under stat. 5 & 6 Will. 4. c. 76., A. and B. were elected by the smallest numbers. At the election of aldermen immediately following, two of the councillors elected by higher numbers were chosen aldermen. C. and D. were chosen councillors in their places, each by fewer votes than had been given for A. or B., At the time for electing councillors in the following year, A. and B. remained in office, and C. was elected councillor in

Where the office is full, or one for which a *quo warranto* may be brought.

(1) *Rex v. Oxford (Mayor of)*, 6 A. & E. 349., vide etiam *Regina v. Leeds (Mayor of)*, 11 A. & E. 512. *Quare*, Whether, if a party be elected a councillor, and duly qualified at the time of his election, and his name be afterwards improperly omitted in the burgess list before his time of service as a councillor has expired, such omission will vacate his office.

If so, *quare*, Whether the office be absolutely vacant, before notice to that effect be given, under stat. 5 & 6 Will. 4. c. 76. s. 52.

(2) Previously to the enactment of the Municipal Corporation Act, the payment of a fine imposed by a bye-law, for refusing to accept a

corporate office, did not exempt the elected from serving the office; but if he refused to serve he was liable to pay the fine for his contempt, and the court would by *mandamus* have compelled him to serve the office; because it is an offence at common law for a member of a corporation to refuse to take on him a corporate office to which he has been appointed; *sed aliter*, if the bye-law says "he shall either pay the fine or serve the office." *Rex v. Bower*, 1 B. & C. 585. 2 D. & R. 842.

(3) MS. Nov. 7. 1839.

(4) *Rex v. Grampound (Mayor of)*, 6 T. R. 301.

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another ward, and was admitted to the office. The candidate for that office who had the next largest number of votes disputed the election, on the grounds that C. was still a councillor of the first ward, inasmuch as he had been chosen to fill an extraordinary vacancy; that this fact was notorious to the burgesses, and consequently, that the votes given for C. in the second ward were thrown away. A *mandamus* was therefore moved for to swear in the opposing candidate:—It was held, that, assuming the objections to be well-founded (upon which the court did not decide), a *mandamus* could not go, the office being full, and being one for which a *quo warranto* might be brought. (1)

In a ward of a borough, one of the councillors, the ward having six, was elected an alderman. His place was not filled up, till the next annual election of councillors. At that election, no notice was given, that his place was to be supplied. Some of the voting papers had three names, some two. The majority on all the papers taken together, and also on the papers having three names, was for A., B., and C. On the papers having two names only, it was for Y. and Z. The alderman and assessors for the ward declared A., B., and C. duly elected. Afterwards, the assessors published a declaration, that Y. and Z. were duly elected. A., B., and C. took the declaration, and acted. Afterwards Y. and Z. took the declaration, and demanded to act, but were not permitted:—It was held (before stat. 7 Will. 4. & 1 Vict. c. 78.) that, even assuming that Y. and Z. should have been declared duly elected, the office was full, *de facto*, of A., B., and C., and no *mandamus* could go to command the mayor, &c. to allow Y. and Z. to act, Mr. Justice Patteson observing, “Assuming for argument’s sake, that the alderman has declared a party to be elected who, in fact, was not duly elected, it is clear, that all the acts prescribed by the statute have been done, and that the office is full, whatever other claimants there may be. It is not the duty of the council to admit parties who have not been declared duly elected.” (2)

Judgment of
Mr. Justice
Patteson in
*Rex v. Win-
chester (Mayor
of)*.

TO ADMIT.

The writ will be granted to admit a person to use an office if he be legally entitled thereto, and has no other adequate remedy.

Upon an appli-
cation by a
burgess to be
inserted on the
burgess roll,
the court bound
to inquire into
his title.

Where a party, whose name has been expunged on revision from the burgess roll of a borough by the mayor, applies, under stat. 7 Will. 4. & 1 Vict. c. 78. s. 24., for a *mandamus* to replace it, the court is bound to inquire into his title;—and under such circumstances it will not be sufficient for the claimant to shew, that his name was inserted by the overseers, and was expunged by the mayor on an objection, which, for want of legal notice under stat. 5 & 6 Will. 4. c. 76. s. 17. (as the party alleges), ought not to have been heard. (3)

(1) *Regina v. Derby (Councillors of)*, 7 A. & E. 419.

(2) *Rex v. Winchester (Mayor of)*, ibid. 215. A rule *nisi* having been obtained for a *mandamus* as above, Y. and Z. afterwards obtained a rule for a *quo warranto* against A., B., and C. The court refused to hear the two rules discussed together; but, after discharging the rule for a *mandamus* on argument, they made the rule absolute for a *quo warranto*, ibid.

(3) *Regina v. Harwich (Mayor of)*, 8 ibid. 919. It may be observed, with respect to qualification, that where the tenant and

occupier of a house underlet the cellar, which was beneath, and had an internal communication with the house; and the under-tenant used the cellar as a warehouse, and was separately rated to the poor for it:—It was held, that the tenant could not qualify as a burgess under stat. 5 & 6 Will. 4. c. 76. s. 9., for the house independently of the cellar. *Regina v. Eye (Mayor of)*, 9 A. & E. 670.

But if two tenements, described as houses, be under the same roof, and open upon a common passage and staircase, but without an outer door opening to the street, the rated

Payment of rates to entitle a person to be put on the burgess list of a borough, under stat. 5 & 6 Will. 4. c. 76. s. 9., must be a payment by the party's own act. It will not be sufficient that another person, without his authority, shall pay the rates for him. (1)

If in a charter of incorporation respecting the admission of members, the charter will admit of a construction consistent with the uniform usage in opposition to the claim, a *mandamus* will not be granted. (2)

A custom that either branch of the corporation might, without assigning any reason, reject a petition for admission to freedom, has been held not to be unreasonable and void, upon the ground of its involving a capricious right of rejection, or its being contrary to public policy, or its savouring of arbitrary power; and that the custom to reject or elect by ballot was not unreasonable or void. (3)

A *mandamus* has been granted; to admit an inhabitant of a borough by prescription to be a free burgess, where it appeared, that he had an inchoate right to be a free burgess, and that such office was a corporate office by prescription (4); to admit a *jurat* (5); to admit and swear in a town clerk (6); to swear in a party to the office of mayor (7); and to admit a deputy into an office, when it could be executed by deputy. (8)

Where upon an affidavit, one of two candidates for the office of registrar of the corporation of Bedford Level had a majority only by means of illegal votes, a *mandamus* was granted to the corporation to admit and swear in the other, who appeared upon the affidavits to have the greater number of legal votes. (9)

A *mandamus* does not lie to admit a person to an office contrary to a local custom (10); nor to a party who has had judgment on an information against him for an usurpation (11); nor where the office is already the subject of a suit in equity. (12)

Where a party is improperly suspended or removed from an office, whether the duties be private or public, if he have a certain term therein, and there are profits annexed to it, a *mandamus* will be granted, if there be no other specific remedy. (13)

It is, however, requisite for a party applying for a *mandamus* to be restored to any office, to make out a *prima facie* title to such office, and to shew, at least, that he has complied with all the forms necessary to constitute his right. (14)

A *mandamus* lies to restore an attorney to an inferior court, for the office of attorney is necessary to the administration of justice, and is of

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Charter admitting a construction consistent with uniform usage.

A custom to reject or elect by ballot is not unreasonable.

Admission of a free burgess.

Jurat.

Town clerk.

Deputy.

Majority acquired by illegal votes.

Judgment for an usurpation. Office, the subject of a suit in equity.

TO RESTORE.

Attorney.

occupier of either of the tenements will be admitted as a burgess under stat. 5 & 6 Will. c. 76. s. 9.

(1) *Regina v. Bridgnorth (Mayor of)*, 10 A. & E. 66., vide 1 Stephens on Elections, 2.

(2) *Rex v. Sligo (Corporation of)*, 2 Fox Smith (Irish), 96.

(3) *Rex v. Dublin (Corporation of)*, Batty (Irish), 628.

(4) *Rex v. West Looe (Mayor of)*, 3 B. & 677.

(5) *Rex v. Rye (Mayor of)*, 2 Ld. Ken. 3.

(6) *Rex v. Slatford*, Comb. 419. 5 Mod. 3.

(7) *Stephens v. Saltash (Mayor of)*, Sir T. Raym. 431.

(8) *Rex v. Clapham*, 1 Vent. 110. *Rex v. Ward*, Str. 893. Barnard. 252. 294.

(9) *Rex v. Bedford Level*, 6 East, 356. 2 Smith, 535., vide etiam *Regina v. Leeds (Mayor of)*, 11 A. & E. 512.

(10) *Rex v. London (Mayor of)*, 1 T. R. 423. *Rex v. Marshal*, 2 ibid. 2. *Rex v. Chester (Mayor of)*, 1 M. & S. 101.

(11) *Rex v. Hearle*, Str. 625.

(12) *Rex v. Wheeler*, C. T. H. 99.

(13) *Rex v. London (Mayor of)*, 2 T. R. 177. *Anon. Loft*, 551. *Anon.* 7 Mod. 118. Comb. 41.

(14) *Rex v. Jotham*, 3 T. R. 575.

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Schoolmaster.

Burgess.

Sword-bearer.

Recorder.

Common coun-
cilman.

Ensigns of
mayoralty.

Irregular sus-
pension, but
for a sufficient
cause.

Temporary
suspension.

TO GRANT
COMPENSATION
UNDER STAT.
5 & 6 WILL. 4.
c. 76.

Jurisdiction of
the lords of the
treasury.

Judgment of
Lord Denman
in *Regina v.
Warwick* (Cor-
poration of).

public concern (1); to restore a man to the office of schoolmaster (2); to re-instate a man to the burgess-ship of a corporation (3); to the office of sword-bearer (4); to the situation of recorder (5); to the office of common councilman (6); and likewise to restore the ensigns of mayoralty to a succeeding mayor. (7)

A *mandamus* does not lie to restore a party to an office from which he has been irregularly suspended, if it appear there were sufficient grounds for suspension (8); or to restore to an office, where it is confessed, that the removal was just, though no notice was given (9); or in favour of an officer who is only temporarily suspended, for the freehold remains still in him (10); or for a town clerk elected *durante bene placito*; or to the clerk of the company of butchers of London (11); or to the gunmakers' company to restore a member to the office of approver of guns (12); or to restore a person to the place of clerk of a company in a corporation (13); or to the clerk of the company of masons in London. (14)

Where a party was removed from a borough office under stat. 5 & 6 Will. 4. c. 76., but re-appointed, and afterwards dismissed, applies to the town council for compensation, which is refused, and he thereupon appeals to the lords of the treasury under stat. 5 & 6 Will. 4. c. 76. s. 66., the lords have no jurisdiction to inquire, whether he was or was not removed for a sufficient cause within that section. And therefore, where the council had refused compensation, and the lords, on an appeal under such statute, and on inquiry into the facts leading to the dismissal, confirmed such refusal, this court granted a *mandamus*, calling on the corporation to assess compensation, notwithstanding the judgment of the lords (15); Lord Denman observing, "The supposed misconduct was laid before us by affidavit, and appeared to us then, as it does now, not to be such as would have warranted removal from an office, held during good behaviour. If, however, the lords of the treasury had jurisdiction to try that question, all the world is bound by their decision, though we may deem it erroneous." "But if that authority was in the treasury, it is incredible, that no power is given to their lordships to inquire into the facts; nor can they be expected to possess the legal knowledge requisite for deciding what misconduct would have justified the officer's removal. On the contrary, all the words of the action are employed in creating a power to revive the assessment of the compensation, in the manner as if the party had been removed by the Municipal Reform Act, or immediately after its passing."

TOWN CLERKS.

A town clerk who was in office at the passing of the statute 5 & 6 Will. 4. c. 76., but who had been re-appointed afterwards, and subsequently dismissed by the council, applied for compensation, which the council refused.

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|---|--|
| (1) <i>White's case</i> , 6 Mod. 18. <i>Hurst's case</i> , 1 Lev. 75. <i>Leigh's case</i> , 3 Mod. 333. | (10) <i>Rex v. Guildford</i> (<i>Approved men of</i>), 1 Lev. 162. 1 Keb. 868. |
| (2) <i>Anon. Loft</i> , 148. | (11) <i>White's case</i> , 6 Mod. 18. <i>Hurst's case</i> , 1 Lev. 75. <i>Leigh's case</i> , 3 Mod. 333. |
| (3) <i>Rex v. Wilton</i> (<i>Mayor of</i>), 5 Mod. 256. | (12) <i>Vaughan v. Gunmakers' Comp.</i> 6 Mod. 82. |
| (4) <i>Roe's case</i> , Comb. 145. | (13) <i>White's case</i> , <i>ibid.</i> 18. 3 Salk. 292. |
| (5) <i>Rex v. Wells</i> (<i>Corporation of</i>), 4 Burr. 1999. | (14) <i>Stamp's case</i> , Comb. 348. |
| (6) <i>Bret's case</i> , Comb. 214. | (15) <i>Regina v. Warwick</i> (<i>Corporation of</i>), 10 A. & E. 386. <i>Regina v. Newberry</i> (<i>Mayor of</i>), <i>ibid.</i> |
| (7) <i>Rex v. Owen</i> , 5 Mod. 314. | |
| (8) <i>Rex v. London</i> (<i>Mayor of</i>), 2 T. R. 177. | |
| (9) <i>Rex v. Axbridge</i> (<i>Corporation of</i>), Cowp. 523. | |

He then appealed to the lords of the treasury by memorial, and prayed therein to be heard by himself, his counsel, agents, or witnesses; the council sent in a memorial in answer, and the town clerk another in reply. The council in their memorial alleged, that they had dismissed him for conduct, which they stated, warranted removal. This, the town clerk denied. The lords of the treasury, without hearing the parties further than by taking the memorials into consideration, awarded, that the town clerk was entitled to no compensation, stating as their reason, that they thought the council had made the removal in the *bona fide* and justifiable exercise of the discretion vested in them. On application for a *mandamus* to the lords, commanding them to hear the appeal, it was held, that the writ could not be granted; for that, if the lords had jurisdiction (and *seem* that they had not), they had already heard and decided, although the court considered the dismissal was not warranted by the town clerk's conduct. (1)

The "common clerk" of a borough, before stat. 5 & 6 Will. 4. c. 76., (Municipal Corporation Act), had always executed, by himself or deputy, the offices of clerk of the peace and clerk of the justices, as incidental to that of common clerk. The first town council elected after that act, appointed him to the office of "town clerk," which he declined to accept, on the ground, that the office was essentially a different one; and he claimed compensation as upon a loss of the entire office of common clerk. The council refused any compensation; and the lords of the treasury, on appeal and hearing of all parties decided, that, as he was re-elected town clerk, he was not entitled to compensation for such part of his emoluments as appertained to that office; but, as he was not re-elected to the offices of clerk of the peace or clerk of the magistrates, he was entitled to compensation for the emoluments of the common clerk acting as clerk of the peace and to the justices; and they awarded to him an annuity "for the loss of his office of common clerk:"—It was held, that the lords had sufficiently adjudicated on the whole subject of appeal, and the court refused the *mandamus* to them to hear and determine the merits of it.

The principle to be elicited from the foregoing case is, that if the lords of the treasury have in fact heard and determined the appeal under stat. 5 & 6 Will. 4. c. 76. s. 66., the court will not interfere by *mandamus*, though it may be satisfied that compensation has been awarded on an erroneous principle. (2)

The town clerk of a borough dying, one of the capital burgesses vacated that office, and was appointed town clerk nine days before the passing of the Municipal Corporation Act, 5 & 6 Will. 4. c. 76. On the 1st of January he was removed. He applied to the town council for compensation, and they refused to grant any. He then appealed, under stat. 5 & 6 Will. 4. c. 76. s. 66. of the act, to the lords of the treasury, who decided, that he was entitled to no compensation:—It was held, that, under the circumstances, none but a nominal compensation was to be expected; and that

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When the writ will not be granted to award compensation in consequence of the lords of the treasury having adjudicated thereon.

(1) *Regina v. Lords Commissioners of the Treasury*, 10 A. & E. 374. In the treasury minute, their lordships observe, "that the proviso was meant to protect the officers from fraudulent motion, but that the town council of Warwick could not be charged with any improper motive, as the dissatisfaction appears to their lordships to be genuine

and well founded. But, in answer to this, it must be said, that the protection against fraudulent motion is specific, and is referred to a precise test—whether the motion would have been warranted by the officer's misconduct." *Per* Lord Denman, *ibid*.

(2) *Ibid*. 179.

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OR REFUSED.

CLERKS TO THE
JUSTICES.

Judgment of
Mr. Justice
Coleridge in
*Rex v. Bridge-
water (Mayor
of)*.

CHAMBER-
LAINS.

in such a case, the court would not grant a *mandamus* to the corporation to assess compensation. (1)

Before and until the Municipal Corporation Act (2) T. was common clerk, prothonotary, and clerk of the peace of the borough of B. during good behaviour; and acted as clerk to the justices of the borough, as by usage the common clerk had always done, either, as T. alleged, incidentally to the office of common clerk, or, as was alleged in answer, by appointment of the justices, the office of clerk to the justices not being mentioned in the charters or records. After the foregoing act passed, he was appointed town clerk; and afterwards, upon a separate commission of the peace being granted to the borough, another person was appointed clerk to the justices by the justices under that commission:—It was held, that T. was entitled to compensation under stat. 5 & 6 Will. 4. c. 76. s. 66. for the loss of the emolument derived from the place of clerk to the justices, although, after the appointment of the new town clerk to the justices, a court of quarter sessions was granted to the borough, and T. was appointed clerk of the peace (3); Mr. Justice Coleridge observing, "I agree with the rest of the court, that it is not necessary, that there should be an office, strictly speaking. Looking at the words of sect. 102., where the words are "office of clerk to the justices," it is clear, that the word is not used there in the strict sense in which we find it employed in our law books, but in the general and liberal sense of a place to which duties and profits are attached."

By a resolution of the corporation of Bath, a person was directed to attend upon and assist the chamberlain of the city in the various business of his office, under the direction of the committee for inspecting the chamberlain's accounts. The appointment was during good behaviour, at an annual salary, payable quarterly. The person so appointed retiring, H. was in 1810 requested by the then chamberlain to accept the office of assistant chamberlain; and the corporation in common hall, on the chamberlain's statement, that he wanted a person in place of the late assistant, resolved, (but the resolution was not communicated to H.) that the chamberlain should be authorised to employ such fit and proper person to assist him in his said office, as he should think proper. The chamberlain told H. that he was appointed, and H. entered upon the duties. A new chamberlain being afterwards appointed, the corporation by a resolution in common hall resolved, that H. should be recommended to the new chamberlain as his assistant; and he was continued in that employment. On the passing of the stat. 5 & 6 Will. 4. c. 76., a new town council was appointed, and a committee named by them, recommended that the office of assistant chamberlain should be discontinued, which was accordingly done:—It was held, that the employment of assistant chamberlain under these circumstances was not an office for which compensation could be claimed under stat. 5 & 6 Will. 4. c. 7. s. 66. (4)

(1) *Exp. Lee*, 7 A. & E. 139. *Quare*, Whether the lords of the treasury have jurisdiction under stat. 5 & 6 Will. 4. c. 76. s. 66., if the town council have refused to make any compensation.

(2) Stat. 5 & 6 Will. 4. c. 76.

(3) It seems, that if the lords commissioners of the treasury order compensation to a party not holding an office within stat.

5 & 6 Will. 4. c. 76. s. 66., the court will not enforce the order by *mandamus* to the corporation; but they will grant the writ where the lords have ordered compensation to a party holding an office within such statute. *Rex v. Bridgewater (Mayor of)*, 6 A. & E. 339.

(4) *Exp. Harvey*, 7 *ibid.* 739.

The steward of a borough, removed under stat. 5 & 6 Will. 4. c. 76., demanded compensation under sect. 66. of that statute, as for an office held for life. The town council allowed compensation as for an annual office only. The lords of the treasury on appeal, and after hearing the parties, awarded compensation on the former principle. On motion for a *mandamus* to the corporation to execute a compensation bond, there appeared evidence on the one hand, that the office was not legally holden for life, and on the other, that it had usually been so holden, and that the appointment was accepted on that understanding:—It was held, that, under sect. 66. the lords of the treasury were not bound to consider only the legal tenure, but might, referring to the circumstances of the case, award compensation as for an office held for life. (1)

Where the steward had received a small annual sum for holding a corporation court, which was paid by the sheriffs, and not out of the borough fund; but he held the court as steward:—It was holden, that compensation might be given him in respect of his emolument (2), Lord Denman observing, “As to the sheriff’s court, it was a court of the corporation; and, if the payments in respect of it were an emolument fairly attached to this corporate office, it was a proper subject of compensation.”

A local act empowered the mayor, bailiffs, and burgesses of a borough to appoint, and also from time to time to displace and remove, a collector of quay and harbour duties, which were to be paid to the mayor, bailiffs, burgesses, and commonalty, under the act, for goods exported and imported, &c.; they were also enabled to allow such collector a salary out of the duties. The act recited, that the mayor, bailiffs, burgesses, and commonalty had, time out of mind, received and managed such duties as trustees; and it prohibited their being applied to any purpose, but those of the quay and harbour, &c. The fund arising from such duties had in fact always been kept distinct; and the corporation had exercised no control over it, except for the purposes of the local act. E. was appointed collector, at a salary under that act. After the passing of stat. 5 & 6 Will. 4. c. 76., the council elected for the borough continued the office of collector, but appointed another person in place of E.:—It was decided, that E. was not entitled to compensation by stat. 5 & 6 Will. 4. c. 76. s. 66. as a person removed from his office under the provisions of that act (3), Lord Denman observing, “We are not satisfied upon the affidavits, that the removal of Mr. Edwards has been made without just cause. Unexceptionable reasons were stated for it upon the argument; but, without deciding that, which is not properly of our jurisdiction, we may add, that we have come to our conclusion with the less regret, because it seems clear, that those dues out of which his salary was paid, do not become a part of the borough fund; and therefore, there would be an incongruity, almost an injustice, in making that fund chargeable with any compensation for the loss of it. Upon the ground, however, that he has not been removed under the provisions of stat. 5 & 6 Will. 4. c. 76., we think this rule must be discharged.”

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

STEWARDS OF
BOROUGH.

COLLECTORS OF
QUAY AND
HARBOUR DU-
TIES.

Borough fund
not liable, if
the dues do not
become part of
the borough
fund.

CONSTABLES.

In *Regina v. Derby (Mayor of)* (4) it appeared, that a person named

(1) *Regina v. Norwich (Mayor of)*, 8 A. & E. 633.

(2) *Ibid.*

(3) *Regina v. Poole (Corporation of)*, 7 A. & E. 730. *Quære*, Whether, before his re-

moval, he was an officer of the borough within the meaning of stat. 5 & 6 Will. 4. c. 76. s. 66. ? *Ibid.*

(4) MS. Nov. 7. 1839.

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

Newton had been appointed a constable by the corporation of Derby in the year 1812, and had continued in the office until the passing of the Reform Act, when he was removed by the new corporation, who placed the office upon a footing different from that on which it had stood before. Upon his removal from office, Newton applied in the usual way to the corporation under the Municipal Corporation Act for compensation for the loss of his office, but they rejected his application: he then appealed to the lords of the treasury, and they made an order directing the corporation to grant him an annuity of 37*l.*, and to execute a bond for securing it. The corporation, however, continued to refuse compliance, although repeated applications were made to them upon the subject. Upon these facts, Mr. Justice Littledale granted a rule.

To affix the
corporate seal.

A *mandamus* lies as a matter of course to put the corporate seal, when requisite, to a certificate of the election of a corporate officer, if there be an affidavit, that the applicant had the majority of legal votes. (1)

RAILWAY COM-
PANIES.

The writ likewise lies against a company to reinstate and lay down a railway, where it was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided, that the public should have the beneficial enjoyment of the same, but by the company subsequently taken up. (2)

Railway com-
pany deviating
from the line
of road pre-
scribed to them
in their act of
incorporation,
and non com-
pletion of the
line of rail.

It has been held, that a *mandamus* lies against a railway company to proceed with the whole line according to the act of parliament, or for deviating therefrom, or to purchase the necessary lands, although the company neither have, nor can without a new act raise funds sufficient to complete the line. (3)

Commanding
a railway com-
pany to assess
compensation.

A *mandamus* to a railway company, commanding them to summon a jury to assess compensation to a claimant, will not be granted where it appears, that the works calculated to damnify the claimant are still *bond fide* proceeding, although the applicant also claims for land taken by the company, and considerable delay has taken place since the commencement of the works. (4)

When tenant
not entitled to
compensation.

The London and Southampton Railway Act (5) provides, that all tenants from year to year shall deliver up possession to the company at the expiration of six calendar months next after notice, whether such notice be given with reference to the commencement of the tenancy or not, and whether before or after the purchase of the lands by the company, or at such time after the expiration of the notice as they shall be required; and that where any such tenant shall be required to give up possession before the expiration of his term or interest, the company shall make compensation for the value of his unexpired term or interest. On the 10th of January the company gave six months' notice under the act to a tenant

(1) *Rez v. York (Mayor of)*, 4 T. R. 699.

(2) *Rez v. Severn Railway Comp.* 2 B. & A. 646.

(3) *Regina v. Eastern Counties Railway Comp.* 10 A. & E. 53. The *mandamus* suggested that the company had been required to define the deviations, and complete the railway to Norwich and Yarmouth, but that they had refused and neglected to purchase the necessary lands between Colchester and Norwich, and Norwich and Yarmouth, or

set out the deviations, or to make and complete the railway. There was no averment that the company had abandoned the design, or were not proceeding with all convenient speed, or that a reasonable time had elapsed without proper preparations, or that deviations would be expedient: — Held, that the *mandamus* was insufficient.

(4) *Exp. Parkes*, 9 Dowl. P. C. 614.

(5) 4 & 5 Will. 4. c. lxxxviii.

from year to year, whose holding began at Christmas; after the expiration of the notice, the tenant, who had refused to quit without compensation, was told by the company, that possession would not be required till Christmas; the company did not take a conveyance of the reversion till 25th of August:—It was held, that the tenant, who voluntarily continued to occupy as usual till Christmas, was in the same situation as if a regular landlord's notice had been originally given to him, and was, therefore, not entitled to compensation; Lord Denman observing, "It makes no difference that the company were not landlords when they gave the notice in January; that notice was undoubtedly meant to operate under the act, and would have done so but for the subsequent conduct of the parties." (1)

A *mandamus* lies to compel a canal company pursuant to the provisions of an act of parliament, to proceed to an assessment of the value of land taken by them for the purposes of the canal. (2)

The writ will likewise be granted to arbitrators under a canal act to appoint an umpire. (3)

A canal company were empowered by stat. 10 Geo. 3. c. 114. to purchase lands, or to take from unwilling owners upon making compensation. The contracts, sales, &c. were to be enrolled with the clerk of the peace for the county, at the expense of the company; and true copies of which were to be evidence in all courts. The lands were to be vested in the company upon the payment or tender of the sum contracted for or assessed as compensation. A landowner applied for a *mandamus* requiring the company to enrol all contracts, &c. relating to certain lands which had been taken by them from his estate, alleging that, at a late trial between himself and the company, it had been material for him, in order to avail himself of privileges conferred by the statute, to prove that the company had taken lands from his estate, and that he had incurred great expense in procuring secondary evidence, for want of enrolment of a contract which, he was informed and believed had been made under the circumstances in which enrolment was prescribed by the statute. But it appearing, that the company had been in undisturbed possession of the lands in question for sixty-five years, the court refused a *mandamus*. (4)

In order to induce the court to issue a *mandamus* to a canal company to make compensation to a claimant, a clear refusal on the part of the company must be shewn; mere delay in attending to the claim is not sufficient. (5)

In *Regina v. Swansea Harbour (Trustees of)* (6), who were empowered by act 6 & 7 Will. 4. c. cxxvi. to purchase lands for certain purposes, it appeared that the trustees offered money for certain land; the landholder did not accept it, but desired that the amount (in accordance with the foregoing act) might be settled by a jury. In the mean time, at their request, he consented, that they should take possession, agreeing to pay him interest on the amount of the future compensation. The inquiry was held, and compensation assessed. An inquisition was drawn up, purporting to

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

INLAND NAVI-
GATION COM-
PANIES.

Arbitrators to
appoint an um-
pire.

Writ will not
be granted, if
the party be in
undisturbed
possession of
land for a long
period.

Where a clear
refusal to make
compensation
must be shewn

Where the
writ will be
granted to en-
force an inqui-
sition for com-
pensation
under a local
act.

(1) *Regina v. London and Southampton Railway Comp.* 10 A. & E. 3.

(2) *Rez v. Stainforth Canal Comp.* 1 M. 8. 32.

(3) *Rez v. Goodrich*, 3 Smith, 388.

(4) *Regina v. Leeds to Liverpool Canal Navigation Comp.* 11 A. & E. 916.

(5) *Regina v. Wilts and Berks Canal Comp.* 8 Dowl. P. C. 623.

(6) 8 A. & E. 439.

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WRIT WILL
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be taken at sessions under the act, and stating, that the trustees and landlord appearing by their counsel, the jurors being sworn to inquire of the purchase money of the lands (specified), and recompense for damage, did assess and give a verdict for the sum of &c. for the land, and the sum of &c. for damages; whereupon the said court did adjudge and order the said sums to be paid by the trustees. On cross motions for a *mandamus* to pay, and a *certiorari* to bring up the inquisition, it was held, that the non statement in the inquisition of any preliminary requisite to the taking of it (as twenty-one days' notice to treat) could not be insisted upon by the trustees, whose business it was to institute the proceedings; that the fact of differences having existed sufficiently appeared by the inquisition; that the inquisition was not irregular in omitting to state, whether or not the sum assessed exceeded or equalled the sum offered by the trustees; and the court granted a *mandamus*, and discharged the rule for a *certiorari*.

Deptford Pier
Company.

The Deptford Pier Company were authorised by act 5 Will. 4. c. xiii. to take lands for the purposes of the act, the compensation money to be assessed by a jury, on refusal by the proprietor to treat after notice, and in some other cases. If the company should not, within three years after the passing of the act, agree for, or cause to be valued and paid for according to the act, the premises to be purchased, the powers given them were to cease, except with consent of the owners and occupiers. Sect. 68. directed that, on payment of the purchase money assessed, either to the proprietor, or, if he should "not be able to make a good title," then into the Bank of England, in the manner and for the purposes specified by the act, it should "be lawful" for the company to enter, and the lands should from thenceforth vest in them. Sect. 80. empowered them to resell lands purchased but found unnecessary. The company gave notice of treating for lands in the possession of C. A jury was summoned, and assessed the purchase money. C. offered to convey and give possession, but was unable to deduce a complete title, though he offered one, which, as he contended, ought to be satisfactory. The company refused to complete the purchase. On motion by C. for a *mandamus* to them to pay the purchase money to C. or into the bank, it was held, that an affidavit by C., shewing merely that he was not in a situation to complete the title, and had suggested a payment into the bank to save expense, was not sufficient for the writ. (1)

Where the
writ will not
be granted to
enforce a defec-
tive title.

But the writ was granted on affidavit shewing, that C. had endeavoured to obtain a complete title, but could not, and that after the assessment, and during the dispute on title, three years from the passing of the act expired was held no ground for refusing the writ. (2)

When the con-
duct of com-
missioners
under an inland
navigation act,
amounts to a
refusal to hear
a complaint.

By an inland navigation act (35 Geo. 3. c. 106.) it was enacted, that any person aggrieved by the works might complain to the commissioners of the navigation at one of their meetings, and they should hear such complaint, and report upon it to a subsequent meeting, which should make such order and give such satisfaction as should be thought just and reasonable, with an appeal to quarter sessions by any party dissatisfied with any judgment of the commissioners.

A party aggrieved required satisfaction of the commissioners (October

(1) *Regina v. Deptford Pier Comp.* 8 A. & E. 911.

(2) *Ibid.*

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

6th), and had several communications with them, but received no definite answer. He then (January 18th) demanded, in the manner prescribed by the act, that the commissioners should, at their next meeting, hear and report upon his complaints, stating that he would, on that occasion, be prepared with evidence of the alleged injury. His agent attended the meeting (February 8th) with the witnesses; but they were ordered to withdraw, and no adjudication was made on his complaint, the previous question being moved and carried. No explanation was given to the complainant. The commissioners had, on his first application, laid a case before counsel, but had not been able to obtain the opinion by February 8th, for which reason they made no communication to the complainant, fearing that if made, it might be treated as an adjudication. The opinion was made (March 24th) too late, as the commissioners alleged, for notice to be given to the complainant of a hearing at their next meeting (March 30th). After that meeting, and before the subsequent one, the complainant moved for a *mandamus* to the commissioners to hear and report upon his complaint:—It was held, that the conduct of the commissioners was a virtual refusal to hear; and a rule absolute was granted, with costs (1); Lord Denman observing, “No satisfactory communication had been made to Lord Boston, nor any time pointed out at which the commissioners would be willing to proceed.”

The conservators of Bedford Level moved for a *mandamus* to landowners to amend and heighten certain banks within the Level, which they were liable to repair *ratione tenuræ*, and which were alleged (but not admitted) to be in a dangerous state. But the writ was refused, inasmuch as stat. 15 Car. 2. c. 17. s. 5. gave the conservators within the Level the authority of commissioners of sewers, and therefore they had a sufficient remedy in their own hands. (2)

Where commissioners possess authority in their own hands to redress a grievance.

A *mandamus* lies against a water company, incorporated by statute, commanding them to issue their warrant for a jury to assess damages to a mill belonging to A. B.;—and if the jury be summoned in obedience to the *mandamus*, and assess a compensation to A. B., and the company refuse to pay the same, or the costs, a *mandamus* will lie to enforce payment of the compensation, though the statute may have made the verdict and judgment records of the quarter sessions; and the company, in shewing cause against the rule for a second *mandamus*, will be precluded from contending, that the injury sustained by A. B. was not within the act, or that all preliminaries necessary to support the first *mandamus* were not fulfilled. .

WATER COMPANIES.

It will also be presumed, that all formal preliminaries, essential to the verdict, have been fulfilled, in default of evidence to the contrary. But if the jury, have assessed a compensation to A. B. without noticing the interest of any other person, it will not be presumed, in the absence of an affidavit, that they have given such compensation for a larger interest than A. B. really had. (3)

If a depositor in a savings' bank call upon the trustees for his deposit, which is not paid in consequence of an embezzlement committed by the clerk, and; on the same account, none of the other deposits are forthcoming,

TRUSTEES OF SAVINGS' BANKS.

(1) *Regina v. Thames and Isis (Commissioners of the Navigation of)*, 8 A. & E. 901.

(3) *Rez v. Nottingham Old Water Works* Comp. 6 *ibid.* 355.

(2) *Regina v. Gamble*, 11 *ibid.* 69.

WHEN THE WRIT WILL BE GRANTED OR REFUSED.

such single depositor may, under stat. 9 Geo. 4. c. 92. s. 45., call upon the trustees of the bank to appoint an arbitrator on their part for the purpose of adjudicating on the dispute touching such depositor's claim; and the court will issue a *mandamus* to the trustees if they refuse. (1) But a *mandamus* will not be issued requiring trustees of a savings' bank to refer a dispute to arbitration under stat. 9 Geo. 4. c. 22. s. 45., if the inquiry can have no result. (2)

WHEN THE WRIT WILL NOT BE GRANTED.

GENERALLY.

Quare impedit.

"That which is likely to be done."

Liability to action.

To execute one part of a power granted by statute.

Ministerial officers.

Private officers.

Equitable right on a trust.

Officer neglecting his duty.

Mandamus will not be granted where there is another specific remedy, as by information in nature of a *quo warranto* (3), or a *quare impedit* (4); or to do that which is likely to be done (5); or to compel the repair of a turnpike road (6); or where a man would be liable to an action by obeying the writ (7), except under stat. 11 Geo. 1. c. 18., upon which a *mandamus* lies, notwithstanding a penalty be given. (8) Neither does the writ lie to execute one part of a power granted by act of parliament (9); or against the governor and company of the Bank of England to transfer stock, because the party has his remedy by *assumpsit* (10); but it is no objection to the issue of the writ to do a particular act, that an indictment will also lie for the omission to do that act.

A *mandamus* will not be granted to a ministerial officer, such as the treasurer of a county, or a constable, to obey an order of the court of quarter sessions (11); nor to the holder of an office of a private nature, and which is not permanent, such as vestry clerk (12); nor to enforce a mere equitable right on a trust. (13)

The writ will be issued whenever any public officer (14) has neglected his duty; but there is considerable doubt whether, when an officer refuses to do his duty, he being amenable to other persons, the court will, under any circumstances, interfere by *mandamus*. (15)

Certiorari taken away.

Where the writ of *certiorari* is taken away, the court will not indirectly bring proceedings under review by *mandamus*. (16)

PAYMENT OF MONEY TO THE TREASURER OF A BOROUGH.

The court will not grant a *mandamus* commanding a party to pay money to the treasurer of a borough, under stat. 5 & 6 Will. 4. c. 76. s. 92., unless the application be made, either by the treasurer, or after he has been required to demand the payment, though the party applying for the *mandamus* be ultimately entitled to the money. (17)

JUDGE OF ASSIZE.

To grant a warrant of restitution under stat. 8 Hen. 6. c. 9.

Under stat. 8 Hen. 6. c. 9., if an indictment for forcible entry and detainer be found by the grand jury at the assizes, and application be thereon made

(1) *Rez v. Mildenhall Savings' Bank* (Trustees of), 6 A. & E. 952. *Quare*, Whether, on such arbitration, the trustees would be exempted from personal liability by stat. 9 Geo. 4. c. 92. s. 9., in a case where the default took place before the statute, or generally?

(2) *Regina v. Northwich Savings' Bank*, 9 A. & E. 729., ante, 2291.

(3) *Rez v. Colchester* (Mayor of), 2 T. R. 259. *Rez v. Whitstable* (Free Fishers of), 7 East, 353. *Rez v. Severn Railway Comp.* 2 B. & A. 646., vide etiam *Rez v. Jeyes*, 3 A. & E. 422.

(4) *Rez v. Chester* (Bishop of), 1 T. R. 396. *Regina v. Exeter* (Chapter of), 12 A. & E. 512.

(5) *Anon.* Loft, 148.

(6) *Regina v. Oxford Roads* (Trustees of), 4 P. & D. 154.

(7) *Regina v. Heathcote* (Sir Gilbert), 10 Mod. 51.

(8) *Rez v. Everet*, R. T. H. 261.

(9) *Rez v. Birmingham Canal Navigation*, 2 W. Black, 708.

(10) *Rez v. England* (Bank of), Doug. 524.

(11) *Rez v. Bristow*, 6 T. R. 168. *Rez v. Surrey* (County Treasurer of), 1 Chitt 630., vide etiam *Rez v. Johnson*, 4 M. & S. 515.

(12) *Rez v. Croydon* (Churchwardens of), 5 T. R. 713.

(13) *Rez v. Stafford* (Marquess of), 3 Ind. 646.

(14) *Rez v. Jeyes*, 3 A. & E. 416.

(15) *Ibid.*

(16) *Rez v. Yorkshire, West Riding* (Junction of), 1 A. & E. 563. 3 N. & M. 802.

(17) *Regina v. Frost*, 8 A. & E. 822.

to the judge of assize to grant a warrant of restitution, it is in his discretion whether he will grant it or not.

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

Therefore, when the judge, upon such an application, made on affidavit, granted a rule *nisi*, which he afterwards, upon cause shewn on affidavit, discharged, and a motion was made to the court (but without removing the indictment) for a *mandamus* to the judge, or a warrant of restitution, the court refused to interfere; and they would not enter into the question, whether the judge had exercised the discretion rightly. (1)

A *mandamus* will not lie to the benchers of an inn of court to compel them to call a student to the bar (2); nor to compel them to admit an individual to be a member of the society, for the purpose of qualifying himself to become a barrister (3); nor to the principal and ancients of Barnard's Inn to admit an attorney into the society (4); nor for a fellow of a college when there is a visitor (5); nor to a visitor when acting under a visitatorial authority. (6)

Inns of court.

A *mandamus* does not lie for a fellow of the college of physicians (7), or to swear in a surgeon. (8) The charter of the college of surgeons directs the censors, &c., upon request, to examine every person who shall have served an apprenticeship of five years to any regularly educated surgeon:—and where the censors, &c. refused to examine a candidate, upon the ground that the person to whom he served his apprenticeship was not a regularly educated surgeon, as he had only received a *diploma* from the college of Glasgow, and had kept an apothecary's shop—a *mandamus* was refused to compel the examination of the candidate, the censors, &c. not having acted capriciously, partially, or on false principles in his rejection. (9)

Colleges of
physicians and
surgeons.

A *mandamus* will not lie to an insurance company to transfer shares standing in the name of a bankrupt into the names of the assignees; for otherwise the court would be called upon to interfere in all cases of dispute between the members of private corporations, which is inconsistent with the character of the writ, it being a high prerogative one, and confined to cases of a public nature. (10)

INSURANCE
COMPANY.

The writ will not be issued to the treasurer of a county to reimburse constables who have expended money in conveying rogues, vagabonds, and disorderly persons, it being a question over which the sessions have jurisdiction. (11)

TREASURER OF
A COUNTY.

A *mandamus* will not lie to the officers of customs to register a ship transferred by the survivors of two part owners, merchants, on the ground, that the executors of the deceased part owner ought to have joined in the transfer. (12) Nor to the commissioners of customs to grant a ship's registry *de novo*, if not expressly ordered to do so by statute. (13)

OFFICERS OF
CUSTOMS.

Registering of
ships.

A *mandamus* will not lie to compel a constable to pay money levied by him under a distress and sale, and who, under an idea of its having been

Constables.

(1) *Regina v. Harland*, 8 A. & E. 826.

(2) *Rex v. Gray's Inn (Benchers of)*, Doug. 353.

(3) *Rex v. Lincoln's Inn (Benchers of)*, 4 B. & C. 855. 7 D. & R. 351.

(4) *Rex v. Barnard's Inn (Principal and Ancients of)*, 5 A. & E. 17.

(5) *Rex v. Ely (Bishop of)*, 1 W. Black. 85.

(6) *Ibid.* 2 T. R. 345.

(7) *Rex v. Physicians (President of)*, 7 T. R. 282.

(8) *Anon.* 7 Mod. 118. Comb. 41.

(9) *Rex v. College of Surgeons*, 1 Hudson & Brooke (Irish), 475.

(10) *Rex v. London Assurance Comp.* 5 B. & A. 899. *Rex v. England (Bank of)*, 2 *ibid.* 620.

(11) *Rex v. Erle*, 2 Burr. 1197.

(12) *Rex v. Liverpool (Collector of Customs of)*, 2 M. & S. 223.

(13) *Rex v. London (Collector of Customs of)*, 1 M. & S. 262. Abbott on Shipping, by Shee, 54.

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

Repairs of
roads.

Nuisance.

Witnesses in
India.

INSPECTION
AND PRODUCTION
OF RECORDS. (6)

To deliver up
public documents
to the
constituted authorities.

Restoration of
records.

Corporators.

County treasurer.
Stat. 12 Geo. 2.
c. 29. s. 7.

erroneous, had restored the money to the purchaser, and the goods to the owner; because, if the writ were issued and disobeyed, the court would only fine for the contempt, and that the magistrates could do. (1)

The writ will not be issued to ascertain, which of two parties is liable to repair a road under local acts of parliament. (2)

A *mandamus* will be granted to abate a nuisance. (3)

Under stat. 13 Geo. 3. c. 63. the court will grant a *mandamus* to the court in India, to examine witnesses on behalf of the defendant in a civil action (4); —but the court cannot do so, in an action at the suit of the crown. (5)

A *mandamus* lies to deliver up public documents to the constituted authorities (7); and it seems that, such papers cannot be retained by a creditor as a *lien* for money advanced. (8) The writ also lies to compel the delivery of records which concern the public administration of justice, to a new officer (9); or against old overseers to compel them to deliver their public books and papers to their successors (10), and to pass their accounts if required to do so by statute. (11) But a *mandamus* to the old churchwardens to deliver up the parish books has been denied. (12)

Any person having a *prima facie* right to a public office, has a right to inspect every document relating to that title, and would obtain the writ for such inspection, previously to the institution of any suit. (13)

A resident inhabitant of a town corporate has a right to inspect and take copies of a bye-law of a corporation pending an action against him for breach of the same, although he may not be a corporator. (14)

By stat. 12 Geo. 2. c. 29. s. 7. the treasurer of every county is to keep books of entries of sums received and paid by him, and is also to deliver in accounts to the justices at every quarter sessions, with vouchers; and by sect. 8. the accounts and vouchers, after having been passed by the justices, are to be deposited with the clerk of the peace, who is to keep them among the records of the county, to be inspected by the justices.

A treasurer delivered in documents, consisting of separate papers, containing respectively the clerk of the peace's account of the county rate, and other charges to the treasurer's *debit*, and also the bills which he had paid, and the vouchers. At the same time he exhibited his book of entries of the sums received and paid. The justices compared the book with the documents, deposited the documents and vouchers with the clerk of the peace, signed the treasurer's discharge (under sect. 9.) in his book of entries, and returned it to him so signed: —It was held, 1. that the book of entries thereby became the accounts passed, and therefore, that such book was to be kept by the clerk of the peace, not by the treasurer himself; 2. that

(1) *Morley v. Stacker*, 6 Mod. 83.

(2) *Regina v. Oxford and Witney Turnpike Roads*, 12 A. & E. 427., sed vide *Rex v. Llandilo Roads* (*Commissioners of*), 2 T. R. 232.

(3) *Rex v. St. John's College, Cambridge*, 4 Mod. 237.

(4) *Grillard v. Hogue*, 1 B. & B. 519., vide *anté*, 1685—1695. tit. EVIDENCE.

(5) *Regina v. Wood*, 9 Dowl. P. C. 310.

(6) *Anté*, 1689—1691. tit. EVIDENCE.

(7) *Ibid*.

(8) *Rex v. Ingram*, 1 W. Black. 50.

(9) *Rex v. Nottingham* (*Sheriff of*), 1 Sid. 31.

(10) *Rex v. Clapham*, 1 Wils. 305.

(11) *Rex v. Warwickshire* (*Justices of*), 2 D. & R. 299.

(12) *Rex v. Street*, 8 Mod. 98, 99.

(13) *Rex v. Newcastle* (*Hostmen of*), Str. 1223. *Rex v. Lucas*, 10 East, 235.

(14) *Harrison v. Williams*, 4 D. & R. 890., vide 1 Stephens's Corporation Acts, 2d ed. 455—461. as to the rights of inspection under stat. 5 & 6 Will. 4. c. 76. Respecting cases where the court refused to interfere by *mandamus* for the inspection of corporation books, vide *Rex v. Chester* (*Sheriff of*), 1 Chitt. 477. *Herbert v. Ashburner*, 1 Wils. 297., *anté*, 1688, 1689. tit. EVIDENCE.

a *mandamus* lay to the treasurer to deposit it; 3. and this, although it contained, besides the discharges of the treasurer, those of his father, who had been treasurer before him, and had passed the accounts in the same way. (1)

WHEN THE
WRIT WILL
BE GRANTED
OR REFUSED.

A *mandamus* will be granted to the steward of a manor to allow inspection of the court rolls to two tenants, litigating a right of common (2); to the steward of a manor and to the homage to hold a court, and present certain conveyances to purchasers of burgage tenements. (3)

Steward of a
manor.

The fact that Gateshead is mentioned as a "borough" in schedule A. of stat. 5 & 6 Will. 4. c. 76., and that in the same schedule, "the borough-holders and freemen of the borough of Gateshead" are mentioned in connexion with it as the "corporate body," is not conclusive of the place having been a borough, or the borough-holders and freemen a municipal corporation, before the statute. And on evidence to the contrary, the court refused to issue a *mandamus*, calling on the stewards, &c. of such borough-holders and freemen to deliver up moneys and documents to the corporation established in Gateshead under the statute. (4)

Where an
order will not
be issued to
deliver up
moneys and
records.

3. INFERIOR COURTS.

INFERIOR
COURTS.

I. Generally.

A *mandamus* lies to an inferior court to compel it to adopt and give effect to the necessary proceedings. (5)

GENERALLY.

The writ will likewise be issued to compel an inferior jurisdiction to grant a new trial in a cause before it, in which alleged injustice had been done to one of the parties. (6)

II. Ecclesiastical Courts and Institutions.

ECCLESIASTI-
CAL COURTS
AND INSTITU-
TIONS.

A *mandamus* lies to prove a will where it is not disputed, or if there be no will, to grant administration (7); to declare a will *per testes* (8); or to grant administration to the next of kin, but not to a particular person. (9)

WHEN MAN-
DAMUS WILL BE
GRANTED.

A *lis pendens* is a sufficient cause against a *mandamus* to the judge of the ecclesiastical court to grant probate of a will. (10)

Administra-
tions and pro-
bates.

The writ will be granted for the inspection of churchwardens' accounts under stat. 17 Geo. 2. c. 38., but the applicant must state some special reasons for which he wishes to see their accounts (11); to compel a bishop (12) to grant inspection of his register of presentations and institutions to a living within his diocese to a person claiming the right of patronage, although the bishop himself claimed that right, for such register is of a

Declaring a
will *per testes*.
Administration
to next of kin.
Churchward-
en's accounts.

(1) *Rex v. Payn*, 6 A. & E. 392.

(2) *Rogers v. Jones*, 5 D. & R. 484.

(3) *Rex v. Midhurst (Borough of)*, 1 Wils. 283., *vide ante*, 1692. tit. EVIDENCE, *post*, 2316.

(4) *Rex v. Greene*, 6 A. & E. 548.

(5) *Amherst's case*, Sir T. Raym. 214. 1 Vent. 188. *Burgh v. Blunt*, 10 Mod. 350. *Rex v. Surrey (Justices of)*, 2 Show. 74. *Trevagnion's case*, Comb. 203. *Thompson v. Goodfellow*, 2 Show. 185.

(6) *Exp. Morgan*, 2 Chitt. 250. *Rex v. Conyngham (Marquess of)*, 1 D. & R. 529. *Arden v. Connell*, 5 B. & A. 885.

(7) *Gray v. Tench*, Comb. 454. *Rex v. Raines (Sir Richard)*, Holt, 310. *Dunkin v. Mun*, Sir T. Raym. 235. *Anon.* 5 Mod. 374. *Offly v. Beets*, 1 Lev. 186., *vide post*, 2310.

(8) *Anon.* Comb. 289.

(9) *Anon.* 11 Mod. 137. *Rex v. Hay*, 4 Burr. 2295. 1 W. Black. 640.

(10) *Lovegrove v. Bethell*, 1 W. Black. 668. *Rex v. Hay*, *ibid.* 640. 4 Burr. 2295.

(11) *Rex v. Greame*, 2 A. & E. 615., *vide etiam Bucks (Justices of)*, 3 N. & M. 68.

(12) *Rex v. Ely (Bishop of)*, 8 B. & C. 112.

INFERIOR
COURTS.

public nature; to compel a dean and chapter to fill up a vacancy among canons residentiary (1); to admit or restore prebendaries (2); to admit an apparitor general (3), parish clerks (4), sextons (5); to restore the registrar of a bishop's court (6); to the ecclesiastical court, to swear in churchwardens elected by the parish (7); to compel the warden of a college to affix the common seal of the college to an answer of the fellows, &c. in Chancery, although the warden may disapprove of the answer of the fellows, and put in a separate answer; to restore a schoolmaster of a grammar school founded by the crown (8); and to restore a member of an university improperly suspended from his degrees. (9)

WHERE MAN-
DAMUS WILL NOT
BE GRANTED.

The writ will not be granted for a matter purely of ecclesiastical cognisance, although an office being subject to the ecclesiastical court is unimportant.

Church rates.

A *mandamus* will not lie to churchwardens to make a church rate (10), although the court will put in motion their functions *in ordine*, i.e. to assemble for the purpose of determining whether a rate shall be made. (11) Neither will it be issued to the court of delegates to admit allegations (12); or to the spiritual court for not delivering up a will concerning land (13); or for letters of administration previous to an application to the spiritual court (14); or for an administrator *durante minori etate*, either to a particular person or generally (15); or to enforce the spiritual court to grant administration according to their sentence (16); or after administration granted, to transfer it to another—because, by stat. 21 Hen. 8. c. 5. s. 3., the spiritual court ought to grant it to the next of kin; and if it be granted to another, the grant is void. (17)

To admit
allegations.

Administra-
tion.

Burial of the
dead.

The mode of burying the dead is a matter of ecclesiastical cognisance; and therefore, where the question was, whether a parishioner had a right to be buried in a churchyard in an iron coffin, which was a new and unusual mode, the court refused a *mandamus*. (18) The court likewise denied the writ to a rector (19) to bury a corpse in a vault, or in any particular part of the churchyard, he having a right to exercise a discretion on the subject.

Dissenting
minister.

A *mandamus* has been refused to restore a minister of an endowed dissenting meeting house, because it did not appear, that he had complied with the requisites necessary to give him a *prima facie* title. (20)

Proctor.

The writ will not be issued to restore a proctor in the spiritual courts, because "the king hath two jurisdictions, one temporal, another ecclesiastical, and they have different laws and different processes, and they are judges of their own officers, that is a temporal office; that they could not take notice of what he is, or what estate he hath, whether for life, or how;

(1) *Chichester (Bishop of) v. Harward*, 1 T. R. 652. *Anon.* 1 Vent. 115.

(2) *Rex v. Norwich (Dean of)*, Str. 159.

(3) *Folke's case*, cit. per cur. in *Rex v. Ward*, ibid. 897.

(4) *Rex v. Ashton*, Sayer, 159. *Rex v. Warren (Clerk)*, Cowp. 371.

(5) *Rex v. Kingscleere (Churchwardens of)*, 2 Lev. 18. *Iles' case*, 1 Vent. 143.

(6) *Anon.* Comb. 264.

(7) *Rex v. Windham*, Cowp. 377.

(8) *Rex v. Morpeth (Bailiffs of)*, Str. 58.

(9) *Rex v. Cambridge (University of)*, T. 19 Geo. 3.

(10) *Rex v. Thetford (Churchwardens of)*, 5 T. R. 364.

(11) *Rex v. Westminster (Churchwardens of)*, 4 M. & S. 250.

(12) *St. David's (Bishop of) v. Lucy*, 1 Ld. Raym. 544.

(13) *Sabine's case*, 1 Sid. 443.

(14) *Sir Richard Raine's case*, 1 Ld. Raym. 262.

(15) *Smith's case*, Str. 892. *Barnard*, 370.

(16) *Anon.* Comb. 158.

(17) *Blackborough v. Davis*, Comyn, 96.

(18) *Rex v. Coleridge*, 2 B. & A. 806.

(19) *Exp. Blackmore*, 1 B. & Ad. 122.

(20) *Rex v. Jotham*, 3 T. R. 575.

that he is a spiritual person, and they have jurisdiction of him; that they make, and they may unmake him." (1)

INFERIOR
COURTS.

An authority was given by patent to registrars to exercise the office by themselves, or by a sufficient deputy to be appointed by the registrars, and allowed by the bishop. The registrars appointed a deputy; but the bishop disapproved of the appointment, stating that he had good and sufficient reasons for so doing, but did not allege any reasons. An application for a *mandamus* to the bishop to admit the party disapproved of was refused, the court being of opinion (2), that as the bishop had the power of approving or disapproving, they could not call upon him to exercise his discretion in a particular manner.

Registrars.

A *mandamus* will not lie to the archbishop of Canterbury to issue his fiat to the proper officer to admit a doctor of civil law; or a graduate of Cambridge, as an advocate of the court of Arches (3); nor to a visitor, where he is clearly acting under a visitatorial authority. (4)

Advocates.

Visitors.

III. Quarter Sessions and Justices.

The court has two jurisdictions over justices of the peace: 1st, to punish and restrain them when they exercise a jurisdiction which they have not; 2dly, to compel them by *mandamus* when they refuse to do, what by law they ought to do.

QUARTER SES-
SIONS AND JUS-
TICES.

WHEN THE
WRIT WILL BE
ISSUED.

Jurisdiction
exercised over
justices.

To hear a legal
application.

Excise infor-
mation.

The court will grant the writ against justices to hear a legal application, although the justices may have refused to hear the case on the grounds—that they considered they had no jurisdiction. (5)

The court of Queen's Bench in Ireland granted an absolute order for a *mandamus* to magistrates of petty sessions to hear an excise information, where they had refused to hear it until they should have the opinion of the law officers of the crown upon an objection made by the defendant's attorney; the objection being, that the jurisdiction of the magistrates was taken away by a notice of appeal to the quarter sessions from a dismissal by the magistrates of a former information for the same cause, having been served by the relator. (6)

Where a notice of appeal described the order of removal as made by R. H. Cundy and another magistrate, instead of B. Cundy, there being two magistrates in the county, whose respective christian names commenced with those initials, and the quarter sessions refused to hear the appeal on the ground of the variance, the court granted a *mandamus* to compel the hearing of the appeal (7); the writ has likewise been issued to rehear an appeal against an order of removal (8); to swear overseers to their accounts (9);

To hear an ap-
peal, magis-
trates having
refused in con-
sequence of a
variance in the
christian name
of the magis-
trate in the
order of re-
moval.

Rehearing ap-
peals.

(1) Per cur. in *Rex v. Oxenden*, 1 Show. 217.

(2) *Ibid.* Holt, 435.

(3) *Rex v. Canterbury (Archbishop of)*, 8 East, 213.

(4) *Rex v. Ely (Bishop of)*, 2 T. R. 345.

(5) *Rex v. Kent (Justices of)*, 14 East, 399. In Ireland the court will, in a proper case, make an order directing magistrates to receive informations, but will not allow a

mandamus to issue for that purpose. *Anon.* 1 Crawford & Dix (Irish), 195.

(6) *Rex v. Gort (Magistrates of)*, 1 Jebb & Symes (Irish), 389.

(7) *Regina v. Denbighshire (Justices of)*, 9 Dowl. P. C. 509.

(8) *Rex v. Leicestershire (Justices of)*, 1 M. & S. 442.

(9) *Rex v. Middlesex (Justices of)*, 1 Wils. 125. *Rex v. Carter (Sir J.)*, 4 T. R. 246.

Rex v. Pascoe, 2 M. & S. 343.

**INFERIOR
COURTS.**

Appeal against
overseers' ac-
counts.

Nomination of
overseer.

Allowance of
a poor's rate.

Surveyor of
highways.

Statement of
case.

Practice of the
court of ses-
sions.

Amendment of
record of a
game convic-
tion.

Record of con-
viction.

Qualification
oaths.

Inspection of
rates.

**WHEN THE
WRIT WILL NOT
BE ISSUED.**
Liability to
action.

to receive an appeal against overseers' accounts, though the accounts had not been previously made or examined at the special sessions, pursuant to stat. 50 Geo. 3. c. 49. s. 1. (1)

Magistrates will be ordered to nominate overseers of the poor, although the time mentioned in stat. 43. Eliz. c. 2. has expired, because the statutes for the relief of the poor are to be construed liberally (2), and a peremptory *mandamus* will be issued in the first instance to sign and allow a poor's rate (3); but it will not be granted under any circumstances with a direction, that certain persons shall be inserted in the rate. (4)

The writ has likewise been issued to appoint a surveyor of highways, if not appointed at the period mentioned in stat. 13 Geo. 3. c. 78. s. 1.; but that statute is now repealed by stat. 5 & 6 Will. 4. c. 50.

Although the court will not issue a *mandamus* to a court of quarter sessions commanding them to grant a case, yet under special circumstances the sessions will be commanded to state a case. (5)

The court will not interfere to regulate the practice of a court of quarter sessions unless it be positively shewn, that it is extremely unjust, because the sessions are judges of their own practice. (6)

A *mandamus* lies to amend the record of a game conviction by setting out the evidence on which it is founded as nearly as possible in the words used by the witness. (7)

If a person be found guilty by a jury at a session irregularly holden, he has a right to have the record of the proceedings made up in accordance with the facts, and the magistrates will be compelled to make up such record. (8)

The writ has also been granted to administer the oaths to a teacher of protestant dissenters, and to allow him to make and subscribe the requisite declarations (9); to proceed against a quaker for a church rate (10); to the justices and the clerk of the peace of a borough to permit the attorney on behalf of certain persons, contributors to the county rate, to inspect and take copies of rates made for the borough, and all orders made for the expenditure of the same, and the several orders of sessions made thereon, and all other proceedings and documents relating thereto. (11)

The court will not grant a *mandamus* commanding justices to do an act which may render them liable to an action (12); and under that principle, a writ was refused to compel a magistrate to enforce a conviction, when it was doubtful whether such conviction was good in consequence of the evidence not having been stated (13); nor to do that which may occasion costs for which they have no means for reimbursement (14); but the court will put justices in motion in cases where they ought to act. (15)

(1) 5 B. & A. 535. 1 D. & R. 146. *Rex v. Colchester (Justices of)*, *ibid.* 454.

(2) *Rex v. Sparrow*, Str. 1123.

(3) *Rex v. Fisher*, Sayer, 160.

(4) *Rex v. Weobly (Churchwardens of)*, Str. 1259.

(5) *Exp. Jarvin (Inhab. of)*, 9 Dowl. P. C. 120., *post*, 2314.

(6) *Rex v. Essex (Justices of)*, 2 Chitt. 385.

(7) *Rex v. Warnford*, 5 D. & R. 489.

(8) *Rex v. Middlesex (Justices of)*, 5 B. & Ad. 1113.

(9) *Rex v. Gloucestershire (Justices of)*, 15 East, 577.

(10) *Rex v. Freeman*, 2 Ld. Ken. 19.

(11) *Rex v. Leicester (Justices of)*, 4 B. & C. 891. 7 D. & R. 370. Respecting the right of the clerk of the court to fees, in which prisoners have been sentenced, *vide Regina v. Baker (Knt.)*, 7 A. & E. 502.

(12) *Rex v. Buckinghamshire (Justices of)*, 1 B. & C. 485. *Rex v. Greame*, 3 A. & E. 615. *Rex v. Morgan*, *ibid.* 616. *a.*

(13) *Rex v. Broderip*, 5 B. & C. 239. 7 D. & R. 861.

(14) *In re Lodge*, 2 A. & E. 123.

(15) *Rex v. Barker*, 6 *ibid.* 388.

Neither will a *mandamus* be granted to compel a magistrate to enforce a conviction for the plaintiff, where he had returned that the defendant was convicted of the penalty before him, and that the conviction was invalid in law. (1)

A friendly society enrolled its rules in 1794 under stat. 33 Geo. 3. c. 54. In 1804 alterations were made in them, but, by a neglect, for which the society was not to blame, the altered rules were never enrolled. They were however acted upon, and the original ones disused till 1835, when the omission to enrol was for the first time discovered. On motion for a *mandamus* to justices to hear the complaint of a member who had been expelled in 1836, it was held, 1. that the rules as altered could not legally be acted upon; and 2. that it was at least doubtful whether the original rules continued in force; and, consequently, that the court could not issue a *mandamus* to the justices, but must leave the applicant to his remedy in equity; Lord Denman observing, "It should be generally understood, that these societies cannot depart from their established rules, or neglect to comply with the statute in the mode of altering or repealing them, without exposing their property to danger, and themselves to great expense, loss, and inconvenience." (2)

A *mandamus* was refused to command justices to rehear an application for an alehouse license, which they had refused, though it was suggested that their refusal arose from a mistaken view of their jurisdiction (3); neither will the justices be commanded to rehear an application for an alehouse license at any other period of the year than within the first twenty days of September, though the justices may have refused a license under a mistake of the law. (4)

On appeal against a conviction for a trespass under stat. 1 & 2 Will. 4. c. 32. s. 30. the appellant admitted the trespass, and only offered evidence, that the property in the land was not as laid in the conviction. The sessions having rejected the evidence, and confirmed the conviction without stating a case, the court refused to call upon them by *mandamus* to hear the case, since the mistake, if any, was one of law, which the court could not enter into, the appeal having in fact been heard, and no case sent up. (5)

The justices in session will not be compelled to rehear an appeal, on the ground, that they had required the appellant to begin his case. (6)

And where an appeal was given to sessions within six months after the cause of complaint, and a motion was made there within that time, to enter and respite one, which was denied, the court would not grant a *mandamus* to the justices to receive it after the six months had elapsed. (7)

An order of removal to E. was made, upon an examination stating a

INFERIOR COURTS.

Enforcement of an invalid conviction.

To hear a complaint from a member of a friendly society.

To rehear applications for alehouse licenses.

TO REHEAR APPEALS.

To hear a case on an appeal under stat. 1 & 2 Will. 4. c. 32. s. 30.

(1) *Rex v. Robinson*, 2 Smith, 274.

(2) *Regina v. Godolphin* (Lord), 8 A. & E. 338. The nature of the alterations was not specified by the affidavits on either side. *Vide* stats. 10 Geo. 4. c. 56. and 4 & 5 Will. 4. c. 40.

(3) *Rex v. Farringdon without*, 4 D. & R. 135.

(4) *Rex v. Surrey (Justices of)*, 5 D. & R. 108. The power of licensing publichouses is absolutely in the discretion of the justices, and a *mandamus* will not be granted them to

license a publichouse; but if the justices grossly abuse their power, they can be punished criminally; and the abuse of a discretionary power is more severely punished than the abuse of a power which is not discretionary. *Rex v. Nottingham (Justices of)*, Sayer, 217. *Giles's case*, Str. 881.

(5) *In re Pratt*, 7 A. & E. 27.

(6) *Rex v. Suffolk (Justices of)*, 6 M. & S. 57.

(7) *Rex v. Derbyshire (Justices of)*, Nolan, 29.

INFERIOR
COURTS.

hiring in 1813, and a service in E. under such hiring. On appeal, upon the ground that there was no such hiring, the respondents proved a hiring in 1810; upon which the sessions refused to go on with the case, and quashed the order. A *mandamus* to enter continuances and hear the appeal was refused (1)—because the sessions had in fact heard; and the variance was material under stat. 4 & 5 Will. 4. c. 76. s. 81. (2)

Notice of an appeal against a borough rate under stat. 5 & 6 Will. 4. c. 76. s. 92. must state directly, that the party appealing is aggrieved, or must shew facts from which it can be collected; and it is not sufficient that the notice describes the appellant as a burgess of the borough, called upon to pay the rate.

When recorder will not be compelled to rehear an appeal against a borough rate.

Conclusions by justices not warranted by facts.

Assignment of reasons for their judgments.

Special entries on their records.

Continuances.

Order of removal.

On an appeal against a borough rate, no notice being proved except as above mentioned, the recorder refused to hear the appeal, or to enter and respite; and a *mandamus* was refused to compel him to hear it, though it was stated on affidavit, that the appellant was a party aggrieved, and that the omission in the notice arose from oversight. (3)

The justices will not be ordered to review their decision on an appeal, on the ground, that the conclusion drawn by them was not warranted by the facts proved (4); nor in cases of appeal to give their reasons for their judgments at sessions; nor to make special entries on their records (5); nor to direct them to enter continuances. (6)

On appeal against an order of removal coming on for trial, the sessions, on an alleged defect in the notice of appeal (that the notice had been served on one only of several parish officers), dismissed the appeal unheard, confirmed the order, and (at the instance of the appellants) granted a case. The appellants without bringing up the case moved for a *mandamus* to the justices to enter continuances and hear the appeal; but the writ was refused, Lord Denman observing, "If any thing wrong has been done, the justices have given you the opportunity of setting it right." (7)

On appeal against an order of removal, the sessions, without going into the appeal, quashed the order, subject to a case on a point said to turn upon the construction of stat. 4 & 5 Will. 4. c. 76. The case not being brought up, the court of Queen's Bench refused to hear the point discussed on an application by the respondents for a *mandamus* to enter continuances and hear the appeal. (8) The writ will not be issued to dismiss an appeal at the sessions (9); nor to justices at sessions requiring them to state a special case. (10)

Dismissal of an appeal.
Special case.

A *mandamus* will not be granted to the chairman of sessions, command-

(1) *Exp. Broseley (Inhab. of)*, 7 A. & E. 423. It was not alleged that the appellant parish was in fact misled.

(2) When appellants may give fresh notice of appeal against an order of removal, vide *Regina v. Middlesex (Justices of)*, 10 Dowl. P. C. 163.

(3) *Rex v. Bond*, 6 *ibid.* 905.

(4) *Rex v. Worcestershire (Justices of)*, 1 Chitt. 649. *Rex v. Carnarvon (Justices of)*, 4 B. & A. 86.

(5) *Rex v. Devon (Justices of)*, 1 Chitt. 34.

(6) *Rex v. — (Justices of)*, *ibid.* 164. *Rex v. Jukes*, 8 T. R. 625.

(7) *Rex v. Northamptonshire (Justices of)*, 6 A. & E. 111.

(8) *Rex v. Suffolk (Justices of) ibid.* 109.

(9) *Rex v. Wilts (Justices of)*, 2 Chitt. 257.

(10) *Peat's case*, 6 Mod. 228. 310., *anti.* 2312. Where the divisional justices of the city of Dublin refused to grant a certificate pursuant to stat. 55 Geo. 3. c. 104. s. 4. (Irish), the court refused a *mandamus*. *Rex v. Police (Divisional Justices of)*, *Alcock & Napier (Irish)*, 269.

The act 53 Geo. 3. c. 111. (Cork Local Act) is repealed by stat. 6 & 7 Will. 4. c. 116. *Jones v. Hayes*, 1 Jebb & Symes (Irish), 656.

ing him to issue warrants for the apprehension of persons against whom a true bill had been found for keeping a gambling house. (1)

Justices can be compelled to summon a person for not paying poor rates (2); and to make a warrant of distress for the poor rate. (3)

The court will not order magistrates to issue warrants of distress to levy a poor rate on persons who have refused to pay, unless they have been previously summoned by the justices; because, a summons must precede a warrant of distress, which is in the nature of an execution. (4)

Neither will justices be enforced to make an order of maintenance on a particular parish (5); because magistrates have never been compelled to come to any particular decision. (6)

The writ will not be issued upon a supposed failure of duty in the justices of the peace to remove a man from a parish, after he had offered security to indemnify the parish. (7)

Nor to the justices of sessions to allow an item of charge in the coroner's account. (8)

Where the inhabitants of a town, not within an hundred, had incurred costs in defending actions brought on stat. 57 Geo. 3. c. 19. s. 38. for damages done by riotous assemblies:—It was held, that *mandamus* would not lie to two justices of the town to make and levy a rate for paying the costs. (9)

Justices will not be compelled to rate a parish within their jurisdiction, in aid of another parish, having exclusive jurisdiction, because it would be requiring them to inquire into that, which they have no means of knowing. (10)

A *mandamus* will not lie to make a new election of a county treasurer, on the ground, that one of the justices who had voted at the election had not taken the qualification oath required by stat. 18 Geo. 2. c. 20.; because the construction to be put upon such statute is, "that the magistrate shall be only so far disqualified from acting, that he shall be subject to certain penalties if he does act." (11)

Where magistrates, from a doubt of their jurisdiction, decline giving possession of premises to a landlord pursuant to stat. 11 Geo. 2. c. 19. s. 16., the court will not, unless it be clear, that they have acted incorrectly, compel them to do so. (12)

The court will not grant a rule *nisi* for a *mandamus* to compel justices to issue their warrant to levy expenses for cutting a hedge, pursuant to stat. 5 & 6 Will. 4. c. 50. s. 65., unless it shall appear, that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand. (13)

INFERIOR COURTS.

To issue a warrant to apprehend persons against whom a true bill had been found.

Non payment of poor rates.

Distress for poor rates. Order of maintenance.

Removal of a pauper from the parish.

Coroners' accounts.

To make a rate for costs incurred by a riotous assembly.

Rating one parish in aid of another.

Election of a county treasurer.

Giving possession under stat. 11 Geo. 2. c. 19. s. 16.

To issue warrants to levy expenses under stat. 5 & 6 Will. 4. c. 50. s. 65.

(1) *Regina v. Middlesex Sessions (Chairman of)*, cor. Williams J. MS. H. T. January 24. 1842.

(2) *Anon.* 2 Chitt. 257. 8 D. & R. 220.

(3) *St. Luke's (Parish of) v. Middlesex (Justices of)*, 1 Wils. 133. *Rex v. Middlesex (Justices of)*, 2 Ld. Ken. 163.

(4) *Rex v. Benn*, 6 T. R. 198.

(5) *Rex v. Middlesex (Justices of)*, 4 B. & A. 298. *Rex v. Eye (Corporation of)*, *ibid.* 271. *Rex v. Truro (Mayor of)*, 3 *ibid.* 590.

(6) *Rex v. Cambridgeshire (Justices of)*, 1

D. & R. 325. *Rex v. Norfolk (Justices of)*, 5 B. & A. 484. *Rex v. Monmouthshire (Justices of)*, 4 B. & C. 844.

(7) *Regina v. Cory*, 3 Salk. 230.

(8) *Rex v. Kent (Justices of)*, 11 East, 229.

(9) *Rex v. King's Lynn (Justices of)*, 3 B. & C. 147. 4 D. & R. 778.

(10) *Rex v. Holbeche*, 4 T. R. 778.

(11) *Per Bayley J. in Rex v. Herefordshire (Justices of)*, 1 Chitt. 700.

(12) *Exp. Fulder*, 8 Dowl. P. C. 535.

(13) *Exp. Whitmarsh*, *ibid.* 431.

INFERIOR
COURTS.

COURTS LEET
AND BARON.

Holding of a
court leet.

Restoration of
steward.

Composition of
the homage.

To summon
specific jurors.

To admit a
copyholder.

To admit bur-
gage tenants.

IV. *Courts Leet and Baron.*

A *mandamus* lies to compel the holding of a court leet (1); and to permit a court leet and a court baron being held in the accustomed place, if certain vested rights would otherwise be damaged. (2)

But it will not be granted to the mayor to give the key of the town hall to the lord of the manor to hold his leet there, although the leet had been usually held in that place. (3)

The writ lies to restore a party to the stewardship of a court leet. (4)

But it does not lie to the lord of a manor to hold a court baron, and to certain of the suitors to compose a homage, and present some conveyances of burgage tenures within the manor, although it may be sworn, that several conveyances were duly executed, and that at a general court they had been offered to the homage, who refused to present them; because the intendment of law is, that every man will do his duty, till the contrary appears; and a *mandamus* will not be granted to complete private rights, or to a jury to make certain presentments upon oath. (5)

The writ will not be granted to summon specific jurors upon a court leet; nor to appoint a general deputy under a bye-law, although it requires that the under-steward, as his sufficient deputy, shall be attendant at every court to discharge the duties of his office; nor (6) to restore the "steward" of a court baron, because it is a court of private jurisdiction. (7)

Upon a sufficient *prima facie* title being made out on the part of the person applying, a *mandamus* will lie to the lord of the manor to admit a copyholder. (8)

In *Regina v. Pitt* (9) Mr. Justice Patteson observed, "The remedy by *mandamus* to compel a lord to admit is comparatively modern; and I cannot find that it was ever exercised except in favour of an heir or tenant actually on the roll."

It is unimportant as to the manner in which the party becomes entitled to the franchise, whether by charter, prescription, or tenure; thus, by the custom of the borough of Midhurst, the jury at a court baron "shall present the alienation of every burgage tenement, and upon such presentment the steward shall admit the tenant," who then becomes entitled to the franchises of the borough;—the jury at a court baron in 1749 having refused to present several conveyances of burgage tenements, the court of King's Bench granted a *mandamus* to the lord to hold a baronial court, and to the burgesses to attend at such court, and to present the conveyances. (10) It may

(1) *Rex v. Colebrooke*, 2 Ld. Ken. 163.

(2) *Rex v. Grantham (Corporation of)*, 2 W. Black. 716.

(3) *Rex v. Wigan (Mayor of)*, 1 Wils. 76. *Rex v. Ilchester (Bailiff of)*, 2 D. & R. 324. 724. 2 B. & C. 764.

(4) *Stamp's case*, Sir T. Raym. 12. *Rex v. Kingscleere (Churchwardens of)*, 2 Lev. 18.

(5) *Rex v. Montacute (Lord)*, 1 W. Black. 60.

(6) *Rex v. Gravesend (Mayor of)*, 2 B. & C. 602.

(7) *Leigh's case*, 3 Mod. 334. *Speaker v.*

Styant, Comb. 127. *Anon.* 12 Mod. 666. *Stamp's case*, Sir T. Raym. 12.

(8) *Rex v. Hendon (Lord of the Manor of)*, 2 T. R. 484. *Rex v. Coggan*, 6 East. 431. *Rex v. Rennett*, 2 T. R. 197, *sed vide Rex v. Brewers' Comp.* 3 B. & C. 172. *recog. in Rex v. Wilson*, 10 *ibid.* 87. *Rex v. Bonsall (Lord of the Manor of)*, 3 *ibid.* 173.

(9) 10 A. & E. 279.

(10) *Rex v. Midhurst (Borough of)*, 1 Wils. 283. *Rex v. Montacute (Lord)*, 1 W. Black. 60. S. C. *nom. Rex v. Montacute (Lord)*, Bull. N. P. 200.

INFERIOR
COURTS.

be observed, that although one *mandamus* will not, in general, lie to restore several persons, yet the court held in the foregoing case it would lie to the jury to do an act to perfect the rights of several.

Where by the custom the court leet was to present to the steward the person whom the commonalty of the borough had chosen to be mayor, the court granted a *mandamus* (1) to the steward to hold a court leet, and to the in-burgesses to attend at such court, and to present J. D., who had been chosen by the commonalty.

To elect a corporate officer.

Under stat. 11. Geo. 4. c. 60. s. 8. the court of Chancery upon the master's report made an order, declaring that the heir of W., legal tenant in fee of copyhold premises, could not be found; that W. held as trustee; and that B. was entitled to the equitable fee; and appointing G. trustee to convey or surrender the legal estate. But the court of Queen's Bench refused to compel the lord, by *mandamus*, to accept G's surrender, on the ground that (assuming the statute to apply to copyholds) the court of Chancery could compel the performance of whatever was requisite, and was better able than the court of Queen's Bench to regulate the rights of the parties; especially as it appeared that B's right was disputed, and that the lord had seized *quousque*, and assigned for a valuable consideration. (2)

Under stat. 11 Geo. 4. c. 60. s. 8. court will not interfere when a court of equity has power to enforce its own decrees.

Where K., copyholder in fee, devised to R. for life, who was admitted, and paid, in respect to her admittance to hold for life, as large a fine as if she had been admitted tenant in fee. During R's life, K's heir at law surrendered to such uses as L. should appoint; and, in default, &c. to the use of L. in fee. K. had not been admitted, or paid any fine:—It was held, that the lord could not be compelled on the application of the heir, nor, *a fortiori*, on that of L., to receive and enrol the surrender, without payment of the fine for the descent of the reversion to the heir. (3)

When lord will not be compelled to enrol a surrender without a fine.

A *mandamus* will not be issued to compel the lord of a manor to grant a license to a copyholder to demise his copyhold land on an alleged custom, that the tenant may demise for three years without license; and that, for license to demise during a longer term, the lord shall have a sum certain for every year of such term. (4)

Demise of copyhold on an alleged custom.

The writ has never been granted to compel the lord to license, because the granting or refusing a license is wholly in the lord's discretion. "It is said to have been decided, that he may be compelled to do so in equity; but the authority cited (5) is by no means clear and satisfactory." (6)

To compel the lord to license.

V. *Public Commissioners.*PUBLIC COM-
MISSIONERS.
Bankrupts.

The court has granted a *mandamus* conditionally to commissioners of bankrupts, to issue their warrant for a further examination of the bankrupt (7); but refused to grant one to certify a bankrupt's conformity to the lord chancellor. (8)

(1) *Christchurch (Borough of)*, 12 Geo. 2. Bull. N. P. 200. S. C. cit. 1 W. Black. 62.

(2) *Regina v. Pitt*, 10 A. & E. 272.

(3) *Regina v. Dullingham (Lady of)*, 8 ibid. 859.

(4) *Regina v. Hale*, 9 ibid. 339.

(5) *Ballard v. Agard*, 6 Vin. Abr. Copyhold, 240. [Y. e.].

(6) *Per Lord Denman in Regina v. Hale*, 9 A. & E. 342.

(7) *In re Bromley*, 3 D. & C. 310.

(8) *Exp. King*, 7 East, 92.

INFERIOR
COURTS.

Taxes.

Excise.

Sewers.

Land tax.

A *mandamus* lies to the commissioners of taxes to re-assess the inhabitants upon default made by the collector, it being the duty of the officer and the inhabitants to take care that the money paid for taxes finds its way into the treasury (1); to commissioners of excise if a proper case be laid before the court for its interference (2); or to commissioners of sewers (3)

And a *mandamus* may be had by a candidate for the office of clerk to the commissioners of the land tax. (4)

AFFIDAVIT AND
RULE NISI.

Application for the writ should be made within a reasonable time.

Election upon judgment of ouster.
When moved for.

Form of affidavit.

Intituling of affidavits.

Substance of affidavit.

4. AFFIDAVIT AND RULE NISI.

An application for the writ should be made within a reasonable time after the grievance has been committed: thus, a *mandamus* for a rate to reimburse those who have been compelled to pay a fine under an indictment against the inhabitants for not repairing a road, must be applied for within a reasonable time after payment (5); and the same rule applies to compel a canal company to assess the value and amount of compensation due for land, when taken for the purposes of the canal. (6)

Motion for a *mandamus* to examine witnesses on an information for offences in India, must be made within the first four full days after plea pleaded.

Mandamus to proceed to an election upon judgment of ouster, cannot be moved for till judgment be actually signed. (7)

The writ can be moved for by counsel any day during term.

Where an act is required by statute to be done so many days at least before a given event, the time must be reckoned, excluding both the day of the act and that of the event. (8)

There is no particular form for an affidavit, to obtain a rule nisi for a *mandamus*.

Affidavits for a *mandamus* sworn in court, or before a judge of Queen's Bench, need not be entitled in the Queen's Bench (9); if made in the country, they must be described as having been sworn before a commissioner of the court of Queen's Bench; and, likewise, entitled in that court. (10)

The affidavit should contain a precise substance of facts; and it will be insufficient, if the allegations be not so positive, that an indictment for perjury could be maintained upon them if false. (11)

The affidavits should shew, that a default has been committed (12), and that the applicant had applied to the defendants to do that, which he requires the court to command the performance of, and their refusal or neglect (13):

(1) *In re Wootton*, 6 Price, 103.

(2) *Rex v. Excise (Commissioners of)*, 2 T. R. 381.

(3) *Rex v. Sewers (Commissioners of)*, 1 B. & C. 477.

(4) *Rex v. St. Martin (Commissioners of the Land Tax for)*, 1 T. R. 146.

(5) *Rex v. Lancashire (Justices of)*, 12 East, 366.

(6) *Rex v. Stainforth Canal Comp.* 1 M. & S. 32., vide etiam *Regina v. Leeds to Liverpool Navigation Canal Comp.* 11 A. & E. 316., ante, 2303.

(7) *Rex v. West Looe (Corporation of)*, 3 Burr. 1386.

(8) *Regina v. Shropshire (Justices of)*, 8 A. & E. 173.

(9) *Rex v. Hare*, 13 East, 189.

(10) *Ibid. Rex v. Jones*, Str. 704.

(11) *Rex v. Sargent*, 5 T. R. 466.

(12) Bull. N. P. 199. (a.)

(13) *Amherst's case*, Sir T. Raym. 214.

Rex v. Chester (Bishop of), 1 T. R. 403.

Rex v. Ely (Bishop of), 2 *ibid.* 334. *Rex*

v. Jotham, 3 *ibid.* 577. Bull. N. P. 199.

(a.)

it must also appear, that the applicant is entitled to the relief he prays (1); and that he has complied with all the forms necessary to constitute his right. (2)

If, however, the affidavits of the applicant omit to state a material fact, the applicant may resort to the affidavits of the defendant, if he can thereby supply the deficiency. (3)

If the application be for a writ to admit, or to be sworn into office, the fact of election should be positively stated. (4)

In a rule for a *mandamus* to elect a mayor, the mayor *de facto* should always be a party. (5)

On application for a *mandamus* to admit a person to a fellowship in right of his relationship to the founder, the statutes, or sworn copies of them, must be produced. (6)

The *mandamus* to replace a name on the burgess list, grantable under stat. 7 Will. 4. & 1 Vict. c. 78. s. 24., is not peremptory in the first instance. (7)

On a motion for a *mandamus* to restore one to an office, an affidavit that he once enjoyed it is unnecessary, as that fact may be stated in the return. (8)

Previously to making an application for a rule *nisi*, it is not requisite to give notice to the opposite party. (9)

The affidavits used in shewing cause against the rule must be delivered to the officer of the court, in order to be filed at the crown office. (10)

When the rule *nisi* is granted, it is drawn by the clerk of the rules on the crown side, and a copy served on the defendant; but personal service is not necessary. (11)

If an officer *de facto* or other parties be omitted, whose rights will be directly called in question, the rule *nisi* can be amended by the insertion of their names, and the rule will be good on a new service. (12)

But after the determination of the court upon a rule *nisi*, the question so decided cannot be again discussed as a special case, until a return has been made to the writ. (13)

It is not regular to grant a single rule *nisi* for the issuing of several writs of *mandamus*.

Proceeding to a new election, after the receipt of a *mandamus nisi* to admit a person who was a candidate at a former election, was held not to be a contempt of court in the returning officer, where he acted in pursuance of the opinion of counsel. (14)

If the facts, upon which a rule *nisi* has been granted, be expressly denied, the rule will be discharged. (15)

AFFIDAVIT AND
RULE *NISI*.

Defective affidavits.

Parties.

Production of records.

Replacing a name on the burgess list.

Unnecessary to state on a motion to restore, that the applicant once enjoyed the office.

Service.

Amendment.

Irregular to grant a single rule for several writs of *mandamus*.

Proceeding to an election after a rule *nisi* to admit, not a contempt. Facts expressly denied.

(1) *Rex v. Oxford (Bishop of)*, 7 East, 345.

(2) Bull. N. P. 201.

(3) *Rex v. Mein*, 3 T. R. 596.

(4) Bull. N. P. 200.

(5) *Rex v. Bankes*, 3 Burr. 1452. 1 W. Black. 445.

(6) *Rex v. Canterbury (Archbishop of)*, 7 Mod. 220.

(7) *Regina v. Eye (Mayor of)*, 9 A. & E. 670.

(8) *Rex v. Cutlers' Comp.* C. T. H. 129.

(9) *Rex v. Jones*, Str. 704.

(10) *Rex v. Middlesex*, 1 Chitt. 368.

(11) 1 Stephens's Corporation Acts, 463. 2d ed.

(12) *Rex v. Bankes*, 3 Burr. 1452. 1 W. Black. 455. Bull. N. P. 200.

(13) *Rex v. Leicester (Justices of)*, 7 D. & R. 706.

(14) *Regina v. Hoyte*, 1 Jebb & Symes (Irish), 636.

(15) *Rex v. Harrison, Sayer*, 110.

RULE ABSOLUTE.

Affidavits improperly sworn.

If the affidavits in answer to the rule be not sworn before a commissioner of the court of Queen's Bench, and do not contain the name of the place where sworn, they cannot be read. (1)

When the rule *nisi* has been served, an affidavit is made, upon reading which, or hearing counsel against the rule, the court will make it absolute, although the right of the party applying does not appear clear, but only doubtful, in order that the right may be tried. (2)

New trial.

Bill of exceptions.

Matters of form must be discussed before the merits.

Stats. 1 Will. 4. c. 21. and 1 & 2 Will. 4. c. 58.

A motion for a new trial, until disposed of (3), will prevent a rule absolute being granted; but a bill of exceptions will not prevent the issuing of a peremptory *mandamus*. (4)

If cause be shewn against a rule for a *mandamus*, the objection, that no sufficient demand and refusal appears, must be taken before the merits are discussed. (5)

Stats. 1 Will. 4. c. 21. and 1 & 2 Will. 4. c. 58. have given additional powers for the protection of officers executing writs of *mandamus*; and also authority to the court in making rules in cases of *mandamus*. (6)

The rule is absolute in the first instance for an inspection of the books of

(1) *Rex v. Yorkshire, West Riding (Justices of)*, 3 M. & S. 493.

(2) *Vide ante*, 2293.

(3) *Wright v. Sharpe*, 11 Mod. 175.

(4) *Ibid.*

(5) *Regina v. Eastern Counties Railway Comp.* 10 A. & E. 531.

(6) The rule in Ireland as to crown motions not being made on the four last days of term, extends to the case of shewing cause against a rule *nisi*. *Regina v. Limerick Bridge (Commissioners of)*, 2 Jebb & Symes (Irish), 465.

By stat. 1 Will. 4. c. 21. s. 4., "it shall be lawful for the court to which application may be made for any writ of *mandamus* (other than such as relate to the said offices and franchises, mentioned in or provided for by stat. 9 Anne, c. 20.), if such court shall see fit so to do, to make rules and orders, calling, not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ, and payment of costs of the application; and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given or mentioned by or in any act passed or to be passed during this present session of parliament, for giving relief against adverse claims made upon persons having no interest in the subject of such claims: provided always, that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any de-

murrer, shall be made and joined by and in the name of the person to whom such writ shall be directed; but nevertheless the same shall and may, if the court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment, as the person to whom the writ shall have been directed might and would otherwise have had."

By stat. 1 & 2 Will. 4. c. 58. s. 8., upon any application under stat. 1 Will. 4. c. 21. and stat. 1 & 2 Will. 4. c. 58., the court can exercise such powers and make such rules as are given by the last mentioned statute.

By stat. 1 Will. 4. c. 21. s. 5., "in case the return to any such writ shall, in pursuance of the authority given by this act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of, or removal from office of, the person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory writ shall be awarded, the same shall and may be directed to any successor in office or right to such person."

a corporation where a *quo warranto* is depending (1); or when a corporate officer holds over; or when an actual vacancy has occurred from death (2); to admit or swear a person into an office, if the right be not disputed. (3)

RULE ABSOLUTE.

Although it is the practice to have only a rule *nisi* in the first instance in cases of election, yet there are cases in which a peremptory *mandamus* will be awarded, in the first instance, for electing an officer. (4)

Elections.

Where it appears there has been improper delay in proceeding on the first *mandamus*, a second will be awarded. (5)

Improper delay.

A rule absolute will not be granted in the first instance, where a long continued exercise of a right is sought to be disputed. (6)

Second *mandamus*.

A peremptory *mandamus* will not be awarded until the proceedings on the first *mandamus* are complete; and therefore, where a *mandamus* had been issued, requiring payment of two distinct sums, and the prosecutor traversed the return, and the issues were found for him as to one sum, and substantially in his favour as to the other, but a rule *nisi* had been obtained to enter a verdict for the defendant as to this, the court would not award a peremptory *mandamus* to enforce payment of the first sum, pending the rule as to the second. (7)

The rule absolute must be taken to the applicant's clerk in court, who upon production of it, will make out the writ. It is then served upon the party to whom it is directed, who must indorse or annex the return thereto, and send it to the crown office by the return thereof.

Practical directions.

6. SUBSTANCE, FORM, DIRECTION, AND DELIVERY OF THE WRIT.

A *mandamus* is either to admit persons into their offices if refused, or to restore them when turned out; and the writ will not be granted to the returning officer to make a return. (8) But it must state all facts necessary to shew, that the prosecutor is entitled to the relief prayed for; but if there be a defect in setting out the title, it will be cured by a return admitting it, and relying upon some other objection. (9)

SUBSTANCE, FORM, DIRECTION, AND DELIVERY OF THE WRIT.

SUBSTANCE AND FORM.

"No precise form is necessary in a *mandamus*." (10)

The writ however should be sufficiently certain in setting forth the duty to be performed; but it need not be particularly stated by what authority this duty exists. (11)

Where one act is dependent on another, the writ can command both to

(1) *Rex v. Trevannion*, 2 Chitt. 366.

(2) *Rex v. Truro (Mayor of)*, *ibid.* 257.

(3) *Anon. ibid.* 254. Bull. N. P. 199. (b.) *Rex v. Litchfield (Archdeacon of)*, 5 N. & M. 42. 1 H. & W. 463. Exp. *Penraddock*, 1 H. & W. 347., *sed vide Neale v. Bowles*, *ibid.* 584.

(4) *Rex v. Heydon (Borough of)*, Sayer, 208.

(5) *Rex v. Haslemere (Corporation of)*, *ibid.* 106. *Rex v. Scarborough (Corporation of)*, *ibid.* 105.

(6) *Rex v. Chester (Citizens of)*, 1 M. & S. 102.

(7) *Regina v. Baldwin*, 8 A. & E. 947.

(8) *Regina v. Heathcote (Sir Gilbert)*, 10 Mod. 48.

(9) Willcock on Corporations, 392. 1 Stephens's Corporation Acts, 2d ed. 466. *Rex v. Yorkshire (Justices of)*, 7 T. R. 72. 467. *Rex v. Denbighshire (Justices of)*, 14 East, 285. *Rex v. Coopers' Comp.* 7 T. R. 543.

(10) *Per Lee C. J. in Rex v. Nottingham (Mayor of)*, Sayer, 37.

(11) *Rex v. Ward*, Str. 897. *Rex v. Bettsworth*, *ibid.* 857. *Rex v. Nottingham*, Sayer, 36. *Peat's case*, 6 Mod. 310. *Rex v. Whiskin*, Andr. 1. *Anon.* 2 Mod. 316. Bull. N. P. 204. (a.) *Rex v. Margate Pier Comp.* 3 B. & A. 220. 2 Chitt. 256.

SUBSTANCE,
FORM, DIREC-
TION, AND DE-
LIVERY OF THE
WRIT.

Admission to
office.

be done. Thus, a *mandamus* to elect, and afterwards to swear the elected into office, may be included in one writ. (1)

A *mandamus* to choose and swear a mayor is taken *reddendo singula singulis*. (2)

In cases of admission, the title of the person claiming to be admitted should be suggested in the writ (3), and the nature of the office. (4) To admit a freeman, the writ should be *ad privilegium*, not *ad locum et officium*. (5)

But it is not requisite to aver, that it is the person's duty to whom the writ is directed to admit or swear the applicant into office. (6)

In commanding a person to undertake an office, it is sufficient to shew the general liability of the defendant to serve, and to allege that he was elected, and without reasonable cause refused to undertake it; but it is unnecessary to aver, that he was able and fit to serve. (7)

Production of
records.

If the production of records be the object of the writ, they need not be specifically described; a general description is sufficient. In the *Nottingham case* (8) the writ was to deliver "*evidentias*" ("*et autem choses queux fueront express per general parolls*").

DIRECTION OF
WRIT.

The writ should be directed to those who are to execute the writ, or to do the thing required (9); and this duty is exclusively and absolutely imposed on the person who applies for the writ; for otherwise, it would be prejudging the right, upon which may depend the very question to be tried. (10)

But if the court be directed by statute to send the writ to a particular officer, it will of course select the person to whom the writ shall be sent. Thus, a householder is entitled to be on the burgess-list of a borough under stat. 5 & 6 Will. 4. c. 76. s. 9. as an occupier, if he reside in his house, but has let a room in the house to a tenant who does not sleep there, and can be put out upon a week's warning: — and, where the mayor and assessors had expunged the name of such a party from the burgess-roll, and the party in the term next following obtained a rule for a *mandamus* to the mayor to insert his name, the court made the rule absolute, directing the *mandamus* to the mayor generally, notwithstanding that the mayor who expunged the name had ceased to be mayor before the rule *nisi* was obtained, that no application had been made to the present mayor, and that the year to which the list belonged had expired before making the rule absolute. (11)

It may be directed to members of corporations by their names of office (12); and a direction to a corporation by its corporate name is good, notwithstanding the vacancy of the mayoralty. (13)

(1) *Rex v. Abingdon (Mayor of)*, 1 Ld. Raym. 559.

(2) *Rex v. Tregony (Mayor of)*, 8 Mod. 111.

(3) *Peat's case*, 6 Mod. 310.

(4) *Rex v. Ward*, Str. 895.

(5) *Rex v. Morris*, 1 Ld. Raym. 338.

(6) *Rex v. Ward*, Str. 895.

(7) *Rex v. Merchant Taylors' Comp.* 2 Lev. 200. Willcock on Corporations, 394. 1

Stephens's Corporation Acts, 2d ed. 467.

(8) *Rex v. Nottingham*, 1 Sid. 31.

(9) *Rex v. Hereford (Mayor of)*, 2 Salk. 701. *Rex v. Derby (Mayor of)*, *ibid.* 436.

Pees v. Leeds (Mayor of), Str. 640.

(10) *Rex v. Rippon (Mayor of)*, 2 Salk. 433.

(11) *Regina v. Eye (Mayor of)*, 9 A. & E. 676.

(12) *Rex v. Abingdon (Mayor of)*, 1 Ld. Raym. 560.

(13) *Rex v. Smith*, 2 M. & S. 583. *Rex v. Taylor*, 3 Salk. 230.

The direction of a writ to the members of a "town council" should be by their corporate name, for that is their legal description, as long as they continue to have a corporate existence. (1)

SUBSTANCE,
FORM, DIREC-
TION, AND DE-
LIVERY OF THE
WRIT.

If a writ be directed to several acting in different capacities, it should be taken distributively, and each are bound to obey the writ according to their several functions. (2)

Where an act is to be performed by some of the members of a "town council," the writ may be directed to them by their corporate name; because their act, in such capacity, is the act of the corporation: or the writ may be directed to those specific councillors by whom the act ought to be performed (3); but if it be extended beyond the persons who are required by the Municipal Corporation Act to concur in the particular thing commanded by the *mandamus*, such extension would render the direction bad. (4)

Where an act is to be performed by part of the council.

If the writ be directed to several, when it is the sole duty of one officer to do the act—as in adjudicating upon the claims of freemen by the mayor, or the enrolment of freemen by the town clerk under the 2d, 4th, and 5th sections of the Municipal Corporation Act—the writ would be quashed, as the direction would be considered insignificant or immaterial (5); but a writ directed to both those officers to perform their respective duties would be good, *reddendo singula singulis*, but bad if directed to the "town council." (6)

Writ directed to several, to do an act which is the duty of one.

If several persons have been removed, there must be a distinct writ for each person, for they cannot join (7); but churchwardens may join. (8)

When several persons have been removed, there must be a distinct writ for each person.

If one parish officer apply for a *mandamus* against another to concur in a rate, the writ must be against the applicant as well as the other. (9)

If the writ be directed wrongfully, such misdirection may be specially returned; but if the exigency of the writ be answered, it will operate as a waiver of the misnomer. (10)

The writ improperly directed.

If the writ be improperly directed, the court will grant a *supersedeas*, *quia improvide emanavit*. (11)

One writ of *mandamus* cannot issue at the instance of two persons for the enforcement of separate claims, although they have been successors in the same office, in respect of which, the claims arise. (12)

One writ cannot issue at the instance of two persons, for the enforcement of separate claims.

The writ will likewise be superseded if directed to those "who have" and those "who have no right." Thus, where a *mandamus* was directed to the mayor, aldermen, and common council to go to the election of town clerk, upon an affidavit that the writ was misdirected, for it was neither to

The writ will be superseded if directed to those who have no right.

(1) *Rex v. Smith*, 2 M. & S. 598.

(2) *Rex v. Tregony (Mayor of)*, 8 Mod. 111. 1 *Stephens's Corporation Acts*, 2d ed. 469.

(3) *Rex v. Abingdon (Mayor of)*, 1 Ld. Raym. 559. *Rex v. Hereford (Mayor of)*, 2 Salk. 701. Bull. N. P. 204. (a.) *Regina v. Gloucester (Mayor of)*, Holt, 451. *Pees v. Leeds (Mayor of)*, Str. 640.

(4) *Rex v. Smith*, 2 M. & S. 598.

(5) *Regina v. Hereford (Mayor of)*, 2 Salk. 701. *Rex v. Abingdon (Mayor of)*, 1 Ld. Raym. 560. *Rex v. Norwich (Mayor of)*, Str. 55.

(6) *Rex v. Tregony (Mayor of)*, 8 Mod. 112. 128.

(7) *Rex v. Kingston-upon-Hull (Mayor of)*, 8 Mod. 209. Str. 578. *Rex v. Chester (City of)*, 5 Mod. 11. 3 Salk. 230. Holt, 438. *Rex v. Andover (Town of)*, 12 Mod. 332. *Rex v. Chester (Mayor of)*, Comb. 307, 308.

(8) *Regina v. Twitty*, Holt, 424.

(9) *Anon.* 2 Chitt. 254.

(10) *Regina v. Ipswich (Baillifs of)*, 2 Salk. 434.

(11) *Rex v. Wigan (Corporation of)*, 2 Burr. 782.

(12) *Exp. Scott and Morgan*, 8 Dowl. P. C. 328.

SUBSTANCE,
FORM, DIREC-
TION, AND DE-
LIVERY OF THE
WRIT.

DELIVERY OF
THE WRIT.

the corporation by the corporate name, nor to the mayor and aldermen only, in whom the right of election was — the court said, “as this writ was directed to the common council who had no right, they would grant a *supersedeas*.” (1)

The writ should be delivered to the officer who is to make the return. Thus, on a *mandamus* to elect a town clerk, it was held, that notwithstanding the election was in the common council, still the writ was to be delivered to the mayor as the most visible part of the corporation. (2)

In *Regina v. Manor of Richmond (Steward of)*, the objection taken was, that the lord of the manor had not been served with the rule as he ought to have been, the general rule being, that the writ must be served upon the lord of the manor, as well as upon the steward: but it was held, that, with respect to a crown manor, there might be a difference, because the steward of Richmond is a statutable officer. (3)

7. EXCEPTIONS TO, AND AMENDMENT, TESTE, AND TIME OF THE RETURN OF THE WRIT.

EXCEPTIONS TO,
AND AMEND-
MENT, TESTE,
AND TIME OF
THE RETURN OF
THE WRIT.

An exception may be taken to the writ after the return, or at any time before the issuing of a peremptory *mandamus*: thus, where the writ was directed to a corporation, commanding them to pay a poors' rate, but omitted to state, that the defendants had no effects upon which a distress could be levied: — It was held to be a fatal omission. (4)

So, likewise, where it was suggested on the face of the writ, directed to an inferior officer of a college, that such college was subject to the power of a “visitor,” the writ will be quashed, it being bad on its face, because such a jurisdiction is but a *forum domesticum*, and not taken notice of by the common law, and is a jurisdiction which purely belongs to the visitor. (5)

Return may
be quashed,
but notice
must be given.

The return to a *mandamus* may be quashed as to part, and allowed as to the residue, provided the two are independent from, and not inconsistent with, each other.

To supersede or quash the writ, a notice of motion must always be given. (6)

Taking out the
writ on other
terms than are
warranted by
the rule.

The court will not permit parties to engraft upon a rule terms which were not granted; and when a rule has been obtained for a *mandamus* to issue, and the *mandamus* is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a *mandamus*, but materially enlarging the terms, the court will quash the writ. (7)

(1) *Rex v. Norwich (Mayor of)*, Str. 55.
Rex v. Wildman, ibid. 879. But the writ will not be superseded, merely on affidavits without a return. *Rex v. Whaley*, ibid. 1139; nor will it be superseded to compel probate, if it appear that the litigation of the will was subsequent to the time at which the *mandamus* issued. *Rex v. Bettesworth*, 7 Mod. 219. Str. 847.

(2) *Regina v. Chapman*, 6 ibid. 152.

(3) MS. Nov. 4. 1839.

(4) *Rex v. Margate Pier Comp.* 3 B. & A. 220. *Taverner's case*, Sir T. Raym. 446. *Townsend's case*, ibid. 69. 1 Lev. 91.

(5) *Dr. Walker's case*, C. T. H. 312. *Rex v. Whaley*, 7 Mod. 308, 309.

(6) *Anon.* 1 Wils. 30.

(7) *Rex v. Water Eaton*, 2 Smith, 54., et vide *Rex v. Tucker*, 3 B. & C. 545.

The writ may be amended at any time before the return. (1) But after the return has been made and traversed, the court will not permit an amendment. (2)

The writ should bear teste in term time, and at the time granted by the court.

A *mandamus*, dated June 13., commanding justices to appoint overseers, is good, although by stat. 43 Eliz. c. 2. they are to be appointed within a month after Easter, and Easter-day in that year was on the 22d of April. (3)

By stat. 9 Anne, c. 20. s. 1., when any writ of *mandamus* shall issue to admit or restore any burgesses or officers of corporations, such persons who are required to make return, shall make their return to the first writ of *mandamus*. And the persons to whom the *mandamus* is directed under stats. 11 Geo. 1. c. 4., 5 & 6 Will. 4. c. 76., and 7 Will. 4. & 1 Vict. c. 78. s. 26., must make their return to the first writ.

There must be fourteen days between the teste and return if above forty miles from London, and eight days if under that distance. (4)

Where the party lives forty miles from London, there must be fourteen, otherwise only eight days, and one of such days is to be taken inclusive and the other exclusive, so that a writ dated the 14th may be returnable the 28th. (5)

It should appear from the affidavit of service, that the writ was delivered to him who had to make the return. (6)

Under stat. 9 Anne, c. 20. s. 6., the court has a discretionary power to extend the time for making the return; a discretion which is always exercised upon a reasonable suggestion of difficulty (7) — although public inconvenience will result from the delay. (8)

By stat. 1 Will. 4. c. 21. s. 3. "the several enactments contained in stat. 9 Anne, c. 20. relating to the return to writs of *mandamus*, and the proceedings on such returns, and to the recovery of damages and costs, shall be and the same are hereby extended and made applicable to all other writs of *mandamus*, and the proceedings thereon, except so far only as the same may be varied or altered by this act."

It is doubtful whether the court, on a proper case being shewn, will direct the return to be made in a shorter time. But if, without special direction of the court, the *mandamus* be drawn so as to allow less time between the teste and the return, the court will supersede the *mandamus* for irregularity, and award an *alias* writ; notwithstanding the case be one in which the court granted the rule for the *mandamus* absolute in the first instance, on the ground of urgency — it being to compel the payment of money for the support of paupers. (9)

EXCEPTIONS TO,
AND AMEND-
MENT, TESTE,
AND TIME OF
THE RETURN OF
THE WRIT.

AMENDMENT
OF THE WRIT.

TESTE AND
TIME WHEN
THE WRIT IS
RETURNABLE.

Stat. 9 Anne,
c. 20. s. 1.

Return must
be made to the
first writ of
mandamus.

Stats. 11 Geo. 1.
c. 4., 5 & 6
Will. 4. c. 76.,
and 7 Will. 4.
& 1 Vict. c. 78.
s. 26.

Delivery of the
writ.

Stat. 1 Will. 4.
c. 21. s. 3.

Provisions of
9 Anne, c. 20.
respecting re-
turns to writs
of *mandamus*
therein men-
tioned, and the
proceedings
thereon, ex-
tended to all
other writs of
mandamus.

(1) *Regina v. Clitheroe*, 6 Mod. 133. *Rez v. Lyme Regis*, Doug. 135.

(2) *Rez v. Stafford (Mayor of)*, 4 T. R. 690.

(3) *Rez v. Sparrow*, 7 ibid. 393.

(4) *Anon.* 2 Salk. 434.

(5) *Rez v. Dover (Mayor of)*, Str. 407.

(6) *Rez v. Exeter (Mayor of)*, 12 Mod. 251.

(7) 1 Stephens's Corporation Acts, 2d ed. 470. The manner of compelling a return,

is by obtaining from the clerk of the rules, a side bar rule to return it within six days after notice of the rule. A copy of the rule must be personally served on the defendant, shewing the original at the same time: if it is not returned within that time, the court will, upon affidavit, grant an attachment. Ibid.

(8) *In re Walsall*, 1 H. & W. 370.

(9) *Rez v. St. Andrew's, Holborn*, 7 A. & E. 281.

EXCEPTIONS TO,
AND AMEND-
MENT, TESTE,
AND TIME OF
THE RETURN OF
THE WRIT.

If the first writ when fully executed does not effectuate the purposes for which it was granted, the court, to administer ample justice, will award a second writ to complete the act begun. (1)

Auxiliary writ.
THE RETURN.

BY WHOM THE
RETURN MUST
BE MADE.

Mayor alone
can make the
return.

The return must in all cases be made by the person to whom it is directed.

Where a *mandamus* is directed to the "mayor, &c.," the mayor alone can make the return, and the other component parts of the corporation cannot disavow it; because the court cannot refuse the mayor's return, he being the principal officer to whom the writ is directed, and to whom it is actually delivered; and all the court can do, is to compel a return to be made to the writ; and if the mayor make a return contrary to the votes of the majority concerned, it is at his peril, and the way to punish him is by information in the Queen's Bench. (2)

Ex-corporate
officers cannot
make the re-
turn.

An ex-corporate officer cannot make the return, unless the election of his successor be void, because, when corporate officers have sworn in successors who have not been legally chosen, they notwithstanding continue corporate officers, and therefore ought as such to make a return to the writ. (3)

Return is
good, though
there be nei-
ther the hand
of the mayor,
or seal of the
corporation to
it.

A return is good, though there be neither the hand of the mayor or seal of the corporation to it, because, before the Statute of York, the sheriff need not have set his hand to any return; and if the return be false, an action can be brought against the whole body politic for making a false return, and against a particular person for procuring a false return. (4)

VALID RETURN.

Must be cer-
tain.

The rule is not to presume every thing against the return, but not to presume any thing either one way or the other. (5)

The same certainty is required in a return to a *mandamus* as in an indictment or return to writs of *habeas corpus*. (6)

If the return to a *mandamus* be certain on its face, that is sufficient, and the court will not intend inconsistent facts for the purpose of making it bad. (7)

Nothing will
be intended.

Nothing will be intended in a return to a *mandamus* (8); and if every part of a return be not good, yet, if it state a sufficient reason to justify the party making it, that will be an answer. (9)

If a return be certain to a certain intent in general, it will be sufficient, and it is not requisite to negative the right claimed in the writ, if it be admitted subject to a qualification. (10)

If the supposal of the writ be false in not truly stating the constitution

(1) *Rex v. Water Eaton*, 2 Smith, 55. Willcock on Corporations, 383.

(2) *Rex v. Abingdon (Mayor of)*, 2 Salk. 431. Ibid. 699.

(3) *Regina v. Clitheroe (Town of)*, 6 Mod. 193.

(4) *Lydston v. Exeter (Mayor of)*, 12 ibid. 126. *Rex v. St. John's College*, Skin. 368.

(5) *Rex v. Lyme Regis (Mayor of)*, Doug. 157.

(6) Ibid. 158.

(7) Ibid. 159. *Manaton's case*, Sir T. Raym. 365. *Rex v. Doncaster (Mayor of)*,

Sayer, 39. *Glide's case*, 4 Mod. 35. *Rex v. Abingdon (Mayor of)*, 2 Salk. 431. Holt. 436—441.

(8) *Rex v. Evans*, 1 Show. 382. *Regina v. Durham (Corporation of)*, 10 Mod. 146. *Rex v. Malden (Corporation of)*, 1 Ld. Raym. 481. 2 Salk. 431. *Regina v. Lane*, 11 Mod. 270. 2 Ld. Raym. 1304. *Rex v. March (President of)*, 1 Lev. 306. *Anon.* Sir T. Raym. 153.

(9) *Rex v. York (Archbishop of)*, 6 T. R. 490.

(10) *Rex v. Dublin (Corporation of)*, Batty (Irish), 628.

of the corporation, the return ought to deny the constitution as being that, THE RETURN.
which is mentioned in the writ. (1)

A return is good, if it pursue the suggestion of the writ (2); and several matters, if consistent with each other, may be returned in the same writ (3); and if some be bad, the court may admit those that are valid, and reject the invalid. (4) But the return must not be argumentative. (5)

Return must not be argumentative.

To hear and determine.

Election.

A return to a *mandamus* to justices to hear and determine a complaint before them, "that it was determined," has been held valid. (6)

In answer to a *mandamus* to elect, it is a good return, that a person has been "duly elected and sworn into office," it being sufficiently positive as to the principal fact. (7) A return that a party was not duly elected sexton according to ancient custom, "and there is a custom for the inhabitants, &c. to remove at their will and pleasure, and that the party was removed pursuant to such custom," is good. (8)

Where the writ is to restore a person who has been removed from an office, the power of the corporation to remove should be correctly stated. Restoration.

In setting out a corporate custom to hold courts for the admission of freemen, it is not requisite to state the place or time where and when such courts have been holden, if it be averred, that they have been held within the city. (9) Admission of freemen.

To a *mandamus* calling on the justices and clerk of the peace of a county to allow rate-payers an inspection of certain orders of sessions concerning the expenditure of the county rate, and all accounts, &c. relating to such orders, it was returned, that inspection of the orders had been given, but that the accounts were those of the treasurer and high constable, which had been passed at the sessions and deposited with the clerk of the peace according to stat. 12 Geo. 2. c. 29. s. 8., and that an abstract thereof had been published according to stat. 55 Geo. 3. c. 51. s. 18., wherefore the inspection of such accounts had been refused: — which was held a good return, because parties claiming merely as rate-payers have no right by the above statute to inspect such accounts when passed and deposited; and that, supposing the accounts, when so passed and deposited, to be public documents, the rate-payers had not such an interest in the contents as entitled them, independently of the statutes, to demand an inspection. (10) Inspection of orders of sessions.

To a *mandamus* requiring A. to deliver to the churchwardens certain books, &c. in his custody, it is a good return to say, that on and since the teste of the writ, A. had not nor has had the books, &c., or any of them, in his custody, power, or possession. (11)

A *mandamus* to the lord and steward of the manor of O. recited that, at a manor court holden before the steward in May, a plaint, in the nature of writ of right, according to the custom, &c., was presented to the steward, received by him, and enrolled in the court rolls; that, at a court holden in August, the demandant and tenant appeared, but that the steward refused to Delivery of parochial records.

(1) *Rex v. Malden* (*Bailiffs of*), 2 Salk. 431.

(2) *Rex v. Penrice* (*Sir H.*), Str. 1235.

(3) *Regina v. Norwich* (*Mayor of*), 2 Salk. 436. *Rex v. Cambridge* (*Mayor of*), 2 T. R. 456. *Rex v. York* (*Mayor of*), 5 ibid. 66. *Wright v. Fawcett*, 4 Burr. 2041.

(4) *Wright v. Fawcett*, 4 Burr. 2041.

(5) *Rex v. Lyme Regis*, Doug. 158. *Manaton's case*, Sir T. Raym. 365. *Regina v. Hereford* (*Mayor of*), 6 Mod. 309.

(6) *Rex v. Richardson*, 1 Wils. 21.

(7) *Rex v. Williams*, Sayer, 140.

(8) *Rex v. Taunton* (*Churchwardens of*), Cowp. 413.

(9) *Rex v. Bosworth*, Str. 1112.

(10) *Rex v. Staffordshire* (*Justices of*), 6 A. & E. 84.

(11) *Rex v. Round*, 5 N. & M. 427. 1 H. & W. 546.

THE RETURN.

proceed upon the plaint; and the *mandamus* commanded the lord and steward to proceed on the said plaint; to which it was returned, that at the court of August the tenant objected to the making of the plaint, as erroneous and irregular, on two grounds; whereupon it was considered and ordered by the court that, for those errors, the plaint and proceedings should be set aside, reversed, annulled, and altogether held for nothing, and that the court would take no further cognisance thereof, and thereupon the plaint and proceedings were set aside, &c.; that notwithstanding a court was holden, in obedience to the *mandamus* in the October following the issuing of the *mandamus*, whereat the tenant contended that, for the former objections and another, the plaint presented in May was erroneous and irregular, and upon these grounds, and because of the judgment of the court in August, he prayed, that the plaint might be held for nothing, and that the court would take no further cognisance thereof; whereupon it appeared to the court that there was error in the plaint and proceedings, and that the court ought not to take cognisance or proceed thereon; and it was considered and adjudged, that the plaint and proceedings were rightly set aside at the court of August, and that the court ought not to take any further cognisance thereof. Upon objection, that the return was contradictory and repugnant, as shewing, that the court proceeded in October upon a plaint already annulled, and that there was no judgment set forth: — It was held, that the return was good, inasmuch as there was no contradiction, and the court appeared to have adjudged, and that the court of Queen's Bench upon *mandamus* could not inquire whether or not the adjudication was erroneous or informal. (1)

AMENDMENT OF RETURN.

Inconsistent causes.

Clerical mistakes in the return may be amended, after it is filed. (2)

If the return contain two inconsistent causes it will be quashed. (3)

INVALID RETURN.

Transaction of business limited to one particular day.

Where by the charter the transaction of certain business is limited to one particular day, a return to a *mandamus*, assigning as a reason for not completing it, that the day was consumed in the necessary business of the corporation, is bad. (4)

Inhibition of a bishop.

An inhibition of a bishop is not a good return to a *mandamus* to swear a churchwarden. (5)

To restore to academical degrees.

Where the return to a *mandamus* to restore to academical degrees alleges a suspension or degradation of the party, and does not state, that he was summoned to attend the proceedings, it is bad. (6)

A return to a *mandamus* to restore, stating that the prosecutor was not duly elected, admitted, and sworn, is bad; because the return must answer, not the words, but the materiality of the writ. (7)

Restoration to office.

A return to a *mandamus* to restore an alderman removed for non residence was disallowed, because it did not set forth a total desertion from the place of which the party was alderman. (8)

It cannot be returned to a *mandamus* for restoring a person to an office, that he is not eligible. (9)

(1) *Regina v. Old Hall (Lord of)*, 10 A. & E. 248.

(2) *Reg v. Lyme Regis*, Doug. 148.

(3) *Reg v. Cambridge (Mayor of)*, 2 T. R. 456.

(4) *Reg v. Carmarthen (Corporation of)*, 1 M. & S. 697.

(5) *Reg v. Simpson*, Str. 609.

(6) *Reg v. Cambridge (University of)*, (*Dr. Ewin's case*), T. T. 19 Geo. 3.

(7) *Reg v. Lyme Regis*, Doug. 79.

(8) *Reg v. Leicester (Mayor of)*, 4 Burr. 2087., *vide stat. 5 & 6 Will. 4. c. 76. s. 52.*

(9) *Reg v. Doncaster (Mayor of)*, Sayr, 40.

Where an applicant obtained a *mandamus* to be restored to the place of town clerk, the mayor returned "*nunquam fuit debito modo admissus*;" but it was held ill, for he ought to have returned "*non fuit admissus*." (1) THE RETURN.

If the return be insufficient, the applicant will be restored. (2)

A return to a *mandamus* to a mayor to convene a meeting to proceed to an election in order to fill up five vacancies in a select body, that the remaining burgesses are too few to proceed to such election, was held to be insufficient. (3) To elect.

It will be bad in a return to a *mandamus* to elect a municipal officer to state, that the "candidates had an equal number of votes;" because, "if there be an equality of votes, and therefore they cannot choose, upon *mandamus* they must agree, or else they shall all be brought up as in contempt, and laid by the heels till they do agree; for, after a jury is sworn, they shall be impounded till they all agree, but here it suffices, that a majority do agree." (4)

So likewise it was resolved, that the return of "*non fuit modo debito admissus*" or "*electus*" was bad, unless the writ suggested a *debito modo*. (5)

The return of "*non fuit electus*" to a *mandamus* directed to an archdeacon to swear a churchwarden was holden bad, because the writ commanded the churchwarden to be sworn, or the contrary to be shewn; and although some cause as an incapacity may be returned, yet the election cannot be denied in the return, for the archdeacon is only a ministerial officer; and the swearing in of a churchwarden is only matter of form, and the office is only temporal. (6)

A return to a conditional *mandamus* to admit to an office stated, as cause for not admitting, that certain electors, at the time of the election recited in the *mandamus*, "were living and might have been convened, but that they did not attend, nor were they convened or summoned:"—It was held bad, for not stating that these electors were within summons; and that the word *convene* is properly applicable only to aggregate bodies, and not to individuals. (7) To admit.

By the true construction of stat. 49 Geo. 3. c. 20. s. 4. (local and public), the election of a treasurer for the county of the city of Dublin is not avoided by the elected officer not entering into the required recognisance, but by the securities not making the necessary affidavit. (8)

The power of trial and amotion (if not inconsistent with the statute law) for any offence by a corporator against his duty as a corporator, is incidental to the constitution of a corporation; and it is necessary to the good order and government of corporate bodies, that there should be such an authority, as much as a power to make bye-laws. (9) POWER OF AMOTION.

(1) *Hereford's case*, 1 Sid. 209. *Regina v. Aliborough* (Borough of), 10 Mod. 101. *v. Ward*, Str. 894., *contra*. *Regina v. Guy*, 6 Mod. 89. *Rex v. Rice*, 5 *ibid.* 325.

(2) *Basset v. Barnstaple* (Mayor of), 1 Sid. 286., *vide Rex v. Owen*, Skin. 669. *Regina v. Guise*, 2 Ld. Raym. 1008. 3 Salk. 162.

(3) *Rex v. Monmouth* (Mayor of), 4 B. & A. 496. (7) *Regina v. Smith*, 1 Jebb & Symes (Irish), 621.

(4) *Regina v. Chapman*, 6 Mod. 152.

(5) *Regina v. Twitty*, 2 Salk. 433. *Rex v. Whiskin*, Andr. 1. (8) *Ibid.*

(6) *Rex v. Harwood*, 8 Mod. 380. *Rex v. Stephens's Municipal Corporation Acts*, 2d ed. 452.

(9) *Rex v. Harwood*, 8 Mod. 380. *Rex*

THE RETURN.

But for a criminal offence, such as murder or felony, the corporator cannot be removed until convicted by a jury. (1)

The mere embezzlement of money, or the commission of an offence not infamous, are not causes for amotion. (2)

The power of removing being *prima facie* in the corporation at large, it is sufficient to state, that the party was removed by the corporate body at large, without averring, that the body at large had the power of removing. (3)

And as the power of removal cannot be exercised by a select part of a corporate body, unless it be specially given to that part by charter or prescription, if a return should set forth a removal by "a select part," without shewing how they were authorised, it would be bad. (4)

"*Non fuit amotus*" is a good return. (5) "*Non fuit electus*" (6); "*non debito modo electus et praefectus ad officium*" (7); that some other individual instead of the applicant had been elected (8); and a return that the complainant has resigned — are valid and sufficient returns. (9)

In all cases where the return to the first *mandamus* is not sustainable, a peremptory *mandamus* will go. (10)

In *Regina v. Poole (Corporation of)*, where a *mandamus* had issued to command the corporation of Poole to levy a rate and pay the money which they owed to Mr. Farr as compensation for the loss of his office as town clerk, to which a return was made by seven of the town council that they had in October last, at a meeting of the council, brought forward a proposition for levying the rate in obedience to the writ, but that they were outvoted by the majority of the meeting — a peremptory *mandamus* was issued, it being considered that such return was frivolous. (11)

Where the return to the first *mandamus* cannot be sustained, a peremptory *mandamus* will be issued.

REMEDIES FOR A FALSE, INSUFFICIENT, OR NO RETURN.

Traversing the return.

Return governed by the rules of pleading.

9. REMEDIES FOR A FALSE, INSUFFICIENT, OR NO RETURN.

Under stat. 9 Anne, c. 20. s. 2. a power is given to traverse the return instead of an action for a false return.

If the facts be alleged as having happened in a particular county, and issue respecting their existence be joined there, the *venire* must be from that county. (12)

The return to a *mandamus* being traversable, is regulated by the ordinary rules of pleading. (13) Upon which principle, a return to a *mandamus* will be bad, if it contain a negative pregnant. (14)

(1) *Rex v. Richardson*, 1 Burr. 537., vide 1 Stephens's Municipal Corporation Acts, 2d ed. 452.

(2) *Rex v. Lyme Regis*, Doug. 148.

(3) *Ibid.* *Rex v. Chalke*, 1 Ld. Raym. 226. Bull. N. P. 205. (a.), 206. (a.)

(4) *Rex v. Doncaster (Mayor of)*, Sayer, 97. It is questionable whether "the councils" under the Municipal Corporation Act possess the powers of amotion, except where that power is given to them by that statute.

(5) *Rex v. Colchester (Mayor of)*, 1 Sid. 210.

(6) *Regina v. Corn. (Corporation of)*, 11 Mod. 174. *Regina v. Twitty*, 7 Mod. 84. *Regina v. Aldborough (Borough of)*, 10 *ibid.* 101.

(7) *Rex v. Lambert*, 12 Mod. 2. *Rex v. York (Mayor of)*, 5 T. R. 66.

(8) *Rex v. Williams, Sayer*, 140.

(9) *Rex v. Rippon (Mayor of)*, 1 Ld. Raym. 564. *Rex v. Tidderley*, 1 Sid. 14.

(10) *Regina v. Norwich (Mayor of)*, 2 Ld.

Raym. 1244. Holt, 444. *Rex v. Ipswich (Bailiffs of)*, 2 Ld. Raym. 1240. *Rex v.*

Shaw, 12 Mod. 113. *Dr. Bentley's case*,

Fortesc. 205. *Rex v. Simpson*, 8 Mod. 325.

Rex v. Oxford (Mayor of), 2 Salk. 428. 435.

Regina v. Baines, 2 Ld. Raym. 1267. *Rex*

v. Owen, Skin. 669. Stat. 9 Anne, c. 20.

(11) MS. Nov. 8. 1839.

(12) *Rex v. Newcastle-upon-Tyne (Mayor*

of), 1 East, 114.

(13) *Rex v. Cambridge (Mayor of)*, 2 T. R.

456.

(14) *Rex v. York (Mayor of)*, 5 *ibid.* 66.

It was resolved that, by stat. 9 Anne, c. 20. s. 2., the prosecutor may plead or traverse the facts in the return to a *mandamus*, and the other party may take issue or demur (1); but no exception can be taken to the return, where the court has no power to grant the writ. (2)

REMEDIES FOR
A FALSE, IN-
SUFFICIENT, OR
NO RETURN.

If the return contain several distinct heads of answer, the prosecutor may, by leave of the court, traverse one or more of these, as untrue in fact, after having argued the validity of others in point of law on a *concilium*. (3)

No exception
can be taken as
to the issuing
of the writ.

In *Rex v. York (Mayor of)* (4) it was held, that if a *mandamus* to certify an election state, that "by reason of which A. was duly elected," the return cannot traverse that A. was not elected as by the writ is supposed.

The prosecutor can reply to a return to a *mandamus* (5); and that which is not answered upon the return, must be looked upon as admitted to be true. (6) And where the prosecutor of a *mandamus* to which a return had been made, moved for a *concilium*, and the court upon argument adjudged, that the return was sufficient in law, it was held, he could not afterwards traverse the facts contained in the return. (7)

Prosecutor can
reply to a re-
turn.

That which is
not answered is
admitted.

The prosecutors of a *mandamus* moved to take the return off the file on affidavit, and on objections made against the validity of the return itself. The court after argument on the law and facts, ordered in general terms that the rule should be discharged. The defendant then traversed the return. On motion to take the traverse off the file, because judgment had already been given in favour of the validity of the return, it was held, that the prosecutors were entitled to traverse (8)

In *Rex v. Suddis* (9) the court seemed to think, that, since an erroneous judgment cannot be impugned as a collateral proceeding, such judgment will support a return to a *mandamus*. (10)

Erroneous
judgment can-
not be im-
pugned.

A rule to inspect charters in order to make a return will not be granted; but in an action for a false return it will be issued. (11)

Inspection of
charter.

Although a return be true in words, yet if it be false in substance, an action lies. (12)

FALSE RETURN.
Return true in
words, but false
in substance.

In an action for a false return to a *mandamus*, it need not be alleged, that they ought to obey it; for, by making a return, that is admitted. (13)

Allegation.

In an action for a false return, it is not material whether the writ ought to have been granted: thus, in *Green v. Pope* (14) it was holden, that if the action be brought for the false return to the *mandamus*, all the rest is but inducement; and, consequently, whether a *mandamus* will lie or not, is not before the court; and that it must be taken *pro confesso*, that a *mandamus* was granted, and that the defendant made a false return.

It is not ma-
terial whether
the writ ought
to have been
granted.

The action for a false return should be brought in the Queen's Bench; Action should

(1) *Rex v. Trinity Chapel (Dean of)*, 8 Mod. 28. *Quære*, Whether, by stat. 9 Anne, c. 20. s. 2., the return to a *mandamus* can be demurred to? *Rex v. Oundle (Lord of the Manor of)*, 1 A. & E. 283. 3 N. & M. 434.
(2) *Rex v. Oxford (New College)*, 2 Lev. 14, 15.

(3) *Regina v. North Midland Railway Comp.* 11 A. & E. 955. n.
(4) 5 T. R. 66.

(5) *Rex v. Lyme Regis (Mayor of)*, Doug. 159.

(6) *Regina v. Buckingham (Corporation of)*, 10 Mod. 174.

(7) *Rex v. London (Mayor and Aldermen of)*, 3 B. & Ad. 255.

(8) *Regina v. Payn*, 11 A. & E. 955.

(9) 1 East, 306.

(10) Vide etiam *Rex v. Yorkshire (Justices of)*, 7 T. R. 467.

(11) *Anon.* 2 Salk. 432., sed vide *Rex v. Hollister*, C. T. H. 245. *Rex v. Newcastle-upon-Tyne (Hostmen of)*, Str. 1223.

(12) *Rex v. Lyme Regis*, Doug. 158.

(13) *Case of Norwich (Mayor of)*, 12 Mod. 322.

(14) 1 Ld. Raym. 126.

REMEDIES FOR
A FALSE, IN-
SUFFICIENT, OR
NO RETURN.

be brought in
the Queen's
Bench.

Venue.

Parties.

When the
court will di-
rect an infor-
mation to try
the facts.

Evidence of
return by de-
fendant.

Peremptory
mandamus in
an action for a
false return.

and where a peremptory *mandamus* was moved for, an action having been brought in Common Pleas for the falsity of the return, and judgment for the plaintiff on demurrer there, Chief Justice Holt said, "I think we should have the record which falsifies the return here in this court. We cannot judge upon their records. You read only a short rule in the cause in Common Pleas that judgment be entered *pro quer.*; perhaps there is no inquiry of damages — no final judgment; it might be arrested there, or perhaps we should reverse it upon a writ of error." (1)

An action for a false return is local; but may be laid in the county where it was made, or in that in which it appears on record. (2)

Two persons cannot bring one action for a false return. (3) But where a number of persons join in prosecuting a *mandamus* to register the certificate of a dissenter's meeting-house, they may join in an action for a false return. (4)

Where the return to a *mandamus* was, that there was neither the hand of the mayor nor the seal of the corporation to it; the court stated, "It is well enough without it." "If the return be false, you may bring your action against the whole body politic for making a false return, and against a particular person for procuring a false return." (5)

A return ought to be by the mayor with the consent of the corporation; and if he do it, not having such consent, an information will lie against him. (6)

Where no one in particular is interested to bring an action for a false return, and the affidavits are contradictory, the court will direct an information to try the facts between the parties; because the return to a *mandamus* under the statute of Anne might be traversed; or upon a *mandamus* concerning some private right the party might have an action for a false return; and a peremptory *mandamus*, if the return be wrong; — but where no one is particularly interested, there is no remedy but by information. (7)

In the case of a *mandamus* out of Chancery, no attachment lies till the *pluries*, for that is in the nature of an action to recover damages for the delay; but, upon a *mandamus* from the court of Queen's Bench, the first writ ought to be returned (8); yet an attachment is never granted without a peremptory rule to return the writ, and then it goes for the contempt. (9)

The defendant being served with the writ, his declaration that a return should be made, together with a rule for an attachment against him for want of a return, and another to discharge that rule on payment of costs, and appearance to the action, is evidence, that the return was made by the defendant. (10)

In an action for a false return, no motion is allowed for a peremptory *mandamus* until four days after the return of the *postea*, because the de-

(1) *Green v. Pope*, Comb. 400.

(2) *Lord v. Francis*, 12 Mod. 408.

(3) *Butler v. Rewe*, ibid. 349.

(4) *Green v. Pope*, 1 Ld. Raym. 127.

(5) *Lydston v. Exeter (Mayor of)*, 12 Mod. 126. *Regina v. Chapman*, Holt, 443. *Rex v. Rippon (Mayor of)*, 1 Ld. Raym. 564. *Enfield v. Hill*, 2 Lev. 238.

(6) *Rex v. Abingdon (Borough of)*, 13 Mod. 308.

(7) *Rex v. Spottland (Overseers of the Poor of)*, C. T. H. 184.

(8) Stats. 9 Anne, c. 20. s. 1. and 11 Geo. 1. c. 4. s. 9.

(9) *Coventry's case (Mayor of)*, 3 Salk. 429.

(10) *Rex v. Thetford (Mayor of)*, 2 Ld. Raym. 848. *Vaughan v. Lewis*, Carth. 229.

pendant has that period to move in arrest of judgment. But it may be awarded on the *postea*, without entering a former judgment. (1)

In general, where the return is adjudged insufficient, a peremptory *mandamus* issues, and if that be not obeyed, an attachment will issue against the persons disobeying it. (2)

"If an officer make an ill return, he shall be amerced; and we will not allow him to quash the ill return and make another; and if upon disallowance of one return, he makes a second bad, an attachment shall go." (3)

If no return be made, an attachment will be granted against those persons to whom it was directed, and when they are before the court, their punishment will be in accordance with their offence. (4)

If the writ be directed to a corporation to do a corporate act, and no return be made, the attachment will be only against those particular persons who refuse obedience. (5)

If a *mandamus* be directed to a "town council," and they adjourn the corporate assembly in order to prevent a return being made, the members will be punishable for contempt. (6)

If a *mandamus* be directed to two persons, one of whom is for obeying the writ, and the other will not join in the return, an attachment must be granted against both. (7)

REMEDIES FOR
A FALSE, IN-
SUFFICIENT, OR
NO RETURN.

INSUFFICIENT
RETURN.

NO RETURN.
Attachment
will be granted
against those
who refuse to
make a return.

10. Costs.

Costs.

By stat. 1 Will. 4. c. 21. s. 6., "in all cases of application for any writ of *mandamus* whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court, and the court is hereby authorised to order and direct by whom and to whom the same shall be paid."

Stat. 1 Will. 4.
c. 21. s. 6.
Costs to be in
the discretion
of the court.

Under stat. 1 Will. 4. c. 21. s. 6. the costs of a *mandamus*, and of applying for it, may be obtained of the court by a distinct motion after the issuing of the writ; and upon such motion for costs the court will refer for its guidance to the affidavits filed in support of the application for a *mandamus*, if it be clear, that both applications are made by the same parties. (8)

In *Regina v. Bridgnorth (Mayor of)* (9) Lord Denman said, "Where a person is bound by law to pronounce a decision, and that decision is disputed before us, and proves to be right, he is entitled to costs."

The court will not compel a relator in a *mandamus*, to give security for costs, he being interested in the matter in question, on the ground of his poverty, or that other persons have induced him to apply for the writ. (10)

(1) *Rex v. Newcastle-upon-Tyne (Mayor of)*, 1 East, 116.

(2) *Basset v. Barnstaple (Mayor of)*, 1 Sid. 286.

(3) *Per Holt C. J. in Anon.* 12 Mod. 410.

(4) *Coventry's case (Mayor of)*, 2 Salk. 429.

(5) Bull. N. P. 201. (b.) Stat. 9 Anne, c. 20. s. 1.

(6) *Regina v. Heathcote (Sir Gilbert)*, 10 Mod. 56.

(7) *Bridgnorth (Bailiffs of)*, Str. 808. 1 Stephens's Corporation Acts, 2d ed. 490.

(8) *Rex v. Kirke*, 5 B. & Ad. 1089.

(9) 10 A. & E. 66.

(10) *Regina v. Malmesbury (Mayor of)*, 9 Dowl. P. C. 359.

MASTER AND SERVANT.

1. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR CONTRACTS OF SERVANT, pp. 2335—2337.

RESPONSIBILITIES — *If a master employ a servant to buy things on credit, he will be liable to the extent that his servant pledges his credit — Articles furnished for the use of the master, the servant being by agreement to provide them — Judgment of Lord Kenyon in *Precious v. Abel* — Master must prove that he gave his servant money to purchase the articles — IRRESPONSIBILITIES — Tailors giving credit to servants, contrary to the orders of their master — Servant employing a tradesman not previously employed by the master — Judgment of Lord Ellenborough in *Hiscox v. Greenwood* — When master in the habit of paying ready money — MEDICAL ATTENDANCE.*

2. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT, pp. 2337—2342.

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3. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES, pp. 2342—2349.

*There must be an original contract for wages — Where one contract is not dissolved by a subsequent contract — Request of a year's wages, applies only to servants hired by the year — Master advancing money to his servant, no defence for non payment of wages — HIRING FOR A YEAR — Clerk hired generally by the year — Where wages recoverable, though not actually due — Hiring at so much per month, is a hiring for the year — Where upon an agreement for three years, one year's wages can only be recovered — To serve as a reporter to a newspaper — Where a pecuniary present recoverable beyond the ordinary wages — HIRING FOR A QUARTER — When servant under a quarterly hiring, discharged in the middle of the quarter — Judgment of Lord Denman in *Smith v. Hayward* — HIRING DETERMINABLE UPON A MONTHLY NOTICE — Servant hired without mentioning time of service — If a master turn away a servant causelessly, he is liable for a month's wages — Judgment of Lord Kenyon in *Robinson v. Hindman* — Master having cause for dismissal, need not state it to his servant — If servant hired for a year depart before that period, he cannot recover any wages for the period he has served — To justify a master in dismissing his servant without warning, there must be either moral misconduct or wilful disobedience — Clerk representing himself as a partner — Servant having left his service for a considerable time — Clerk under a yearly hiring, quitting his service before the expiration of the year — Deputy against his principal — FORM OF ACTION — PLEADINGS — DAMAGES — When no fixed sum is agreed upon — EVIDENCE — PAYMENT OF MONEY INTO COURT.*

4. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTERS FOR CHARACTERS OF SERVANTS, pp. 2349, 2350.

*Any thing said or written by a master, is in general a privileged communication — Judgment of Mr. Justice Bayley in *Pattison v. Jones* — The gist of the action is malice — Judgment of Mr. Justice Parke in *Child v. Affleck* — Master not bound to prove every fact stated in his letter of character — Where giving a false character*

is not actionable — *Judgment of Lord Alvanley in King v. Waring* — Master giving a character unsolicited — *Judgments of Mr. Justice Rooke and Mr. Justice Chambre in Rogers v. Clifton.*

5. REMEDIES OF MASTER FOR INJURY TO SERVANT, pp. 2351—2358.

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Master can maintain an action for injury done to his servant — DAMAGES — Master entitled to damages from the time when the disability commenced, to the time when it is expected to cease — *Judgment of Chief Justice Abbott in Flemington v. Smithers.*

II. SEDUCTION, pp. 2351—2357.

WHEN THE ACTION CAN BE MAINTAINED — BY PARENT — Daughter a married woman — Hiring as a servant the daughter of another for seduction — BY UNCLE FOR SEDUCTION OF HIS NIECE — BY STRANGER — BY MASTER — WHEN THE ACTION CANNOT BE MAINTAINED — To sustain the action there must be *damnum et injuria* — *Judgment of Mr. Baron Parke in Blaymire v. Haley* — Mother maintaining her daughter during her confinement — Father permitting a married man to visit his daughter as a suitor — Assignees of a bankrupt, for seduction of bankrupt's servant — DECLARATION AND PLEADINGS — Form of action — *Judgment of Mr. Baron Parke in Chamberlain v. Hazlewood* — EVIDENCE — Competency of witness — Acts of service — *Judgment of Mr. Justice Littledale in Maunder v. Venn* — The general character and conduct of the seduced — *Judgment of Chief Baron Brady in Magrath v. Browne* — Defendant may call witnesses to prove acts of sexual intercourse — DAMAGES — Principle by which the amount of damages is to be calculated — *Judgment of Lord Eldon in Bedford v. McKowl* — *Judgment of Lord Ellenborough in Irwin v. Dearman* — Promise of marriage will not affect the right of the father or master to damages — *Judgment of Chief Justice Wilnot in Tullidge v. Wade* — PAYMENT OF MONEY INTO COURT.

III. ENTICING AWAY SERVANTS AND APPRENTICES, pp. 2357, 2358.

I. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR CONTRACTS OF SERVANT.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR CONTRACTS OF SERVANT.

A contract made by a servant acting under the express or implied authority of the master is binding on the master. (1)

In *Stubbing v. Heintz* (2) Lord Kenyon said, "If the master employs his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit." (3)

In *Greatland v. Freeman* (4) it was held, that where a party dealt with a tradesman on credit, it was not sufficient to give notice to the tradesman's servant, that he meant to pay ready money in future; but it must be given to the tradesman himself; Lord Eldon observing, "It was a change in the usual mode of dealing, suggested by the defendant himself; and as he had personal dealings with the master in a particular mode, notice to the servant alone of a change in that mode would not be sufficient; the defendant must shew that the master himself had notice of it, or he could have no defence to the action."

In an action on a farrier's bill (5) it appeared, that the defendant, by an agreement with the groom, allowed him 5 guineas a year, for which he was

If a master employ a servant to buy things on credit, he will be liable to the extent that his servant pledges his credit.

If a party have dealt with a tradesman on credit, and be desirous of paying ready money in future, he must give notice to the principal.

Articles fur-

(1) F. N. B. 120. (G.)

(4) 3 Esp. N. P. C. 85.

(2) *Peake's N. P. C.* 67.

(5) *Precious v. Abel*, 1 *ibid.* 350.

(3) *Vide etiam Hazard v. Treadwell*, Str.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR CONTRACTS OF SERVANT.

nished for the use of the master, the servant being by agreement to provide them.

Judgment of Lord Kenyon in *Precious v. Abel*.

Master must prove that he gave his servant money to purchase the articles.

IRRESPONSIBILITIES OF MASTER.

Tailors giving credit to servants, contrary to the orders of their master.

Servant employing a tradesman, not previously employed by the master.

Judgment of Lord Ellenborough in *Hiscox v. Greenwood*.

to keep the horses properly shod, and furnish them with proper medicines when necessary; upon which Lord Kenyon said, "that it was no defence to the action, unless the plaintiff knew of this agreement, and expressly trusted the groom. That if the servant buys things which come to his master's use, the master should take care to see them paid for; for a tradesman has nothing to do with any private agreement between the master and servant." (1)

If the defendant's coachman go in his master's livery to the plaintiff, and hire horses, which his master afterwards uses, he is bound to pay for the hire of the horses, although he has previously agreed with the coachman, that he would pay him a large salary to provide horses, unless the person of whom the horses were hired had some notice, that the coachman hired them on his own account, and not for his master. (2)

Where a baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid:—It was held, in an action by him to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised, and that the plaintiff was entitled to the verdict, as the defendant did not prove, that he had given the housekeeper money for the purpose of paying the bills in question. (3)

If an express authority be not given by the master, or from the nature of the case an authority cannot be implied, the master will be irresponsible:—thus, where A. ordered of B. two suits of livery a year for her coachman; and B. supplied one suit of livery, and at the desire of the coachman supplied plain clothes instead of the other:—It was holden, that B. could only recover from A. the price of the livery actually supplied.

So likewise where B. had, on a previous bill delivered, been paid for a livery suit which he had furnished and immediately taken back from the coachman:—It was held, that A. was entitled to be allowed the amount paid for this suit, on a plea of set-off for money had and received, pleaded in an action for the amount of a subsequent account for clothes. (4)

If a servant employ a tradesman to do any work, who has not been employed before by his master, and the tradesman do the work without communication with the master, though the thing to which the work was done was the property of the master, he will not be liable; nor can the tradesman retain the property as a lien: thus, in *Hiscox v. Greenwood* (5) Lord Ellenborough observed, "that the defendant was not entitled to retain the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority; that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, nor to which he gave his assent. It was the duty of the tradesman, when he was employed, to have inquired of the principal, if the order was given by his authority; but having neglected to do so here, and never having employed him, the master was not liable to the demand, and the detainer of the chaise was unlawful."

(1) *Sed vide Kendal v. Andrews*, 1 Esp. N. P. 141.

(2) *Rimell v. Sampayo*, 1 C. & P. 254.

(3) *Miller v. Hamilton*, 5 ibid. 433.

(4) *Hunter v. Berkeley* (*Countess Dowager of*), 7 ibid. 413.

(5) 4 Esp. N. P. C. 174.

If the master of a family be in the habit of paying ready money for articles furnished in certain quantities to his family, and if the tradesman suffer other goods of the same sort to be delivered without informing the master, or satisfying himself that they were for his use, when in fact they were not, the master will not be liable. (1) Thus, in *Stubbing v. Heintz* (2) Lord Kenyon said, "Nothing could be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money, the master will not be liable to pay it over again." (3)

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR CONTRACTS OF SERVANT.

When master in the habit of paying ready money.

The obligation of the master to provide medical assistance for his servant, if any, must arise from contract. It cannot be contended, that a master is impliedly bound by contract to furnish his servant with all necessaries; for in some cases he neither engages to furnish clothes or victuals, and if not, he is not bound to provide either (4): but where a servant, who hurt her foot in getting over a gate, called in a surgeon, who was not the regular medical attendant of the family, without the knowledge of her master or mistress, it was held, that the master was not liable to pay the surgeon's bill. (5)

MEDICAL ATTENDANCE.
Master not liable for medical attendance.

A servant whose limb is fractured by a fall when sitting on the shafts of his master's waggon is a casual pauper in the parish in which he falls; and must be supported and cured at their expense, and not at that of his master. (6)

And the master is not liable to the overseers who have been compelled to pay the amount of the surgeon's bill. (7)

If a servant become ill in consequence of a service away from her master's family, and call in a surgeon, and, after this, the master send his own surgeon, but his wife, knowing of the first surgeon's attendance, does not express her disapprobation — the master will be liable to pay him for his attendance. (8)

Where master liable for medical attendance.

If a servant fall ill, and a master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between them that he should do so. (9)

And a master is bound to support his yearly servant in every period of sickness. (10)

2. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT. (11)

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT.

A master is responsible for the tortious acts of his servant, when committed in the execution of his orders.

But it is competent in all cases for a plaintiff to bring his action, either

(1) *Pearce v. Rogers*, 3 Esp. N. P. C. 214.

(2) *Peake's N. P. C.* 66.

(3) *Vide etiam Kendal v. Andrews*, 1 Esp. N. P. 141. *Sir R. Wayland's case*, 3 Salk. 234. *Bolton v. Hillersden*, 1 Ld. Raym. 224. *Maunder v. Conyers*, 2 Stark. 281. *Rusby v. Scarlett*, 5 Esp. N. P. C. 76.

(4) *Wennall v. Adney*, 3 B. & P. 247. *Atkins v. Banwell*, 2 East, 505. *Scarman v. Castell*, 1 Esp. N. P. C. 270.

(5) *Cooper v. Phillips*, 4 C. & P. 581.

(6) *Newby v. Wiltshire*, 2 Esp. N. P. C. 739. *Wennall v. Adney*, 3 B. & P. 247.

(7) *Ibid.*

(8) *Cooper v. Phillips*, 4 C. & P. 581.

(9) *Sellen v. Norman*, *ibid.* 80. *Rez v. Winterset*, Cald. 298.

(10) *Rez v. Winterset*, *ibid.*

(11) *Vide ante*, 961. tit. CARRIERS — 1002. tit. CASE — 1498. tit. EVIDENCE — *et post*, tit. NUISANCE — tit. TRESPASS.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT.

Master liable in trespass for the acts of his servant, in executing his orders with ordinary care.

When injury arises from the driving of the servant.

Case will lie against a master for the negligence or unskilfulness of his servant.

Injudicious acts of servant.

Misconduct of servant.

against the person from whom the authority flowed, or against the person by whom the injury was actually committed. (1)

A master is liable in trespass for any act done by his servant, in the course of executing his orders with ordinary care; and, therefore, where a master ordered his servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall:—It was held, that the master was liable in trespass. (2) So likewise trespass lies against a master, if, while the servant is driving his master in a gig, the horse runs away and does damage. (3)

An action on the case will lie against a master for an injury done through the negligence or unskilfulness of the servant acting in the master's employment (4): thus, if a servant in order to perform his master's orders, strike, but injudiciously, in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable (5), being an act done in pursuance of the master's employment; or if an injury happen through the misconduct of a servant in driving his master's carriage (6), the master will be liable, though he may be going out of the way.

In an action on the case for damage done to the plaintiff's cabriolet, against which the defendant's cart was driven, the defendant will be liable, although it should appear, that the defendant's servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was driving him, and who was not in the service of the defendant. (7)

A person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left for the jury to say, whether or not the horse was taken by the servant with the implied authority of the defendant; and a verdict having been found for the plaintiff, a new trial was refused. (8)

In *Fenton v. Dublin Steam Packet Comp.* (9), which was an action for sinking the plaintiff's vessel by a steam boat belonging to the company, it appeared, that the defendants, being owners of the steam vessel, chartered her to D. for six months at 20*l.* per week, the owners to keep her in good and sufficient order for the conveyance of goods, &c. to and from Newcastle and Goole, or on any other coasting station which D. might employ her in; D. to pay all disbursements, including harbour dues, pilotages, sea-

Owners of vessels responsible for the acts of their crew.

(1) *Vide ante*, 1003—1008. tit. CASE. *Bush v. Steinman*, 1 B. & P. 404., *vide Matthews v. Westminster and Middlesex Water Works Comp.* 3 Camp. 403. *Harris v. Baker*, 4 M. & S. 27.

(2) *Gregory v. Piper*, 9 B. & C. 591. 4 M. & R. 500.

(3) *Chandler v. Broughton*, 3 Tyrw. 220. 1 C. & M. 29.

(4) *Anon.* 1 Ld. Raym. 759. *Morley v. Gaisford*, 2 Hen. Black. 443. *Brucker v. Fromont*, 6 T. R. 659.

(5) Per cur. in *Croft v. Alison*, 4 B. & A. 592.

(6) *Joel v. Morison*, 6 C. & P. 501.

(7) *Booth v. Mister*, 7 *ibid.* 66.

(8) *Goodman v. Kennell*, 1 M. & P. 241.

3 C. & P. 167. Where the declaration alleged that the defendant was possessed of a waggon and horses, which were under the care of the defendant's servant, and the servant was driving them; and that the defendant by his said servant so carelessly drove the same, that plaintiff's carriage was injured:—It was holden on a plea of "not guilty," that defendant could not prove that the servant and horses were not the defendant's, for the allegation that they were so was matter of inducement, and under Reg. Gen. H. T. 4 Will. 4., "Pleadings in particular Actions," IV. 1., was admitted by the plea, and permission to amend was refused. *Hart v. Crowley*, 12 A. & E. 378.

(9) 6 A. & E. 835.

men's and captain's wages, and coals, oil, tallow, &c. for engines, and to insure the vessel, the policy to be deposited with the owner; and the question was, whether D. was responsible to A.? which was decided in the negative upon the interpretation of the charter-party only, Mr. Justice Patteson observing, "The question is, whose servants were the crew? for their negligence has occasioned the accident. I do not say that they are not the servants of the charterer. *Laugher v. Pointer* (1) does not bear on the point. To hold that the hirer is liable, is not inconsistent with holding the letter liable also; and since that case, it has been held that the letter is liable. (2) The issue is, whether the defendants had the possession and care of the vessel by their servants, which brings us back to the question, whose servants were the crew? Now, on the charter-party alone, I have no difficulty in saying, that they were the servants of the owners. The charterer hires the steam vessel for six months, with the option of retaining her six months longer; but the owners are to keep her in good order, and the charterer is not to find seamen, coals, &c., but to pay for all disbursements in these and other respects. Therefore I think it clear that the owners are to have their own engineer and servants on board, and that the charterer is to pay for them. These are therefore the servants of the owners."

RESPONSIBILITIES AND IRRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT.

Judgment of Mr. Justice Patteson in *Fenton v. Dublin Steam Packet Comp.*

Canal companies are also liable for the negligent acts of their servants: thus, in *Parnaby v. Lancaster Canal Comp.* (3), the declaration which was in case stated, that by the Canal Act (stat. 32 Geo. 3. c. 101.) the company was formed to make and maintain the canal, with power to take tolls; and all persons had free liberty to navigate the canal; and if any boat should be sunk in the canal, and the owner or person having care of it should not, without loss of time, weigh it up, it was by the statute to be lawful for the company to weigh it up, and detain it till payment of expenses; that the company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that, although the company could and ought to have requested the owner, &c. to weigh it up, and if that was not done without loss of time, could and ought to have weighed it up, and, in the meantime have caused a light or signal to be placed to enable boats to avoid it, yet the company did not cause the owner, &c. to weigh it up, nor themselves weigh it up, nor place a light or signal, whereby plaintiff's boat navigating the canal ran foul of the sunken boat, and was damaged: — It was held by the court of Exchequer Chamber (affirming the judgment of the court of Queen's Bench) that the declaration disclosed a sufficient duty and breach; and that such duty was not created by the clause enabling the company to weigh the boat, but arose upon a common law principle, that the owners of a canal, taking the tolls for the navigation, were bound to use reasonable care in making the navigation secure, the want of which reasonable care might be collected from the declaration, although the complaint was ostensibly founded on the statute.

Canal companies responsible for the negligence of their servant.

A master is answerable for the illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit: thus,

Master responsible for the

(1) 5 B. & C. 547.

(3) 11 A. & E. 223.

(2) Referring apparently to *Smith v. Lawrence*, 2 M. & R. 1.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT.

illegal acts of his servant, if within the reasonable scope of his authority.

Judgment of Chief Baron Alexander in *Attorney General v. Siddon*.

Illegal acts by servant.

Master and servant jointly liable, for the consequences of an illegal act.

When master not responsible for the illegal acts of his servant.

Judgment of Mr. Justice Patteson in *Lyons v. Martin*.

IRRESPONSIBILITIES.

where, after the detention of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit, by which he intended to protect the goods from seizure, the master was held liable for the penalty attached to the offence of unduly using a permit (1), Chief Baron Alexander observing, "It is always competent to the defendant to prove his innocence if he can, but the finding is *prima facie* evidence upon which these convictions proceed. If he does not prove his innocence, the law presumes his guilt from the fact of the goods being found concealed upon his premises."

If a master command his servant to do an illegal act (2), the servant, as well as the master, will be liable to the party injured, for the servant cannot plead the command of the master in bar of a trespass.

An action on the case was brought against a master and his servant (3) for breaking a pair of horses in Lincoln's Inn Fields, where, being unmanageable, they ran against and hurt the plaintiff; it appeared, that the master was absent; but it was holden on motion in arrest of judgment, that the action would lie, for it should be intended, that the master sent the servant to train the horses there.

But in *Lyons v. Martin* (4) it was held, that although a master was answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service, yet he was not so if the act was in itself unlawful, and was not proved to have been authorised by the master; (as if a servant, authorised merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrained them,) Mr. Justice Patteson observing, "*Brucher v. Fromont* (5) and other cases, where the master has been held liable for the consequences of a lawful act negligently done by his servant, do not apply. A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one. Every person is to be taken to know the law."

With respect to the irresponsibility of master for the tortious act of his servant it is said (6), "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I, because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose, they are his beasts." (7) "If I command my servant to distrain, and he ride on the distress, he shall be punished, not I." (8)

It is laid down by Chief Justice Holt in *Middleton v. Fowler* (9) as a general position, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him." And Lord Kenyon in *M^cManus v. Crickett* (10) said, "Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that, which his own malice suggests, he no longer acts in pursuance of the authority given him; and, according to the doctrine of Lord Holt, his master will not be answerable for such act."

(1) *Attorney General v. Siddon*, 1 Tyrw. 41. 1 C. & J. 220.

(2) *Sands v. Child* (*Sir Josiah*), 3 Lev. 352.

(3) *Michel v. Alestree*, 2 ibid. 172

(4) 8 A. & E. 512.

(5) 6 T. R. 659.

(6) Bro. Abr. Trespass, 435.

(7) 2 Rol. Abr. Trespass (Q.), 553.

(8) Noy's Maxims, ch. 44.

(9) 1 Salk. 282.

(10) 1 East, 108.

The captain of a man-of-war was holden not to be responsible for the damage done to another vessel through the negligence of his lieutenant (1) who was upon deck, and had the actual direction and management of the steering and navigating of the ship at the time, and when the captain was not upon deck, nor was called upon by his duty to be there, Mr. Justice Grose observing, "This action, as it affects the defendant Captain Mouncey, is founded on his alleged negligence; but the facts stated, shew negligence not in him, or in any servant or agent of his, or in any person whom he has appointed, but in some other person; it is an attempt, therefore, to place upon his shoulders a burden which ought to be borne by another. There can be no reason for making one man liable for the act of another whom he did not appoint or employ. If Captain Mouncey had ordered the others to do the act, it would have been a different question." (2)

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT.

Captain of a man-of-war not responsible for the acts of his lieutenant.

Judgment of Mr. Justice Grose in *Nicholson v. Mouncey*.

Butcher not responsible for the acts of his drover.

Where a butcher employed a licensed drover to drive home some bullocks from Smithfield market, and the drover employed a servant of his own for that purpose, through whose negligence a bullock injured the plaintiff's property: — It was holden, that the butcher was not liable, for the drover was a person carrying on a distinct and independent business of his own. (3)

A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. (4)

Wilful acts of servant.

If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable (5); nor will he be liable if the servant use the carriage for his own purpose, and without his master's consent; because the master is only liable, where the servant is acting in the course of his employment. (6)

In *Laugher v. Pointer* (7) it appeared, that the defendant, a gentleman usually residing in the country, being in London a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper accordingly sent a pair, and a person to drive them. The defendant did not select the driver, nor had he any previous knowledge of him, but the stable-keeper sent such person as he chose for his purpose. The driver had no wages from his master, but depended on receiving a gratuity from the person whose carriage he drove; the defendant in this case gave him 5s. as a gratuity. By reason of his negligent driving the plaintiff's horse sustained an injury, whereupon an action was brought; and upon these facts the court of King's Bench were equally divided. (8)

Servants of a job-carriage master.

(1) *Nicholson v. Mouncey*, 15 East, 384.

(2) Vide etiam *Bowcher v. Noidstrom*, 1 Taunt. 568. A collector of customs, appointed by the commissioners under stat. 3 & 4 Will. 4. c. 51. s. 6. to collect duties on articles coming into the kingdom, and, on payment, to sign bills of entry, which, by sect. 18. are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and immediate officer of the crown; and his functions, as collector, are ministerial. Therefore he is liable in an action for non-

feasance in the exercise of his office; as for refusing to sign such a bill of entry without payment of an excessive duty. *Barry v. Arnaud*, 10 A. & E. 646.

(3) *Milligan v. Wedge*, 10 Law Journ. N. S. 19.

(4) *M'Manus v. Crichton*, 1 East, 106.

(5) *Croft v. Alison*, 4 B. & A. 590.

(6) *Joel v. Morison*, 6 C. & P. 501.

(7) 5 R. & C. 547.

(8) Vide etiam *Quarman v. Burnett*, 6 M. & W. 499., *antè*, 1018. tit. CASE.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR THE TORTIOUS ACTS OF SERVANT.

Judgment of Lord Abinger in *Brady v. Giles*.

In *Brady v. Giles* (1), which was an action for damage done through negligent driving of a carriage and horses let to hire and driven by the servants of the owner, it was held to be a question for the jury, whether the servants were acting as the servants of the person hiring, or of the owner; Lord Abinger, refusing to nonsuit the plaintiff, observed, "It had always appeared to him, that the court of King's Bench had pursued an erroneous course in *Laugher v. Pointer* (2) when they allowed the question now raised to be discussed, as if it were a question of law for the judge to decide. It always appeared to him, that it was quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible, and the temporary hirer became so."

In an action for negligently driving against the plaintiff's horse, the defendant's servant may be a witness for him without a release; the objection to the witness is now removed under stat. 3 & 4 Will. 4. c. 42. ss. 26, 27., by making an indorsement on the record according to the directions of the statute. (3)

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

3. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

The relation between master and servant arises from the contract of hiring; and of course, where there is no agreement to that effect, the relation of master and servant does not subsist. (4) Master and servant may covenant with each other by deed, as well as through the intervention of any other instrument.

If, under a parol or written agreement, a person retain another as his clerk or servant, and it be mutually agreed, that the master shall pay him so much by the day, month, or year, in consideration of services to be performed by him; and if the servant fulfil his part of the contract, he can maintain an action against the master, or, in case of his death, against his personal representatives, for a breach of the contract on the part of the master by the non payment of such salary or wages.

In all cases there must be an original contract of service for wages. Thus, where a servant came over from the West Indies (5), where he had been a slave, and who continued in the service of his master in England without any agreement for wages, was held not to be entitled to any wages, because there had been no express promise on the part of the master.

A contract, by which a servant hires himself to a master as a footman and groom, is not dissolved from a subsequent contract, by which he engages to bind himself to serve in a different character at higher wages and in a foreign country, although the servant accompanies his master into such foreign country, the service performed abroad being the same as that originally contracted for. (6)

(1) 1 M. & Rob. 495., sed vide *Quarman v. Burnett*, 6 M. & W. 499., *anté*, 1018. tit. CASE.

(2) 5 B. & C. 547.

(3) *Pickles v. Hollings*, 1 M. & Rob. 468., *vide anté*, 1754—1758. tit. EVIDENCE.

(4) *Alfred v. Fitzjames* (*Marquis of*) 3 Esp. N. P. C. 3.

(5) *Ibid*.

(6) *Rex v. Buckingham*, 3 N. & M. 72.

There must be an original contract for wages.

Where one contract is not dissolved by a subsequent contract.

A bequest of a year's wages to each of the testator's servants, over and above what may be due to them at the time of the testator's decease, applies to such servants only, as are usually hired by the year. (1)

A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles not necessary for her:—It was held, that, as she was a minor, these advances constituted no defence to an action for her wages (2); and money paid by a master for coach-fares for the mother of his servant, who was under age, cannot be deducted from the wages of the servant. (3)

A general hiring for a year, and so on, particularly of clerks and respectable servants, can only be put an end to at the end of a current year, where no misconduct is imputed. (4)

Such a hiring is a hiring for a year, and so on from year to year for so long time as the parties respectively please, and may be so described in the declaration; and such an implied yearly hiring is not destroyed by the salary being paid monthly; nor is it within the Statute of Frauds. (5)

A servant was engaged at a yearly salary, payable quarterly. A month after the termination of one of the years of the service, the servant tendered his resignation. After another month the resignation was accepted, nothing being said about remuneration for the time elapsed since the termination of the last year's service:—It was held, that the law implied no engagement to pay for the services performed since the last quarter; but that, under the circumstances, it ought to have been left to the jury to say, whether the parties had come to an agreement, that those services should be paid for. (6)

A clerk hired generally by the year at a certain salary, may, upon a dissolution of the contract by mutual consent within the year, recover salary *pro rata*, without any express agreement to that effect. (7) So, also, he may recover *pro rata* where the contract has been dissolved by mutual consent within the year, and the issuing of a fiat in bankruptcy (8); and the departure of the clerks upon the ceasing of the trade, is evidence of a dissolution of such contract. (9)

If an agreement be entered into for the employment of a clerk for four years from the 1st of January, 1823, at a salary of 400*l.* a year, and the salary be paid up to the 1st of January, 1825; and in July, 1825, the clerk be dismissed; the clerk, upon being dismissed in July, 1825, may commence an action in Michaelmas Term, 1825, though at that time, according to the agreement, a year's salary would not be due. (10)

A hiring at so much per month is a hiring for a year, and a general hiring, in the absence of any custom to rebut the presumption, is to be presumed as having been a hiring for a year. (11) Thus, a clerk hired at 12*l.* 10*s.* per month for the first year, to advance 10*l.* *per annum* until the salary is 180*l.*, is hired for at least one year. (12) In *Fawcett v. Cash* (13) Mr.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

Bequest of a year's wages, applies only to servants hired by the year.

Master advancing money to his servant, no defence for non payment of wages.

HIRING FOR A YEAR.

Clerk hired generally by the year.

Where wages recoverable, though not actually due.

Hiring at so much per month is a hiring for the year.

(1) *Booth v. Dean*, 1 M. & K. 530.

(2) *Hedgley v. Holt*, 4 C. & P. 104.

(3) *Ibid.*

(4) *Beeston v. Collyer*, 4 Bing. 309. 12 Moore, 552. 2 C. & P. 607.

(5) *Ibid.*

(6) *Lamburn v. Cruden*, 2 M. & G. 253.

(7) *Thomas v. Williams*, 3 N. & M. 545. A. & E. 685.

(8) *Ibid.*

(9) *Ibid.*

(10) *Pagani v. Gandolfi*, 2 C. & P. 370.

(11) *Fawcett v. Cash*, 5 B. & Ad. 904. 3 N. & M. 177.

(12) *Ibid.*

(13) *Ibid.*

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

When upon an agreement for three years, one year's wages can only be recovered.

Justice Patteson observed, "This is not the case of a domestic servant, where the contract might have been put an end to by paying a month's wages, or giving a month's warning. There was clearly a contract for one year at least. The words 'for one year' do or do not refer to the period of service. If they do, it is in terms a contract for a year; if they do not then no time is mentioned, and it is a general hiring for a year."

The defendants, directors of a mining company in South America, agreed to employ the plaintiff as superintendent of mines for three years, at a salary increasing yearly; and the directors were at liberty to dissolve the agreement at any time, on giving the plaintiff twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and if the plaintiff served the three years, he should be entitled to the expenses attending the return of himself and his family. The directors dismissed him before the expiration of the second year, without giving him notice or paying him the year's salary:—It was held, that he was only entitled to one year's salary from the date of his dismissal, and to his own expenses for his return to England; and the jury having found for those sums only, the court refused to increase the verdict by adding expenses incurred by the plaintiff for the return of his family, or for the salary which would have accrued from the time of his dismissal to the end of the third year, when his service would have terminated. (1)

To serve as a reporter to a newspaper.

Where the contract was to serve as a reporter to a newspaper for one whole year from a certain day, and so from year to year, to the end of each year commenced, so long as the parties should respectively please:—It was holden, that this contract could only be terminated at the end of the current year. (2)

Where a pecuniary present recoverable beyond the ordinary wages.

An agreement, by which a master promised his servant, in addition to his ordinary wages, a present of 20*l.*, the services to be at all events till the end of one year, was renewed in all its parts from year to year by the servant having continued several years, and nothing being said to the contrary by either party:—It was held, that the 20*l.* was due for every year of the service. (3)

HIRING FOR A QUARTER.

When servant under a quarterly hiring, discharged in the middle of the quarter.

Where a servant, under a quarterly hiring, is discharged by his master without sufficient cause in the middle of the quarter, it seems, that he cannot recover wages for the whole quarter under a count in *indebitatus assumpsit* for work and labour, although after the dismissal he tendered himself to serve through the remaining part of the quarter: but at all events, a servant improperly dismissed in the middle of a quarter, and who tendered himself, but was not allowed to serve through the remaining part of the quarter, cannot recover wages for such part in an action of *indebitatus assumpsit* for work and labour, commenced before the quarter ended: thus, in *Smith v. Hayward* (4) Lord Denman stated, "I think this rule was granted for the purpose of bringing the case of *Gandell v. Pontigny* (5) into question, and that there would have been no rule but for that case. The view taken by Lord Ellenborough of the point there decided,

Judgment of Lord Denman in *Smith v. Hayward*.

(1) *French v. Brooke*, 4 M. & P. 11.

(2) *Williams v. Byrne*, 7 A. & E. 177.

(3) *Mansfield (Earl of) v. Scott*, 1 Clark & F. 319.

(4) 7 A. & E. 544.

(5) 4 Camp. 375. 1 Stark 198.

was different from that which Lord Tenterden took of the same point in *Archard v. Hornor* (1); and, if we were bound to decide between the two authorities, I should say that the latter case is grounded on the better reason. There is obviously a great difference between suing for a breach of contract in dismissing the plaintiff, and for work and labour which, by reason of the dismissal, has not been performed. The defence in the last case would be the non performance of the work; in the other, some excuse for breaking off the contract. But, here, no question arises on this point, for the action is brought too soon. The plaintiff sues during a period of time in which he might have returned to the service and completed it, or obtained a mere beneficial employment in place of that withdrawn, so that he would have been benefited, and not hurt by the dismissal. The rule must be discharged."

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

The plaintiff was hired as superintendent of works at the rate of 150 guineas a year from a day named; either party to have the option of determining the engagement by a month's notice. At the end of eighteen months the plaintiff was dismissed without notice, or cause assigned, eighteen months' wages being then due to him. A month after dismissal he brought an action, declaring specially on the agreement, and stating as the breach, that the defendant would not continue him in his employ till the expiration of such month's notice, but discharged him in the middle of a year without notice; whereby he lost all the wages, profits, &c. which he might have derived from continuing in the defendant's service, and was still unemployed:—It was held, that the contract was for dismissal on a month's warning or a month's wages, and that, on this count, the plaintiff could recover only the month's wages; but that he might have added a common count for work and labour, and recovered under it his wages for the eighteen months (2); Mr. Justice Patteson observing, "An ingenious argument has been urged to supply the omission of a common count, which there is no doubt, the plaintiff might have added. It is not correctly stated, that the agreement was for a year; the hiring was 'at the rate of 150 guineas per annum'; therefore the year was divisible."

HIRING DETERMINABLE UPON A MONTHLY NOTICE.

If a servant be hired in the general way, without mentioning the time, that is a general hiring, and in point of law a hiring for the year (3), and the servant is considered to be hired with reference to the general understanding upon the subject (4), viz. that he shall be entitled to his wages for the time he shall serve, though he do not continue in the service during the whole year; and if he die before the end of the year, his personal representatives will be entitled to a proportionable part of the wages due to him at the time of his death.

Judgment of Mr. Justice Patteson in *Hartley v. Harman*.

The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there be a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of 500*l.* a year. (5)

Servant hired without mentioning time of service.

If the contract between master and servant be the usual one for a year,

(1) 3 C. & P. 349.

(2) *Hartley v. Harman*, 11 A. & E. 798.

(3) *Fawcett v. Cash*, 5 B. & Ad. 904. 3 N. & M. 177.

(4) Admitted in *Cutter v. Powell*, 6 T. R.

320., vide etiam *Huttman v. Boulnois*, 2 C. & P. 510.

(5) *Beeston v. Collyer*, 4 Bing. 309. 12 Moore, 552. 2 C. & P. 607.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

Menial servants liable to be discharged at a month's notice.

If a master turn away a servant causelessly, he is liable for a month's wages.

Judgment of Lord Kenyon in *Robinson v. Hindman*.

Master having cause for dismissal, need not state it to his servant.

If servant hired for a year, depart before that period, he cannot recover any wages for the period he has served.

To justify a master in dismissing his servant without warning, there must be either moral misconduct or wilful disobedience.

Clerk representing himself as a partner.

determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to have been for an entire year; and he cannot, on the common count for wages, recover for any further period than that, during which he had served. (1)

A head gardener with a house to live in rent free is a menial servant, and is liable to be discharged on a month's notice. (2)

In *Robinson v. Hindman* (3) it appeared, that the action was brought by the plaintiff to recover the amount of a month's wages, on the ground of his having been discharged by the defendant without any notice or warning. No agreement was proved to the effect of the claim, but general usage only was relied on; the defendant proved, that the plaintiff was negligent in his conduct, frequently absent when his master wanted him, and often slept out at nights:—upon which Lord Kenyon said, "that though in the present case he thought the plaintiff was not entitled to recover, on account of his misconduct, he was of opinion, that if a master turned away his servant without warning, or previous notice, and there was no fault or misconduct in the servant to warrant it, he ought to have the allowance claimed, of a month's wages, which he thought reasonable."

Where a justifiable cause of dismissal exists, it is sufficient to prevent the recovering of wages, though the servant might not in fact have been dismissed upon that ground; and it is not necessary, that the cause relied on in answer to an action for wages should have been stated at the time of the dismissal. (4)

If a yearly servant be dismissed by his master before the year expires, for such misconduct as will justify his dismissal, the servant is not entitled to any wages for the time during which he served, although the master may have previously recovered damages against him in consequence of the same act of misconduct (5): for although the *prima facie* presumption is, that a servant is hired for a year, yet if there be anything to rebut that presumption, such as having violated his duty before the expiration of the year, so as to prevent his master from having his services for the whole year, the servant cannot recover wages *pro rata*.

Thus, in *Callo v. Brouncher* (6) Mr. Justice Parke said, "that there was a contract for a year, with an implied agreement, that if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect, the defendant should be at liberty to part with the plaintiff." (7)

A master is justified in dismissing a clerk or servant for an assault with intent to ravish a maid-servant, and he will not be entitled to wages, even for the time during which he has served (8); and being the father of a bastard child is a good cause of discharge by a master. (9)

If a clerk, retained at a salary to manage a mercantile business, declare that he is a partner, and will transact the business as such, the employer may immediately dismiss him, although the party has not committed any

(1) *Archard v. Hornor*, 3 C. & P. 849.

(2) *Nowlan v. Ablett*, 2 C. M. & R. 54. 1 Gale, 72.

(3) 3 Esp. N. P. C. 235., vide etiam *Fawcett v. Cash*, 5 B. & Ad. 908. *Nowlan v. Ablett*, 2 C. M. & R. 55.

(4) *Ridgway v. Hungerford Market Comp.* 4 N. & M. 767. 3 A. & E. 171.

(5) *Ibid. Turner v. Robinson*, 6 C. & P. 15. 5 B. & Ad. 789.

(6) 4 C. & P. 518.

(7) Vide etiam *Spain v. Arnott*, 2 Stark.

(8) *Atkin v. Acton*, 4 C. & P. 308.

(9) *Rez v. Welford*, Cald. 57.

other act of misconduct, nor refused, in terms, to go on as clerk (1); Mr. Justice Littledale observing, "The cases referred to were properly decided; but this differs from them. In those there was no question that the party was servant, and he had done something improper in that capacity. Here the plaintiff disclaimed being a servant; if the defendant had suffered him to go on in the employment after that, the nature of his situation might have been doubtful to those who dealt at the house, and the circumstances would have been evidence for a jury, that the plaintiff really was a partner. Therefore the defendant was justified in dismissing him, and refusing to pay him wages from the time of dismissal."

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

If a servant have left his service for a considerable time, the presumption is, that all his wages have been paid. (2)

Servant having left his service for a considerable time.

If a clerk be engaged at a salary of 100*l.* a year, and having received his wages up to a certain time, serve some time longer and then leave the service before the year expires without due cause, and without any notice, he is not entitled to recover any wages up to the time of his quitting; and he is liable to a cross-action for leaving the service without notice. (3)

Clerk under a yearly hiring, quitting his service before the expiration of the year.

But if there have been no misconduct on either side, it may be left as a question for the jury, whether the facts of the case raise a presumption, that at the time of the resignation there was an understanding, that a payment *pro rata* should be made. (4)

An action will not lie by a deputy against his principal for an increase of salary, without an express agreement, where the latter had been appointed to a new office. (5)

Deputy against his principal.

If the contract be by deed, the action must be brought in debt or covenant (6);—if the contract be not by specialty, an action of debt or *assumpsit* can be maintained. (7)

FORM OF ACTION.

In *Smith v. Kingsford* (8) the plaintiff, a domestic servant, entered into the defendant's service on the 19th of November, and on the 15th of January her mistress caused her to be taken, on a charge of stealing, before a magistrate, who remanded her till the 20th, when she was discharged. On the 22d the plaintiff went to demand her clothes and wages, including 1*l.* 1*s.* in lieu of a month's warning. The defendant tendered her 2*l.* 2*s.* for the two months' actual service, but refused to pay the additional guinea:—It was holden, that, inasmuch as such placing the plaintiff in custody was no dissolution of the contract, the plaintiff was, under the circumstances, entitled to wages for the third month, which had been entered upon, and that the whole might be recovered under the common count for work and labour.

In an action of debt for wages as hired servant, it was pleaded, that the plaintiff was hired on the terms that, if he should be drunk during service, he should forfeit all wages then due; that after the wages became due, and whilst the plaintiff was in the defendant's service, he was drunk, whereby &c.: to which it was replied, that after the plaintiff was drunk, the defendant exonerated him from the forfeiture, and agreed to pay him the wages already due as aforesaid, and continued to employ him as such servant: to this it was new assigned,

PLEADINGS.

(1) *Amor v. Fearon*, 9 A. & E. 548.

(2) *Sellen v. Norman*, 4 C. & P. 80.

(3) *Huttman v. Boulnois*, 2 *ibid.* 510.

(4) *Lamburn v. Cruden*, 2 M. & G. 253.,
vide etiam *Bayley v. Rimmell*, 1 M. & W. 506.

(5) *Bell v. Drummond*, Peake's N. P. C. 45.

(6) *Ante*, 1053. tit. COVENANT — 1173.
tit. DEBT

(7) *Ante*, 229. tit. ASSUMPSIT — 1173. tit.
DEBT.

(8) 3 Scott, 279.

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTER FOR WAGES.

that part of the wages accrued due before the plaintiff was drunk, and the rest afterwards; and that the plaintiff declared, not only for wages due before, but also for wages due after &c.:—It was holden, on special demurrer, that the replication was bad for not shewing any consideration for agreeing to pay the forfeited wages; and that the replication and new assignment together were not double, for the plea applied only to wages due before forfeiture, and the new assignment to wages due after; and that where a defendant demurs to a replication and new assignment, for that “they are not, nor is either of them sufficient in law,” and shews for causes, that the replication is bad in itself, and both together bad for duplicity, the demurrer is divisible, and judgment may be for the defendant on the replication, and for the plaintiff on the new assignment. (1)

DAMAGES. WHEN NO FIXED SUM AGREED UPON. (2)

Where A. agreed to enter the service of B., and wrote to him a letter as follows:—“I hereby agree to enter your service as weekly manager, commencing next Monday; and the amount of payment I am to receive, I leave entirely to you;” and A. served B. in that capacity for six weeks:—It was held (*Parke B. dissentiente*), that the foregoing contract implied, that A. was to be paid something, at all events, for the services performed; and that the jury, in an action on a *quantum meruit*, might ascertain what B., acting *bonâ fide*, would or ought to have awarded (3); Mr. Baron Alderson observing, “It appears to us, that the nature of the contract between the parties is to be deduced from the paper itself, and that a contract to pay something is to be inferred from it; and the jury were to ascertain how much the defendant, acting *bonâ fide*, would or ought to have awarded.”

If A. agree to serve B. as an apothecary’s assistant, at such salary as C. shall think reasonable, and if it appear that no application have been made to C. to fix any salary, A. cannot recover any thing for his services in an action for work and labour. (4)

When an award is a bar.

In *Dunn v. Murray* (5) the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant in a certain capacity for a year, at the rate of 5 guineas per week throughout the year, the defendant undertook to employ him for a year, and alleged as a breach, that the defendant dismissed the plaintiff from his employ before the end of the year without any reasonable or probable cause. The declaration contained counts for wages, and for work and labour, &c. The cause, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages which he would have been entitled to receive from the defendant on the day when the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal, might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages, in consequence of the dismissal from the defendant’s employ before the end of the year, it was held, that the award of the arbitrator was a bar to such action.

(1) *Monkman v. Shepherdson*, 11 A. & E. 411.

(2) *Ante*, 298—315. tit. ASSUMPSIT. Justices possess the power of determining complaints between masters and servants, under stats. 20 Geo. 2. c. 19., 6 Geo. 3. c. 25., 4 Geo.

4. c. 34., 5 Geo. 4. c. 96., 7 Will. 4. & 1 Vict. c. 67.

(3) *Bryant v. Flight*, 5 M. & W. 117.

(4) *Owen v. Bowen*, 4 C. & P. 93.

(5) 9 B. & C. 780. 4 M. & R. 571.

An agreement for the hiring of a servant may be proved by parol although the terms of the agreement have been, by the direction of the parties, written down by a third person; such writing, though read over to the parties, not being signed by them. (1)

A contract for yearly service at a specific salary must be proved as alleged, although both the time and sum be averred under a *videlicet*. (2)

Where a defendant pleads only a plea which admits the plaintiff's right to recover, evidence of facts which would be a bar to the action is not admissible in mitigation of damages.

Thus, where, to an action for wrongfully discharging the plaintiff from the defendant's service, the defendant pleads only payment of money into court, he cannot prove, in mitigation of damages, that he discharged the plaintiff for misconduct. (3)

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTERS FOR WAGES.

EVIDENCE.

PAYMENT OF MONEY INTO COURT.

4. RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTERS FOR CHARACTERS OF SERVANTS.

"By some old statutes, regulations were established respecting the characters of labourers; but in the case of domestic and menial servants, there is no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there is no law to enforce the doing of it." (4)

But a master is liable to an action on the case, if he wilfully give a servant a false character.

In *Pattison v. Jones* (5) Mr. Justice Bayley said, "Generally speaking, any thing said or written by a master when he gives the character of a servant is a privileged communication. If a servant, therefore, charge a master with publishing a libel, it is competent to the latter, under the general issue to prove, that the alleged libel was written under such circumstances as to make it a privileged communication, and thereby throw on the plaintiff the necessity of shewing, that it does not come within that protection which the law gives to a privileged communication. But if the supposed libel be not communicated *bond fide*, it does not fall within the protection which the law extends to privileged communications."

In *Child v. Affleck* (6) Mr. Justice Parke said, "The rule laid down by Lord Mansfield in *Edmondson v. Stevenson* (7) has been followed ever since. It is, that in an action for defamation in giving a character of a servant, the 'gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved.'"

In an action by a servant for a libel in the form of a character, it is no

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTERS FOR CHARACTERS OF SERVANTS.

Any thing said or written by a master, is in general a privileged communication.

Judgment of Mr. Justice Bayley in *Pattison v. Jones*.

The gist of the action is malice.

Judgment of Mr. Justice Parke in *Child v. Affleck*.

(1) *Wrex v. Wrangle* (*Inhab. of*), 4 N. & M. 375. 2 A. & E. 314. 1 H. & W. 41.

(2) *Preston v. Butcher*, 1 Stark. 3.

(3) *Speck v. Phillips*, 5 M. & W. 279.

(4) *Per* Lord Kenyon in *Carrol v. Bird*, 3 Esp. N. P. C. 201. Bystat. 32 Geo. 3. c. 56. if any person give a false character of a servant, or a false account of his former service, or if any servant bring a false character, or alter a certificate, or alter a certificate of character, he will forfeit upon conviction 20l. with 10s. costs.

It seems, that if a servant, when he is taken into a service, bring a written character, and be afterwards dismissed for ill behaviour, that the master does no wrong, if, before he returns the character to the servant, he write upon it, that the person was afterwards in his service and dismissed for ill behaviour. *Taylor v. Rowan*, 7 C. & P. 70.

(5) 8 B. & C. 584.

(6) 9 *ibid*. 406.

(7) Bull. N. P. 7. (a.)

RESPONSIBILITIES AND IRRESPONSIBILITIES OF MASTERS FOR CHARACTERS OF SERVANTS.

Master not bound to prove every fact stated in his letter of character.

Where giving a false character is not actionable.

Judgment of Lord Alvanley in *King v. Waring*.

Master giving a character unsolicited.

Judgments of Mr. Justice Rooke and Mr. Justice Chambre in *Rogers v. Clifton*.

proof of express malice, that the master has communicated to the party inquiring his belief as to misconduct, after the plaintiff had quitted his service; nor that he has made a similar communication to persons from whom he received the plaintiff with a good character. (1)

If a master, in giving the character of a servant state in a letter certain facts, the master, in defence of an action brought by his servant for libel, is not bound to prove the truth of every fact he stated; it will be sufficient if he give such evidence, as will convince the jury, that he wrote what he did, with an honest conviction of its truth. (2)

In *King v. Waring* (3) Lord Alvanley said, "The question is, if, in consequence of the letter so written by the defendant, and which letter was false and unfounded, the plaintiff was prevented from getting a place. It has been decided, that giving a character to a servant, however injurious to him, yet if fairly given would not sustain an action; but if the letter was procured by another letter, not written with a fair view of inquiring a character, but to procure an answer, upon which to ground an action for a libel, such evidence, I think, ought not to be admitted." (4)

In *Pattison v. Jones* (5) Lord Tenterden said, "In ordinary cases of libel, malice is implied; but in cases of letters giving the character of servants, where that character is applied for, there is a burden of proof on the plaintiff to shew malice: however, where, as in this case, the first letter was sent by the former master, unasked, I am not satisfied that that rule applies."

In *Rogers v. Clifton* (6) Mr. Justice Rooke said, "A master may at any time, whether asked or not, speak of the character of his servant, provided that he speak in the honesty of his heart, and that an action cannot be maintained against him for so doing. In support of this opinion, the case of *Bell v. Thatcher* (7) may be referred to, where Sir Matthew Hale says, 'If such actions could be supported, a man should not speak disparagingly of a cook or a groom, but an action would be brought. At the same time, masters are not warranted in speaking ill of their servants from heat or passion.'" In the same case Mr. Justice Chambre said, "I will refer to the case of *Lowry v. Aikenhead* (8) before Lord Mansfield. In that case the rule laid down by Lord Mansfield was, that where a person intending to hire a servant applies to his former master for a character, the master is not bound to prove the truth of the character which he gives; for what he speaks of the servant he does not speak officiously, but only discloses that, which rests in his own knowledge alone; but, that where a master speaks ill of a servant, who has quitted his place, without any previous application having been made to him, there he must plead and prove the truth of the character in justification." (9)

(1) *Child v. Affleck*, 4 M. & R. 338. 9 B. & C. 408.

(2) *Pattison v. Jones*, 8 B. & C. 578.

(3) 5 Esp. N. P. C. 14.

(4) Vide *Pattison v. Jones*, 3 C. & P. 383.

(5) Ibid. 385.

(6) 3 B. & P. 593.

(7) Vent. 275.

(8) M. T. 8 Geo. 3.

(9) Vide etiam *Weatherston v. Hawkins*, 1 T. R. 110. *Herv v. Dawson*, Bull. N. P. 8. *McDougall v. Claridge*, 1 Camp. 267. *Hodgson v. Scarlett*, 1 B. & A. 232. *Hume v. Bentinck (Lord)*, 2 B. & B. 130., ante, 2219. tit. LIBEL.

5. REMEDIES OF MASTER FOR INJURY TO SERVANT.

I. Generally.

A master can maintain an action for an injury done to his servant, as false imprisonment, battery, &c., which deprives the master of his service.

In an action of tort for wounding the plaintiff's servant, whereby he was disabled from serving, it was held, that the jury may give damages for the loss of service, not only before action brought, but afterwards, down to the time when, as it appears in evidence, the disability may be expected to cease; Mr. Justice Coleridge observing, "The argument here, that the complaint is grounded, not on the act, but on the resulting damage, is a fallacy. The action is for the two united." (1)

A declaration for such injury, stating the servant to have been permanently crippled, is supported by evidence, that the injured part is disabled, and likely to remain so, but, with care, will be restored in time. (2)

In *Flemington v. Smithers* (3) it appeared, that the plaintiff's son, who was in fact his servant, in delivering parcels from a stage coach received an injury, by which the father was deprived of his services, Chief Justice Abbott said, "With regard to the amount of damages, I should tell you, that this action is brought to recover such sum as you (the jury) may think the plaintiff entitled to for the loss of the services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did; but beyond those things, it appears to me, that you ought not to go in your estimate of damages."

The servant is a competent witness, the gist of the action being the loss of his services to his master.

REMEDIES OF MASTER FOR INJURY TO SERVANT.

GENERALLY.

Master can maintain an action for an injury done to his servant.

DAMAGES.

Master entitled to damages from the time when the disability commenced, to the time when it is expected to cease.

Judgment of Chief Justice Abbott in *Flemington v. Smithers*.

Servant a competent witness.

II. Seduction.

An action of case or trespass (4) is maintainable by a father or master for a compensation in damages for debauching his daughter or servant, and getting her with child, and for the expenses attending her confinement. To support this action, there must be some appearance, at least, of the relation of master and servant subsisting between the father and his daughter. (5)

But if the daughter be merely absent on a visit at the time she was seduced, the action can be maintained. (6)

A father may maintain an action of trespass for the seduction of his daughter, who was a married woman, but living with him as his servant, being separated from her husband; and, "in the absence of any interference

SEDUCTION.

WHEN THE ACTION CAN BE MAINTAINED. BY PARENT.

Daughter a married woman.

(1) *Hodgell v. Stallebrass*, 11 A. & E. 301.

(2) *Ibid.*

(3) 2 C. & P. 292.

(4) *Chamberlain v. Hazlewood*, 7 Dowl. P. C. 816.

(5) *Anon.* 1 Smith, 333.

(6) *Johnson v. M'Adam*, cit. in *Dean v. Peel*, 5 East, 47. *Harris v. Butler*, 2 M. &

W. 542. *Holloway v. Abell*, 7 C. & P. 528.

REMEDIES OF
MASTER FOR
INJURY TO SER-
VANT.

Hiring as a
servant the
daughter of an-
other for se-
duction.

By UNCLE for
the seduction
of his niece.

By STRANGER
for an adopted
child.

By MASTER
for debauching
his servant.

WHEN THE
ACTION CANNOT
BE MAINTAINED.

The daughter
must be the
father's servant.

To sustain the
action there
must be dam-
num et injuria.

Judgment of
Mr. Baron
Parke in *Blay-
mire v. Haley*.

by the husband, it is not competent to the defendant to set up his rights as an answer to the action." (1)

A father may bring an action for debauching his daughter, though the daughter be above twenty-one years of age, where acts of service are proved, though there be no contract for service. (2)

Where a defendant, intending to seduce the servant and daughter of the plaintiff, hired her as his servant, and thereby obtained possession of her person, it was held, that the father might maintain an action on the case against him for such seduction, although the daughter was living apart; because, as he hired her with the view of seducing her, "the relation of master and servant was never contracted between them." (3)

In trespass for seducing the plaintiff's niece and servant, *per quod servitium amisit*, evidence that the party seduced (being about sixteen years of age) occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece; and such relation is not destroyed by the circumstance of the niece's being entitled, on her coming of age, to a sum of nearly 500*l.*, of which the interest is applied in the mean time for her benefit. Proof in such case, that the niece, after her seduction and abandonment by the defendant, returned to her uncle's house, where she continued some time in a state of great agitation, and received medical attendance, and was obliged to be watched lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle which is necessary to maintain the action. (4)

It may also be maintained, by a stranger in blood, for the seduction of an adopted child. (5)

A master may maintain an action for debauching his servant, though he is no way related to her in blood. (6)

The seduced cannot support this action. Thus, in *Norton v. Jason* (7) it was holden, that, although the daughter cannot have an action, yet the father may; not for assaulting his daughter, and getting her with child, because this is a wrong particularly done to her, yet for the loss of her service caused by this.

In order to maintain an action for seduction, the daughter must be the father's servant; and though he receives part of her wages, and she is under age, yet, if she be not his servant, he cannot maintain such action. (8)

If the daughter be seduced while she was in the domestic service of another person, although it be alleged in the declaration, that she was there with the intention, on the part of her father and herself, that she should return to her father's when she quitted her service, unless she should go into another service, the action cannot be maintained. Thus, in *Blaymire v. Haley* (9) Mr. Baron Parke observed, "The averment (that the girl left her father's house with his consent, and with the intention on both their parts, that she should return thither on quitting her service) was evidently inserted

(1) *Per* Lord Tenterden in *Harper v. Luffkin*, 7 B. & C. 387. 1 M. & R. 166.

(2) *Bennett v. Allcott*, 2 T. R. 166.

(3) *Per* Abbott C. J. in *Speight v. Oliveria*, 2 Stark. 493.

(4) *Manvell v. Thomson*, 2 C. & P. 303. *Fores v. Wilson*, Peake's N. P. C. 77.

(5) *Irwis v. Dearman*, 11 East, 53. *Edmondson v. Machell*, *ibid.* 24, 25.

(6) *Fores v. Wilson*, Peake's N. P. C. 77.

(7) *Style*, 398.

(8) *Carr v. Clarke*, 2 Chitt. 260. *Pethwaite v. Parkes*, 3 Burr. 1878.

(9) 6 M. & W. 55.

for the purpose of shewing an *animus revertendi* in the daughter, and so assimilating this case to those in which actions have been held to lie for the seduction of a girl while on a visit to a friend. (1) But this case is very distinguishable from those: here the girl was in the actual service of another person, and her intention was not to return at any definite time to her father's house, but only on her dismissal from her service, and in the uncertain event of her not going into another service. That an action for seduction will not lie under such circumstances, has been expressly decided in *Dean v. Peel*. (2) In order to sustain this action, there must be *damnum et injuria*. The plaintiff not having shewn any right to the services of his daughter at the time of the seduction, there is here *damnum absque injuria*. A mere temporary absence undoubtedly would not be sufficient to defeat the action; but that is very different from a continued and regular service."

REMEDIES OF
MASTER FOR
INJURY TO SER-
VANT.

No action will lie for debauching a daughter, though the mother maintain her and her child during her lying-in, unless for the consequential loss of service. (3)

Mother main-
taining her
daughter dur-
ing her con-
finement.

A father, who permits a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her (4); in fact, if the father be the plaintiff, and he has misconducted himself, the action cannot be maintained.

Father per-
mitting a mar-
ried man to
visit his daugh-
ter as a suitor.

The right of action for the seduction of a servant does not pass to the master's assignees on his bankruptcy. (5)

Assignees of a
bankrupt for
the seduction
of bankrupt's
servant.

An action for seducing the daughter and servant of the plaintiff may be brought either in trespass for the direct injury, *per quod servitium amisit*, or in case for the consequential damage. Thus, in *Chamberlain v. Hazlewood* (6) Mr. Baron Parke observed, "There may have been no direct decision on this subject; but it has been the constant practice with pleaders, to declare either in one form of action or the other. The cases which have been cited, of *Woodward v. Walton* (7) and *Ditcham v. Bond* (8), are only authorities to shew, that trespass may be maintained, although the observations of Chambre J. and Dampier J. are certainly at variance with what has been for years the established practice. We should do much mischief, if we were to shake a practice which has so long prevailed. The plaintiff has the option to bring trespass for the direct injury to his servant *per quod servitium amisit*, or case for the consequential damage."

DECLARATION
AND PLEAD-
INGS.

FORM OF AC-
TION.
Judgment of
Mr. Baron
Parke in *Cham-
berlain v. Hazle-
wood*.

The declaration should contain an allegation, that the relation of master and servant existed at the time the seduction was accomplished. (9)

Allegation, that
the relation of
master and
servant existed.

The action was held to lie by a father, although the daughter had not been actually confined before action brought, and although he had voluntarily turned her out of his house upon discovery of her pregnancy. (10)

The effect of the general issue in actions of trespass for personal injuries, has not been altered by the new rules under the plea of "not guilty;"

PLEADINGS.

(1) *Booth v. Charlton and Johnson v. M'Adam*, cit. 5 East, 47., vide *Harris v. Butler*, 2 M. & W. 542.

(2) 5 East, 45.

(3) *Salerthwaite v. Duerst*, 5 East, 47. n. *Harris v. Butler*, 2 M. & W. 539.

(4) *Reddie v. Scott (Clerk)*, Peake's N. P. C. 316.

(5) *Howard v. Crowther*, 8 M. & W. 601.

(6) 5 ibid. 517.

(7) 2 N. R. 476.

(8) 2 M. & S. 436.

(9) *Salerthwaite v. Duerst*, 5 East, 47. n.

(10) *Per Lord Denman in Joseph v. Cawander*, Winton Sum. Ass. 1834, cit. Roscoe's Ev. 483.

REMEDIES OF
MASTER FOR
INJURY TO SER-
VANT.

EVIDENCE.

COMPETENCY
OF WITNESS.

Daughter or
servant a com-
petent witness
for the plaintiff.

ACTS OF SER-
VICE.

Not necessary
to shew any
positive acts of
service.

Judgment of
Mr. Justice
Littledale in
in *Maunder v.*
Venn.

Not requisite
to prove a con-
tract of service.

CHARACTER.

The general
character and
conduct of the
seduced.

and in an action of case for seduction, the service as well as the seduction is put in issue. (1)

The daughter or servant is a competent witness to prove the plaintiff's case.

In an action brought by a parent for the seduction of his daughter, it is not necessary to sustain the action, that the daughter should be produced as a witness at the trial, "though the withholding of her is open to observation." (2)

In *Blaymire v. Haley* (3) Mr. Baron Parke stated, "A constructive service must be proved in all cases." In *Manvell v. Thomson* (4) Chief Justice Abbott said, "the smallest degree of service will do." In *Bennett v. Allcott* (5) Mr. Justice Buller held, that "In actions of this kind the slightest evidence is sufficient, even milking cows;" and in *Carr v. Clarke* (6) Chief Justice Abbott observed, "Even making tea has been said to be an act of service."

In *Maunder v. Venn* (7), which was an action for seduction, Mr. Justice Littledale said, "that the proof of any acts of service was unnecessary; it was sufficient that she was living with her father, forming part of his family, and liable to his control and command. The right to the service is sufficient. I remember Lord Alvanley so ruling, and I have always myself been of the same opinion; if it were otherwise, no action could be maintained for this injury by a father in the higher ranks of life, where no actual services by the daughter are usual."

It is not necessary to prove a contract of service, if the daughter was in fact a servant; or that she slept in the house (8); or was under the control of her father. (9)

In *Holloway v. Abell* (10) it appeared, that A. occupied two farms seven miles distant from each other; A. resided at one, and his son and his daughter at the other, where she acted as mistress, and had the poultry for her benefit. This was holden sufficient to prove her the servant of A., because it is not essential to prove actual service by the daughter; it being, as previously observed, only requisite, for her to be under the control of her father, otherwise a duke or marquis could never bring an action for seduction.

In *Magrath v. Browne* (11), which was an action for seduction, the plaintiff's counsel asked the following question, "Have you had an opportunity of observing the conduct of the plaintiff and her daughter; and if so, have you ever known them to be guilty of any impropriety of conduct?"

This question was objected to, because it had been decided in *Bamfield v. Massey* (12) that the plaintiff could not give evidence of the daughter's good character, unless in answer to evidence of general bad character on the other side. That in *Dodd v. Norris* (13), where the cross-examination went strongly to reflect on the witness's character, Lord Ellenborough would not allow witnesses to be called to character, as no evidence of her

(1) *Holloway v. Abell*, 7 C. & P. 528.

(2) *Per Wood B.* in *Farmer v. Joseph*,
Holt's N. P. C. 451.

(3) 6 M. & W. 56.

(4) 2 C. & P. 304.

(5) 2 T. R. 168.

(6) 2 Chitt. 261. *Mann v. Burrett*, 6 Esp.
N. P. C. 32.

(7) M. & M. 323.

(8) *Mann v. Barrett*, 6 Esp. N. P. C. 23.

(9) *Holloway v. Abell*, 7 C. & P. 528.

(10) Ibid.

(11) *Armstrong & Macartney* (Irish),
136.

(12) 1 Camp. 460.

(13) 3 ibid. 519.

bad character had been given on the part of the defendant; because, if the cross-examination lead to any imputation on the witness's character, she might be re-examined as to that, and would have a full opportunity of explanation. That there was an exception to the rule, if the cross-examination impeached the credit of the witness as to the *res gesta*; but that was not the present case; and so long as no evidence was offered of general bad character, the question could not be asked. To these observations reliance was placed as an answer on *Bate v. Hill* (1), in which it was held by Mr. Justice Park, "that the plaintiff's counsel might call witnesses to the general good character of the party seduced, if her character had been attacked in cross-examination;" but Chief Baron Brady observed, "I will not interfere with the cases cited by counsel; they apply to questions as to general character: the question objected to, is as to the conduct of the plaintiff and her daughter; there is a great distinction, and I will allow this question."

REMEDIES OF
MASTER FOR
INJURY TO SER-
VANT.

Judgment of
Chief Baron
Brady in *Ma-
grath v. Browne*

The evidence of general good character of the party seduced in *Bate v. Hill* (2) seems to have been admitted by consent, or at least without argument, while *Bamfield v. Massey* (3) and *Dodd v. Norris* (4) were ruled after argument by Lord Ellenborough after an interval of six years between one and the other; and although the principle of *Bate v. Hill* was acted upon in *Brown v. Goodwin* (5), it cannot be laid down as positive, that where Mr. Justice Park gave no reasons for his decision, and where the evidence was admitted by consent, or at least without objection, that the judgments of Lord Ellenborough should be considered as overruled. (6)

In an action of seduction, the daughter is not bound to answer in cross-examination, whether she had not previously been criminal with other men. (7)

Daughter not
bound to an-
swer whether
she had sexual
intercourse
with other men

Where the seduced was called, and asked on cross-examination if she knew one A. B., which she denied; and in defence it was sought to contradict her, by proving, that she had stated that A. B. was the father of her illegitimate child, and that he had deserted her:—It was held, that the evidence was inadmissible, Lord Denman observing, "If the language had been offered in evidence as shewing, that the witness went about in a light manner saying things of this description, I should not have rejected it. But the evidence was put pointedly, as bearing upon particular facts which she had stated. When words are to be proved, as having been uttered by a witness, it is always expected, that he shall have an opportunity of explanation; and that rule applies here." (8)

Judgment of
Lord Denman
in *Carpenter v.
Wall*.

(1) 1 C. & P. 100.

(2) *Ibid*.

(3) 1 Camp. 460.

(4) 3 *ibid*. 519.

(5) 1 Irish Circuit Cases, 61., *antè*, 1788.

(6) It has been stated by Messrs. Armstrong and Macartney in their learned reports of Irish judgments (137. n.), that "general character is necessarily vague, founded on common report, 'oft got without merit, and lost without deserving;' and an opinion on it, whether for good or evil, may be quite compatible with much, nay total, ignorance of the real character; whereas, the evidence of a witness, who speaks to conduct, must rest on the personal observation of the witness himself, is of the highest nature known to the law, and carries the strongest conviction to the minds of the jury. And

as it is now settled, that any number of witnesses may be called to speak to the conduct of a party in the situation of the plaintiff's daughter, to attest her purity, if possible, from the hours of childhood and innocence to the moment of her degradation; and as the evidence as to the conduct is of a higher and more satisfactory nature than that as to general character, and therefore, in prudence, will be resorted to when it can be had, it may be concluded, that wherever the evidence as to conduct is available, the *vexata questio* of evidence as to general character in the absence of evidence of bad character is not likely to arise."

(7) *Dodd v. Norris*, 3 Camp. 519.

(8) *Carpenter v. Wall*, 11 A. & E. 803.
3 P. & D. 457.

REMEDIES OF MASTER FOR INJURY TO SERVANT.

Defendant may call witnesses to prove acts of sexual intercourse

Promise of marriage.

DAMAGES.

Principle by which the amount of damages is to be calculated.

Judgment of Lord Eldon in *Bedford v. M^r Kowl*.

Judgment of Lord Ellenborough in *Irwin v. Dearman*.

In an action for seduction of the plaintiff's daughter, the defendant may examine witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses, who may each be asked as to the fact, and the time and place of its occurrence; but if the jury are of opinion that the defendant had such intercourse with the plaintiff's daughter as caused him to be the father of the child, the plaintiff is entitled to the verdict, and the evidence of her unchastity with others, is only to be considered in mitigation of damages. (1)

In *Capron v. Balmond* (2) Mr. Justice Parke not only allowed proof of a promise of marriage (3), but also that the defendant had persuaded the daughter to take measures to destroy her offspring, and had spoken to her about hiring a nurse and other arrangements in contemplation of marriage, these facts being all immediately connected with the act complained of.

The claim to damages in cases of seduction is founded on the strictest principles of justice, the enforcement of which is essentially requisite to curb licentiousness, and preserve the morals of society.

In *Bedford v. M^r Kowl* (4) Lord Eldon said, "The defendant's counsel object that all evidence, except that which applies to loss of service, is inadmissible. In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to her child; in such case, I am of opinion, that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children, whose morals may be corrupted by her example." (5)

So, likewise, in *Andrews v. Askey* (6), which was an action by a widow for the seduction of her daughter *per quod servitium amisit*, the jury were directed, that they were not to confine the assessment of damages to the mere loss of service, but might give some damages for the distress and anxiety of mind which the mother had felt.

The foregoing principles are not confined to parent and child, but extend to all other cases: thus, in *Irwin v. Dearman* (7) Lord Ellenborough said, "This has always been considered as an action *sui generis*, where a person, standing in the relation of a parent, or *in loco parentis*, is permitted to recover damages for an injury of this nature *ultra* the mere loss of service. But even in the case of an actual parent, the loss of service is the legal foundation of the action; and however difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate, and cannot now be shaken. And having been considered, in the case of *Edmondson v. Machell*, to extend to an aunt, as one standing *in loco parentis*, I think that this plaintiff, who had adopted and bred up the daughter of a friend and comrade from her infancy, seems to be equally entitled to maintain the action on account of the loss of service, to him aggravated by the injury done to the object on whom he had thus placed his affection."

(1) *Verry v. Watkins*, 7 C. & P. 308.

(2) *Exeter Spring Ass.* 1831, cit. *Roscoe's Ev.* 484.

(3) *Sed vide Dodd v. Norris*, 3 Camp. 519. *contra*.

(4) 3 Esp. N. P. C. 119.

(5) *Quare*, Whether the jury can take into their consideration the injury sustained by the servant herself in having been deflowered? *Edmondson v. Machell*, 2 T. R. 4.

(6) 8 C. & P. 7.

(7) 11 East, 24.

The fact of a promise of marriage having been given to the seduced by her seducer will not affect the right of the father or master to recover damages: thus, in *Tullidge v. Wade* (1) Chief Justice Wilmot observed, "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of 20s., yet the jury have done right in giving liberal damages; and if A. B. brings another action against defendant for the breach of promise of marriage, so much the better; he ought to be punished twice."

REMEDIES OF MASTER FOR INJURY TO SERVANT.

Promise of marriage will not affect the right of the father or master to damages.

Judgment of Chief Justice Wilmot in *Tullidge v. Wade*.

Evidence may be given on an inquisition of damages in an action for seduction, that the defendant visited at the plaintiff's house for the purpose of paying his addresses to the daughter with an intention of marriage. (2)

And in case of an inquisition of damages for seduction, where 1000*l.* had been awarded by the jury to the plaintiff, although the parties were in a moderate sphere of life, the court of Exchequer refused to set it aside on the ground of the damages being excessive; and they considered themselves bound by the sheriff's minutes of the evidence, verified by his affidavit, which was given before him. (3)

The plaintiff is allowed to prove the amount of the expenses sustained by him in consequence of his daughter's confinement, &c. (4) The amount of a surgeon's bill, though not paid, may be recovered; but not a physician's fees if not actually paid, since the payment of such fees cannot be enforced. (5)

Money cannot be paid into court under stat. 3 & 4 Will. 4. c. 42. s. 21.

PAYMENT OF MONEY INTO COURT.

III. Enticing away Servants and Apprentices.

In *Hart v. Aldridge* (6) Mr. Justice Aston said, "It is clear that a master may maintain an action against any one for taking and enticing away his servant, upon the ground of the interest, which he has in his service and labour."

But the master may waive his action for the tort (7), and bring an action of *indebitatus assumpsit* for work and labour done by his apprentice, against the person who tortiously employed him.

An action will lie for continuing to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master, or know, when he employed him, that he was the servant of another (8); in fact, "a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master—the very act of giving him employment is affording him the means of keeping out of his former service." (9)

Trespass on the case lies by a master for seducing his journeyman away (10), although only hired by the piece, and not for any certain

ENTICING AWAY SERVANTS AND APPRENTICES.

SERVANTS. Action lies for enticing away the servant of another;

or for seducing away a journeyman.

(1) 3 Wils. 19.

(2) *Elliott v. Nicklin*, 5 Price, 641.

(3) *Ibid.*

(4) *Tullidge v. Wade*, 3 Wils. 19.

(5) *Dixon v. Bell*, 1 Stark. 289.

(6) *Cowp.* 54.

(7) *Lightly v. Clouston*, 1 Taunt. 112., vide etiam *Foster v. Stewart*, 3 M. & S. 191.

(8) *Blake v. Langton*, 6 T. R. 221.

(9) *Per cur.* *ibid.*

(10) *Hart v. Aldridge*, *Cowp.* 54.

**REMEDIES OF
MASTER FOR
INJURY TO SER-
VANT.**

Judgment of
Lord Mans-
field in *Hart v.*
Aldridge.

time. (1) Thus, in *Hart v. Aldridge* (2) Lord Mansfield observed, "What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might perhaps have been different, if the men had taken work for every body, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time."

No action lies for seducing a servant from his master, who had paid the penalties stipulated by his articles for leaving him (3); because, in such a case, "the plaintiff has already received from the servant more than ample satisfaction for the injury done him; he cannot afterwards proceed against any other person for a further satisfaction." (4)

Inducing ser-
vant to leave his
master's service
at the expira-
tion of the time
of service
agreed upon.

An action will not lie for inducing a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention at the time of quitting his master's service. (5)

EVIDENCE.

In an action against A. for seducing the servant of B. from his service, it is sufficient evidence, that A. asked the servant to enlist in the army, and afterwards gave him money. (6)

DAMAGES.

In an action on the case for enticing away the plaintiff's servants, the measure of damages is not to be ascertained as the actual loss he sustained at the time, but for the injury done him by causing them to leave his employment. (7)

APPRENTICES.

Action will lie
for seducing
away, or retain-
ing an appren-
tice.

An action will lie for seducing away or retaining an apprentice. It is not material, whether the apprentice be legally apprenticed or not; it is sufficient, if he be so *de facto*. (8)

Captain of a
man-of-war
cannot retain
the apprentice
of another.

The captain of a ship of war detaining an apprentice who had been impressed after verbal notice by such apprentice of his condition, is liable in an action by the master for wages for the service of the apprentice. (9)

Where master
not a house-
keeper.

An action cannot be maintained for harbouring an apprentice as such, if the master to whom he was bound was not a housekeeper, and of the age of twenty-four years (10); because, as observed by Chief Justice Mansfield, "If such taking is illegal, and contrary to law, it is impossible that the master can recover damages for the violation of a supposed right, originating only in a contract which the law forbids."

Judgment of
Lord Mans-
field in *Gye v.*
Felton.

- (1) *Anon.* Loft, 493.
- (2) *Cowp.* 56.
- (3) *Bird v. Randall*, 3 Burr. 1345. 1 W. Black. 373. 387.
- (4) *Per* Lord Mansfield, *ibid.*
- (5) *Nichol v. Martyn*, 2 Esp. N. P. C. 734.
- (6) *Keane v. Boycott*, 2 Hen. Black. 511.
- (7) *Gunter v. Astor*, 4 Moore, 12. *Dixon v. Bell*, 1 Stark. 287. 5 M. & S. 198.
- (8) *Barber v. Dennis*, 1 Salk. 68. 6 Mod. 69.
- (9) *Eades v. Vandeput*, 5 East, 39. 2 The prize money gained by an apprentice serving on board a letter of marque ship does not belong (*Carsan v. Watts*, 3 Doug. 350.) to the master, the usage being proved that such money is the property of the apprentice.
- (10) *Gye v. Felton*, 4 Taunt. 876.

NUISANCE.

1. GENERALLY, pp. 2359—2363.

DEFINED — DANGEROUS OPENINGS AND NON REPAIRS — NOXIOUS AND OFFENSIVE TRADES — *When the action cannot be maintained.*

2. ABATEMENT OF NUISANCE, pp. 2363—2365.

I. PUBLIC NUISANCE, p. 2363.

II. PRIVATE NUISANCE, pp. 2363, 2364.

III. NOTICE TO ABATE — NON-ABATEMENT OF NUISANCE, pp. 2364, 2365.

3. DECLARATION AND PLEADINGS, pp. 2365—2368.

VENUE—FORM OF ACTION—PARTIES — *The actor — Owner of the land — Assignee — Tenant for years — Tenants in common — Devises — Reversioner — Persons in the exercise of a public duty* — PLEADINGS — *Effect of plea of "not guilty" — Public way — Making a noise.*

4. EVIDENCE, pp. 2368—2372.

Proof by plaintiff — "View" under Reg. Gen. H. T. 2 Will. 4. — Local proof of nuisance — RIGHT OF POSSESSION — LICENSE — Canal company must prove a compliance with their act of incorporation — Acknowledgment of nuisance by defendant — Damage from mischievous animals.

5. LIMITATION OF ACTION — PARTICULARS OF DEMAND — DAMAGES — COSTS — JUDGMENT, pp. 2372—2374.

1. GENERALLY.

GENERALLY.

The term "nuisance" signifies any thing that causes hurt, inconvenience, damage, or annoyance. The rule of the common law is that of the civil law, "*sic utere tuo ut alienum non lædas.*"

Nuisances are of two kinds, viz. public or private nuisances:—public or common nuisances affect the public, and are an annoyance to all the king's subjects; and private nuisances which merely hurt or annoy the lands, tenements, or hereditaments of another. The latter are only remediable by civil proceedings; but the former, as they annoy the whole community in general, and not merely some particular persons, are punishable by indictment, and are not the subject of a civil suit. It would be unreasonable to multiply actions by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects. (1)

(1) *Aldred's case*, 9 Co. 59. (a.) *William's case*, 5 *ibid.* 73. By stat. 7 & 8 Geo. 4. c. 18. s. 1. if any person shall set or place any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with intent that the same, or whereby the same may destroy, or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, it shall be a misdemeanour. Provided (sects. 2. & 4.) that it shall not be illegal to set guns or traps, such as may have been usually set to destroy vermin, or spring-guns, man-traps, or other engines,

GENERALLY.

In general, an action is not sustainable for public nuisance, unless the plaintiff have sustained special damage.

If by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein, then, for this particular damage, which is not common to others, the party shall have his action. But the particular damage in this case must be direct, and not consequential, as by being delayed on a journey of importance (1); and if the plaintiff did not act with ordinary care and skill with a view to protect himself from the mischief, he cannot recover. (2)

If a party living in the neighbourhood, and who has been in the habit of passing to and fro on a highway, be obliged by a nuisance thereto to take a more circuitous route in his transit to and from the nearest market-town to his house, it is a private injury, for which he may sue as well as indict. (3) Being delayed four hours by an obstruction in a highway, and being thereby prevented from performing the same journey as many times in a day, as if the obstruction had not existed, is a sufficient injury to entitle a party to sue for the obstruction. (4) And if the nuisance prevent the plaintiff navigating his barges on a public navigable creek, and compel him to convey his goods out of the same over a great distance of land, it will be actionable. (5) But the mere obstruction of the plaintiff in his business (6), or delaying him a little while on a journey (7), is not such a damage as will entitle the party to his action; the damage ought to be direct, not consequential. (8)

DANGEROUS
OPENINGS AND
NON-REPAIRS.

An action is maintainable to recover damages for any injury resulting to the person or property of the plaintiff, from the carelessness and negligence of the defendant or his agent in the use or management of his own property. (9)

In some cases there may have been negligence in both parties, and yet the plaintiff may be entitled to recover: thus, in *Bridge v. Grand Junction Railway Comp.* (10), Mr. Baron Parke said, "The rule of law is laid down in *Butterfield v. Forrester* (11), and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong." (12)

If a horse and cart be left standing in the street, without any person to watch them, the owner, whose servant had so negligently left the cart, is liable for damages done by them, although there may be evidence to show

from sunset to sunrise, in dwelling-houses, for the protection thereof.

For decisions previous to this statute for injuries arising from spring-guns, &c. vide *Hott v. Wilkes*, 3 B. & A. 304. *Dixon v. Bell*, 5 M. & S. 198. 1 Stark. 287. *Townsend (Clerk) v. Wathen*, 9 East, 277. *Deane v. Clayton (Bart.)*, 2 Marsh. 577. 1 Moore, 203. 7 Taunt. 489., et vide *Sears v. Lyons*, 2 Stark. 317. *Bird v. Holbrook*, 4 Bing. 628. 1 M. & P. 607. *Jay v. Whitfield*, cit. 3 B. & A. 308. (c.)

(1) *Paine v. Patrick*, Bull. N. P. 26. (a.) S. C. nom. *Partrich*, Carth. 194.

(2) *Butterfield v. Forrester*, 11 East, 60. *Flower v. Adam*, 2 Taunt. 314.

(3) *Rex v. Taunton, St. Mary (Inhab. of)*, 3 M. & S. 472.

(4) *Wilkes v. Hungerford Market Comp.* 3 Bing. N. C. 283.

(5) *Rose v. Miles*, 4 M. & S. 101.

(6) *Hubert v. Groves*, 1 Esp. N. P. C. 148. *Rose v. Miles*, 4 M. & S. 103.

(7) *Paine v. Partrich*, Carth. 191.

(8) *Ibid.* 3 Black. Com. by Chitt. 213.

(9) *Vide ante*, 1003—1008. tit. Cas.

(10) 3 M. & W. 248.

(11) 11 East, 60.

(12) *Vide etiam Marriott v. Stanley*, 1 M. & G. 568.

that the damage was directly occasioned by the act of a person striking the horse. (1)

GENERALLY.

The principle of responsibility is, that the agent is the mere instrument of the defendant, and that it is incumbent upon him to select an agent of competent skill and ability, and to exercise a control and authority over him, in order that others may not be injured.

Principle of responsibility.

The occupier of a house is bound to rail or fence in the area; and if an accident happen, it is no defence, that the premises had been in the same situation for many years before the defendant came into possession of them. (2)

Occupiers bound to rail or fence in areas.

An occupier of a house who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap thereof be so placed and secured, that, under ordinary circumstances, it shall not fall in or occasion injury; but if the occupier have so placed and secured it, and a wrongdoer throw it over, the former will not then be liable in damages for any injury occasioned thereby. (3)

Flaps of cellars must be so secured, as not to occasion injury under ordinary circumstances.

Where A. contracted with B. to repair his (A.'s) house for a stipulated sum, and B. contracted with C. to do the work, and C. with D. to furnish the materials, and the servant of D. brought a quantity of lime to the house and placed it on the road, by which the plaintiff's carriage was overturned, it was held, that A. was liable for this damage. (4) So where an incorporated waterwork company contracted with certain pipe-layers to lay down pipes, who employed workmen by whose negligence an accident happened, Lord Ellenborough held the company liable. (5)

Proprietors of houses liable for consequential injuries arising from the neglect of those whom they employ.

If the owner of a house be bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger, from the want of repair. (6)

Where the tenant of a house was bound to repair it, but the landlord superintended the repairs, and the cellar was left in a dangerous state, and an accident happened, the landlord was held liable. (7)

Cellar left in a dangerous state.

If there be an intermediate agent, or more than one, the maxim of law is *respondeat superior*. "This maxim is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it" (8); and the action ought to be brought either against the very party who committed the injury, or against the principal. (9)

Thus, where a defendant had employed a bricklayer to make a sewer, who left it open, in consequence of which the plaintiff fell in and broke his leg, the defendant was held liable. (10)

Sewer left open.

- (1) *Illidge v. Goodwyn*, 5 C. & P. 190. (7) *Leslie v. Pounds*, 4 Taunt. 649. *Payne v. Rogers*, 2 Hen. Black. 349.
- (2) *Cowpland v. Hardingham*, 3 Camp. 398. (8) Per Best C. J. in *Hall v. Smith*, 2 Bing. 160.
- (3) *Daniels v. Potter*, 4 C. & P. 262. (9) *Stone v. Cartwright*, 6 T. R. 411.
- Proctor v. Harris*, *ibid.* 337. (10) *Sly v. Edgley*, 6 Esp. N. P. C. 6.
- (4) *Bush v. Steinman*, 1 B. & P. 404., et vide *Harris v. Baker*, 4 M. & S. 29. *Laugher v. Pointer*, 5 B. & C. 560. 8 D. & R. 563. For negligence in the repairing or taking down of houses, vide *anté*, 1012, 1013. tit. CASE. *Dodd v. Holme*, 1 A. & E. 493.
- (5) *Matthews v. West London Waterworks Comp.* 8 Camp. 403. *Drew v. New River Comp.* 6 C. & P. 754.
- (6) *Payne v. Rogers*, 2 Hen. Black. 349. *Brown v. Windsor*, 1 C. & J. 20. *Wyatt v. Harrison*, 3 B. & Ad. 871. *Lukin v. God-sall*, Peake's Add. Cas. 15. *Massey v.*

GENERALLY.

NOXIOUS AND
OFFENSIVE
TRADES.

The erection of any thing offensive so near the house of another as to render it useless and unfit for habitation is a nuisance; *e. g.* the erection of a swine sty (1), limekiln (2), privy (3), smith's forge (4), tobacco mill (5), or tallow furnace near a common inn. (6)

With respect to the injuries to health as a consequence of a public nuisance, it seems, that if the injury be attributable to the inhabitants of a county, no action is sustainable (7); and if the special injury be occasioned by an individual, an action lies. (8)

If a person keep his hogs, or other noisome animals, so near the house of another, that the stench of them renders the enjoyment of life and property uncomfortable (9), this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. (10)

The establishing and exercising any offensive trade, as a tanner's, a tallow chandler's, or the like, to the damage of another, is a nuisance; for though these are lawful and necessary trades, yet they should be exercised in remote places. (11)

In *Flight v. Thomas* (12), which was an action of case for annoying the plaintiff in the enjoyment of his house, by causing offensive smells to arise near to, in, and about it; enjoyment as of right for twenty years was pleaded of a mixen on the defendant's land contiguous and near to the plaintiff's house, whereby, during all that time, offensive smells necessarily and unavoidably arose from such mixen. On a traverse of the right, the defendant had a verdict; but it was held, that the plea was bad, and that the plaintiff was entitled to judgment *non obstante*, for that it did not shew a right to cause offensive smells in the plaintiff's premises, nor that any smells had in fact been used to pass beyond the limits of the defendant's own land.

Apprehension
of danger.

If life be made uncomfortable by the apprehension of danger, it is a nuisance, and it is therefore a nuisance to keep great quantities of gunpowder near dwelling houses. (13)

And where defendant employed a steam engine in his business as a printer, which produced a continual noise and vibration in the plaintiff's apartment, which adjoined the premises of the defendant, it was held to be a nuisance. (14).

Improper
erection of a
hayrick.

An action lies against a party for so negligently constructing a hayrick on the extremity of his land, that in consequence of its spontaneous ignition his neighbour's house was burnt down. (15)

Nuisance to
lands.

Where a smelting house for lead was erected so near the land of another, that the vapour and smoke destroyed the corn and grass, and damaged the cattle therein, it was holden to be a nuisance (16); and consequently, if

Goyder, 4 C. & P. 161. *Peyton v. London*
(*Mayor of*), 9 B. & C. 725. *Coventry v.*
Stone, 2 Stark. 534.

(1) *Aldred's case*, 9 Co. 59. (a.)

(2) *Ibid.*

(3) *Jones v. Powell*, Hutt. 136.

(4) *Bradley v. Gill*, Lutw. 69.

(5) *Styan v. Hutchinson*, Lond. Sitt. after
M. T. B. R. 40 Geo. 3. cit. Selw. N. P.
1114.

(6) *Morley v. Pragnel*, Cro. Car. 510.

(7) *Russell v. Devon (Men of)*, 2 T. R.
667. *Mary's case*, 9 Co. 112. (b.)

(8) 1 Bac. Abr. Action on the Case, 86—
123. *Iveson v. Moore*, 1 Salk. 15, 16.

(9) *Rex v. White*, 1 Burr. 337.

(10) *Aldred's case*, 9 Co. 58.

(11) 3 Black. Com. by Chitt. 217.

(12) 10 A & E. 590.

(13) *Rex v. Taylor*, Str. 1167.

(14) 3 Black. Com. by Chitt. 217. a.

(15) *Vaughan v. Menlove*, 3 Bing. N. C.
468.

(16) 1 Rol. Abr. Action sur case (N.)
89.

any other act be done in itself lawful, but being done in a place which necessarily tends to the damage of another's property, it is a nuisance.

So, also, if my neighbour, being bound, omit to scour a ditch, whereby my land is overflowed, it will be a nuisance. (1)

But an action cannot be maintained to prevent an excess in the plaintiff's use of his right (2); or for the reasonable use of a person's rights; though it be to the annoyance or inconvenience of another, as if a butcher, brewer, &c. use his trade in a convenient place. (3)

And it seems, that the owner of a steam vessel has the same right of mooring in a navigable river as the owner of a sailing vessel, and consequently, no action can be maintained for a nuisance by the occupant of a house on the bank of such river for any injury arising from such steam vessel, unless such injury be occasioned by a malicious or wanton abuse of the right of using the navigation of the river. (4)

GENERALLY.

WHEN THE ACTION CANNOT BE MAINTAINED

2. ABATEMENT OF NUISANCE.

ABATEMENT OF NUISANCE.

I. Public Nuisance.

PUBLIC NUISANCE.

"Every unauthorised obstruction of a highway to the annoyance of the king's subjects is an indictable offence," and a nuisance (5); and independently of any legal proceedings, it appears, that any person may lawfully abate a public nuisance, at least if it be placed in the middle of a highway, and obstruct the passage of his majesty's subjects. (6) But though a party may remove the nuisance, yet he cannot remove the materials, or convert them to his own use (7); and so much of the thing only as causes the nuisance ought to be removed, as if a house be built too high, only so much of it as is too high should be pulled down.

Thus, if a house be built across a highway, any person may pull it down; and it is said he need not observe particular care in abating it, so as to prevent injury to the materials. And though a gate illegally fastened might have been opened without cutting it down, yet the cutting would be lawful. However, it is a general rule, that the abatement must be limited by its necessity, and no wanton or unnecessary injury must be committed. (8)

II. Private Nuisance.

PRIVATE NUISANCE.

Private nuisances can be abated; and if a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by the latter for his cattle, the party injured may enter on the soil of the other, and abate the nuisance, and justify the

Abatement of private nuisance.

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|--|---|
| (1) <i>Hale on F. N. B.</i> 427. | Vent. 169. 1 Mod. 76. 2 Keb. 846. 5 Bac. |
| (2) <i>Com. Dig.</i> Action upon the Case for Nuisance (C.). | <i>Abr. Nuisance</i> (A.), 788—795. <i>Weld v. Hornby</i> , 7 East, 199. <i>Res v. Neville, Peake's</i> |
| (3) <i>Res v. Watts, M. & M.</i> 281. <i>Res v. Cross</i> , 2 C. & P. 483. | <i>N. P. C.</i> 125. <i>Res v. Stead</i> , 8 T. R. 142. |
| (4) <i>Hodgens v. Pim</i> , 2 Hudson & Brooke (Irish), 456. | (6) <i>Lonsdale (Earl) v. Nelson</i> , 2 B. & C. 302 |
| (5) <i>Per Lord Ellenborough in Res v. Cross</i> , 3 Camp. 227. <i>Jacob Hall's case</i> , 1 | (7) <i>Dalt. c.</i> 50. |
| | (8) <i>Lodis v. Arnold</i> , 2 Salk. 458. <i>Lonsdale (Earl) v. Nelson</i> , 2 B. & C. 302. |

ABATEMENT OF NUISANCE.

Nuisances by
act of omis-
sion.

Judgment of
Mr. Justice
Best in *Lons-
dale (Earl of)*
v. Nelson.

Neglecting to
repair works
connected with
a port.

The abater of
a private nu-
isance cannot
remove the ma-
terials.

trespass; and this right of abatement is not confined merely to a house, mill, or land. (1) It seems, that a libellous print or paper affecting a private individual may be destroyed, or, which is the safer course, taken and delivered to a magistrate. (2)

In *Lonsdale (Earl of) v. Nelson* (3) Mr. Justice Best observed, "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy, as not to allow time to call on the person on whose property the mischief has arisen, to remedy it; in such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice."

When a person is bound to repair works connected with a port, and neglects to do so, another person cannot justify an entry to repair without averring and proving that immediate repairs were necessary, and the party's right to use the port. (4)

The abater of a private nuisance cannot remove the materials further than necessary, or convert them to his own use. (5) And so much only of the thing as causes the nuisance should be removed, as if a house be built too high, only so much of it as is too high should be pulled down. (6)

NOTICE TO ABATE — NON- ABATEMENT OF NUISANCE.

Notice to abate
the nuisance.

III. Notice to abate — Non-abatement of Nuisance.

In some cases it is necessary (7), and under any circumstances it is judicious, prior to the commencement of the action, to require the defendant to abate the nuisance. (8) If the action be not brought against the original erector of the nuisance, but against his feoffee, lessee, &c., a special request to the defendant to remove the nuisance should, strictly speaking, be alleged (9),

(1) 2 Rol. Abr. Trespass (I.), 565. Com. Dig. Pleader (3 M.), 42. *Sprigg v. Neal*, 3 Lev. 92.

(2) *Case de Libellis Famosis*, 5 Co. 125. (b.) *Dubost v. Beresford*, 2 Camp. 511. *Lonsdale (Earl of) v. Nelson*, 2 B. & C. 311. 3 Black. Com. by Chitt. 5.

(3) 2 B. & C. 311.

(4) Ibid.

(5) Dalt. c. 50. *Foredick v. Collins*, 1 Stark. 173.

(6) *Baten's case*, 9 Co. 53. *Truhern's case*, Godb. 233. *Rex v. Pappineau*, Str. 686.

Quare, If to trespass for destroying a

picture, the defendant may plead, that it was a scandalous libel upon individuals, and that, being publicly exhibited, he cut it in pieces by way of abating a nuisance? *Du Bost v. Beresford*, 2 Camp. 511.

The owner of such a libellous picture so destroyed, is at most only entitled to recover the value of the paint and canvass which formed its component parts. Ibid.

(7) *Lonsdale (Earl of) v. Nelson*, 2 B. & C. 302.

(8) *Winsmore v. Greenbank*, Willes, 583. *Brent v. Haddon*, Cro. Jac. 555. *Paradock's case*, 5 Co. 100.

(9) Ibid.

and a notice of removal left at the premises is evidence against a subsequent occupier to render him liable. (1)

ABATEMENT OF
NUISANCE.

Where a clause in a statute (50 Geo. 3. c. cxlix. s. 105. local and personal, public) required thirty days' notice of action for any thing done in pursuance of it, and enabled the party complained of to tender amends for any irregularity : — It was held, that a letter written to the defendant, who justified under the act, requesting him to communicate the names of certain parties, and stating that, unless the request was complied with, the plaintiff would "take proceedings against him accordingly," was an insufficient notice within the statute. (2)

When notice
must be absolute.

The foregoing act likewise authorised trustees, upon complaint of any inhabitant and "due investigation," to order any "pigsty, necessary, or nuisance," in or near the streets, &c. to be removed within seven days after notice in writing to the occupier of the premises wherein such nuisance was situate. The trustees issued such a notice to the plaintiff, imputing, that he kept a brothel, and ordering him to discontinue such nuisance. The plaintiff thereupon brought an action, as for a libel against the clerk who signed the notice : — It was holden, that he was entitled to notice of action under the above clause, although it did not appear, that there had been either complaint or investigation before the issuing of the order. (3)

If the party against whom a verdict has been recovered do not abate the nuisance, another action may be brought for continuing the nuisance. Thus, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass : — It was holden (4), that after notice to defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.

Non abatement
of nuisance
after verdict.

3. DECLARATION AND PLEADINGS.

The venue is local, but it is not necessary to give a local description of the nuisance ; and, since Reg. Gen. Hilary Term, 4 Will. 4., the statement of place should be omitted. (5)

DECLARATION
AND PLEAD-
INGS.

VENUE.

Case is the proper remedy for any injury to the absolute rights of persons not immediate, but consequential ; as for keeping mischievous animals, having notice of their propensity, or for special damage arising from a public nuisance. It also lies for any other nuisance to houses or lands in possession, and for injuries to watercourses, where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water. (6) But if the injury be immediate, as if a person incite his dog to bite another, or let loose a dangerous animal ; or if the defendant, in the act of throwing a log into a public street, hurt the plaintiff ; or if an injury be committed by cattle to land, the action should be trespass. (7)

FORM OF AC-
TION.

(1) *Salmon v. Bensley*, R. & M. 189.
(2) *Per* Lord Denman C. J. at Nisi Prius, in *Norris v. Smith*, 10 A. & E. 188.
(3) *Ibid.* *Semble*, a brothel is a nuisance within the meaning of such an enactment.

(4) *Holmes v. Wilson*, *ibid.* 503.
(5) *Vide post*, 2368—2372. tit. EVIDENCE.
(6) *Griffiths v. Marson*, 6 Price, 1.
(7) 1 Chitt. Pl. 133.

DECLARATION
AND PLEAD-
INGS.

Action on the case, legal remedy for a nuisance.

Where consequential hurt or damage has arisen from a nuisance, or keeping mischievous animals, it is sufficient if the declaration concisely state the defendant's possession of the personal or real property, and his consequent obligation or duty, the non observance of which is complained of. But when the act or nonfeasance complained of is not *prima facie* actionable, it is usual to state, that the act complained of was wrongfully done. (1) Not only the injury complained of, but also the motive that it was wrongfully or maliciously committed, should be stated; as that the defendant well knowing the mischievous propensity of his dog, or having been requested to remove a nuisance erected by another, maliciously or fraudulently contriving and intending, &c. (stating a bad intent corresponding with the wrongful act complained of) committed or permitted the tort. (2)

Allegation of nuisance to plaintiff's house.

In an action on the case for a nuisance to the plaintiff's house, &c., it is sufficient for the plaintiff in his declaration to state generally, that he was lawfully possessed of the house, or other property affected by the injury complained of. (3)

What may be rejected as surplusage.

In case, for exhibiting an inscription opposite to the plaintiff's house, insinuating that it was a house of ill-fame, it was alleged in the declaration, that the plaintiff carried on the business of a retailer of wines there:—It was held, that such allegation might be rejected as surplusage, there being no averment, that the publication of the inscription was of and concerning the plaintiff as such retailer of wines. (4)

PARTIES.
The actor.

For misfeasance or malfeasance, as for obstructing ancient lights; or for nonfeasance, as for not taking care of premises, so as to prevent the consequence of a public nuisance, as for leaving open an area door or coal plate (5), or for not repairing fences (6), private ways (7), or watercourses, &c. (8), the action should in general be against the party who did the act complained of, or against the occupier (9), and not against the owner, if the premises were in the possession of his tenant, unless he covenanted to repair. (10)

Owner of the land.

But if the owner of the land, having erected a nuisance thereon, demise the land, an action may be supported against him, though out of possession, for the continuance of it, because by the demise he affirmed such continuance (11); and every occupier is liable for the continuance of the nuisance on his land, &c. though erected by another, if he refuse to remove the same after notice. (12)

Assignee.
Tenant for years.

The assignee of an estate is not liable for an injury resulting from any nuisance or wrongful act committed thereon before he came to the estate; but if he continue the nuisance, he may be sued for such continuance. (13)

If tenant for years erect a nuisance, and make an underlease to B., an

(1) *Stancilffe v. Hardwick*, 3 Dowl. P. C. 766.

(2) 1 Chitt. Pl. 388.

(3) Tidd, 443.

(4) *Spall v. Massey*, 2 Stark. 559.

(5) *Matthews v. West London Waterworks Comp.* 3 Camp. 403.

(6) *Cheetham v. Hampson*, 4 T. R. 318.

(7) *Rider v. Smith*, 3 ibid. 766.

(8) *Sutton v. Clarke*, 6 Taunt. 44.

(9) *Cheetham v. Hampson*, 4 T. R. 318.

(10) *Payne v. Rogers*, 2 Hen. Black. 350.

(11) *Rosewell v. Prior*, 2 Salk. 460. *Cheetham v. Hampson*, 4 T. R. 320. *Bush v. Steinman*, 1 B. & P. 409.

(12) Com. Dig. Action upon the Case, Nuisance (B.).

(13) Ibid. *Moore v. Browne*, Dyer, 320. *Rosewell v. Prior*, 2 Salk. 460. *Bush v. Steinman*, 1 B. & P. 409.

action lies against either (1); and if A. take the goods of C., and B. take them from A., C. may have his action against A. or B. at his election.

DECLARATION
AND PLEAD-
INGS.

Tenants in
common.

Although tenants in common must in general sever in real actions, unless in a *quare impedit*; and in ejectment, where a joint demise would be improper, yet for a nuisance to their land they can join, because, though their estates are several, yet the damages survive to all; and it would be unreasonable, when the damage is thus entire, to bring several actions for a single trespass. (2) And when there are several owners, or persons chargeable as joint tenants, or tenants in common in respect of their real property, and are not made defendants, the party who is sued alone can plead in abatement. (3)

Devisee.

A devisee can support an action for the continuance of a nuisance erected in the lifetime of the testator, for every continuance of a nuisance makes it a fresh one. (4)

REVERSIONER.

A reversioner can sue where the value of his reversionary interest is damaged, or judgment can be arrested (5); but he must distinctly allege and prove such a permanent injury as to affect his reversionary interest; and an injury merely affecting the possession will not suffice. (6)

In case by a reversioner for an injury to the reversion, it is no answer, that the injury complained of, was caused by the wrongful act of the tenant, for which he might be liable to an action. (7)

An action on the case for an injury to the inheritance lies by the reversioner against the tenant pending the term, for inclosing and cultivating waste land included in the demise, and for continuing the grievance. (8)

A surveyor of a highway, who had subtracted a portion of a bank by the road side, was holden liable in an action on the case at the suit of the reversioner (9); for it was a permanent injury to the land, and had a tendency to alter the evidence of title.

In *Tucker v. Neuman* (10) it was held, that building a roof with eaves which discharge rain-water by a spout into adjoining premises, was an injury for which the landlord of such premises might recover as reversioner, while they were under demise, if the jury thought there was damage to the reversion; Mr. Justice Patteson observing, "In *Baxter v. Taylor* (11) the act was no injury in itself, but was complained of as done with intent to establish a right of way. In the present case, that which the defendant did was in itself something lasting. There is no ground for a rule."

The statement of the reversionary interest is merely inducement; and though a seisin in fee, &c. is often stated in a declaration by a reversioner (12), yet, in order to avoid the necessity of proving the precise estate as alleged, the title should be only generally alleged. (13)

Statement of
reversionary
interest.

(1) *Rosewell v. Prior*, 2 Salk. 460. *Bush v. Steinman*, 1 B. & P. 409.

(2) 4 Bac. Abr. Joint Tenants (K.), 513 —517. *Cutting v. Derby*, 2 W. Black. 1077. *Harrison v. Barnby*, 5 T. R. 247. 1 Chitt. Pl. 65.

(3) 1 Saund. 291. *Mitchell v. Tarbutt*, 5 T. R. 651. 1 Chitt. Pl. 83.

(4) *Some v. Baruish*, Cro. Jac. 231. (5) *Jackson v. Pesked*, 1 M. & S. 234.

Com. Dig. Action upon the Case, Nuisance (B.). 8 Wentworth's Pleading, 548.

(6) *Jackson v. Pesked*, 1 M. & S. 234. (7) *Egremont (Lord) v. Pulman*, M. & M. 404.

(8) *Queen's College (Oxford) v. Hallett*, 14 East, 489. (9) *Alston v. Seales*, 9 Bing. 3.

(10) 11 A. & E. 40. (11) 4 B. & Ad. 72. (12) *Beau v. Bloom*, 3 Wils. 461.

(13) 2 Chitt. Pl. 547.

**DECLARATION
AND PLEAD-
INGS.**

Persons in the
exercise of a
public duty.

Where persons in the exercise of a public duty, as commissioners of sewers or trustees of roads, do some act within their jurisdiction, which is in fact a nuisance to the property of another, yet no action lies (1); but if they act in an arbitrary and oppressive manner (2); or if they exceed the authority intrusted to them (3); or act carelessly or negligently, they are answerable. (4)

PLEADINGS.

Effect of plea
of "not guilty."

Nuisance for
carrying on an
offensive trade.

Obstruction of
right of way.

Digging a
trench in an
adjoining close.

"In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of 'not guilty' will operate as a denial only, that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house." And in an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way. (5)

For nuisance to the plaintiff's property, by digging a trench in an adjoining close, the defendant cannot, under the plea of not guilty, raise any objection as to defective proof of the inducement in the declaration. (6)

In case against the defendant for negligently driving his cart and horse against the plaintiff's horse, it was holden (7), that, under the plea of "not guilty," the defendant could not shew, that he was not the person driving, and that the cart did not belong to him, those being facts stated in the inducement, of which the plea could not operate as a denial; and the misconduct in driving being the only wrongful act, put in issue thereby.

Pleading a
public way.

In pleading a public way, it is not necessary to state the *termini*, or to shew, that it was immemorially a way, the term "public highway" being sufficient. (8)

Making a
noise.

In case for a nuisance in making a noise, &c. near plaintiff's dwelling house, which he was possessed of for a term of years, the defendants pleaded, that they had been possessed of certain workshops in which the noise was made, ten years before the plaintiff was possessed of the term in his house, and that they had always, during that time, made the noise in question, which was necessary for carrying on the trade:—the plea was holden to be bad. (9)

EVIDENCE.

Wrongful act
or omission,
and consequen-
tial damages.

Proof by plain-
tiff.

The plaintiff must prove the wrongful act or nuisance committed by defendant, the amount of damage, and his title to the property affected; but a mere possessory interest will suffice. (10)

4. EVIDENCE.

(1) *Plate Glass Comp. v. Meredith*, 4 T R. 794. *Harris v. Baker*, 4 M. & S. 27. *Sutton v. Clarke*, 6 Taunt. 43. *Boulton v. Crowther*, 2 B. & C. 703.

(2) *Ibid.* *Leader v. Moxton*, 3 Wils. 461.

(3) *Ibid.*

(4) *Ibid.* *Jones v. Bird*, 5 B. & A. 837.

(5) *Reg. Gen. H. T.* 4 Will. 4. IV. case 1. 5 B. & Ad. App. ix. 10 Bing. 471. 2 C. & M. 22.

(6) *Dukes v. Gosling*, 3 Dowl. P. C. 619. *Tidd's N. P.* 366.

(7) *Taverner v. Little*, 5 Bing. N. C. 678.

(8) *Rouse v. Bardin*, 1 Hen. Black. 351. 355. *Rex v. Stoughton*, 2 Saund. 158. (d.) *Allen v. Ormond*, 8 East, 6. *Aspindall v. Evans*, 3 T. R. 265. *Doe d. Mitchinson v. Carter*, 3 *ibid.* 60.

(9) *Elliotson v. Feetham*, 2 Bing. N. C. 134., vide etiam *Bliss v. Hall*, 4 *ibid.* 183. *Tidd's N. P.* 366.

(10) *Vide stat.* 2 & 3 Will. 4. c. 71.

When the defendant pleads "not guilty," the plaintiff must not only prove the existence of the nuisance, but that the defendant was the person who caused it. (1)

EVIDENCE.

Proof of existence of nuisance, and caused by defendant.

If the action be brought against the defendant for the negligence of his agent, it is necessary to establish, not merely that the servant, or other person whose negligence occasioned the damage, was the servant of the defendant, but also, that the mischief was occasioned in transacting the business of the master; for the latter is not responsible for any substantive tort by the agent whom he employs, unconnected with the employment or authority delegated to him. (2)

By Reg. Gen. Hilary Term, 2 Will. 4. r. 63., "the rule for a view may, in all cases, be drawn up by the officer of the court on the application of the party, without affidavit or motion for that purpose." And in all cases it is made part of the rule or order, that, if no view be had, or if had by less than the number of jurors mentioned in the rule, &c., the trial shall nevertheless proceed, without any objection being made on that account, or on account of any defect in the return of the *distringas* or *habeas corpora*; that no evidence shall be given on either side at the time of taking the view; and, in ordinary cases, that the expenses of taking it shall be equally borne by both parties. (3)

Rule for a view.

The action upon the case for a nuisance is local in its nature, and the nuisance must be proved to have been committed in the county where the venue is laid (4); and where no place and county were alleged, in which the nuisance was committed, it was holden, that the county in the margin should be intended. (5)

Local proof of nuisance.

In an action on the case for damaging the plaintiff's wharf, the declaration stated the wharf to be situate near the river Thames, to wit, "at Kingston, in the parish of St. Saviour, Southwark, in the county of Surrey;" though there was no such place as Kingston in that parish:—It was held, that this allegation was to be referred to the venue, and not to the local situation of the wharf; and, therefore, that it was not necessary to prove it to be so situated. (6)

In an action for an injury resulting from falling down an unprotected area, the declaration stated, that the defendant was possessed of the premises, and that they were adjoining "a certain public and common street and highway." It appeared, that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them, but it did not appear, that any conveyance had been made to him:—It was held, that it was sufficient evidence to go to the jury of a possession in the defendant. (7)

RIGHT OF POSSESSION.

In an action of case, an averment that the plaintiff's close, at the time of the injury, was in the occupation of J. V. and H. V., is sufficiently proved, if at the time of the injury it was in their occupation, though the tenant be since changed, and even before action brought. (8)

(1) *Dawson v. Moore*, 7 C. & P. 25. vide *Jeffries v. Duncombe*, 11 East, 226. 2 Tidd's N. P. 366. Camp. 3.

(2) *Brady v. Giles*, 1 M. & Rob. 494.

(3) Archb. by Chitt. 407.

(4) *Warren v. Webb*, 1 Taunt. 379., sed vide stat. 3 & 4 Will. 4. c. 42. s. 22.

(5) *Warren v. Webb*, 1 Taunt. 379., sed

(6) *Haymer v. Raymond*, 1 Marsh. 363. 5 Taunt. 789.

(7) *Jarvis v. Dean*, 11 Moore, 354.

(8) *Fowles v. Miller*, 3 Taunt. 137.

EVIDENCE.

Although a tenant in possession can maintain an action for his individual loss arising from a nuisance, yet, in an action by a reversioner, the tenant is a competent witness to prove the injury. (1)

Where the tenant holds under a written agreement.

Where the tenant held under a written agreement, the court of Common Pleas were divided on the question, whether it was necessary, that the agreement should be produced to prove the fact of tenancy. (2) But in an action for an injury to the reversion in cutting down a tree, the tenant holding under a written agreement, the court of King's Bench held, that it was necessary to produce the agreement. (3)

In an action on the case for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration, that the premises were in the occupation of one S. P., as tenant thereof to the plaintiff. It was proved, that the house had been let to S. P. by a *cestui que trust*, to whom she had paid rent, the plaintiff being his trustee:—It was held to be no variance, as the legal estate was in the plaintiff, and the *cestui que trust* was to be considered as his agent or bailiff. (4)

If in an action by the reversioner against the tenant of a house, for opening a door in a wall without the consent of the plaintiff, and thereby damaging the house, and prejudicing the plaintiff's reversionary interest, the opening of the door be proved, and all actual damage be disproved, the jury should be directed to inquire, whether the reversionary interest of the plaintiff has or has not been injured:—and a nominal verdict entered for the plaintiff without such direction or inquiry, on the ground, that the defendant had no right to make the alteration, was set aside. (5)

Injury to an easement.

If an injury to an easement be complained of, the plaintiff, in the absence of an express grant, must give evidence of the condition of the land, &c., and the enjoyment of the right, as far back as possible, in order to raise a presumption of right by grant or prescription. (6)

LICENSE.

In *Wood v. Manley* (7) Mr. Justice Coleridge upon a question respecting a license said, "All the cases proceed on the principle, that a man who, by consenting to certain terms, induces another to do an act, shall not afterwards withdraw from those terms."

If a parol license have been given by the plaintiff to the defendant, and executed, it will be an answer to the action; and a license executed is not countermandable (8), for an authority coupled with an interest cannot be revoked. (9)

License must be strictly proved.

In *Blanchard v. Bridges* (10) Mr. Justice Patteson said, that a party who claimed under a license, any thing short of an acquiescence for twenty years, "must produce such evidence as leads clearly and conclusively to

(1) *Doddington v. Hudson*, 1 Bing. 257.

(2) *Strother v. Barr*, 5 ibid. 136. 2 M. & P. 207.

(3) *Cotterill v. Hobby*, 4 B. & C. 455.

(4) *Vallance v. Savage*, 5 M. & P. 576. 7 Bing. 595.

(5) *Young v. Spencer*, 5 M. & R. 47. 10 B. & C. 145. The reversionary interest of the plaintiff might be injured, although the house itself was not.

(6) *Peake's Ev.* 294., *sed vide stat.* 2 & 3 Will. 4. c. 71.

(7) 11 A. & E. 34.

(8) *Winter v. Brockwell*, 8 East, 308. *Liggins v. Inge*, 7 Bing. 682.

(9) *Gausson v. Morton*, 10 B. & C. 731. *Hodgson v. Anderson*, 3 ibid. 842. *Taylor v. Waters*, 7 Taunt. 374. Goods which were upon the plaintiff's land were sold to the defendant. By the conditions of sale, to which plaintiff was a party, the buyer was to be allowed to enter, and take the goods:—It was holden, that after the sale the plaintiff could not countermand the license (*Wood v. Manley*, 11 A. & E. 34.), Mr. Justice Patteson observing, "I do not say that a mere purchase will give a license; but here the license is part of the contract."

(10) 4 A. & E. 195.

the inference of a license or covenant;" and it seems upon principle, that all licenses, while they remain purely executory, and no consideration received for the grant, are countermandable. (1)

"But a parol executory license is countermandable at any time." (2) Thus, in *Wallis v. Harrison* (3) it was holden, that a parol license from A. to B. to enjoy an easement over A.'s land was countermandable at any time whilst it remained executory; and that if A. conveyed the land to another, the license was determined at once, without notice to B. of the transfer; and B. was liable in trespass, if he afterwards entered upon the land. (4)

An easement in the land of another cannot be created but by grant. (5)

In an action by a canal company for a nuisance in digging clay pits, by which the banks of the canal were injured, it is incumbent on the plaintiffs to shew, that the banks were at the time of the damage in such a state, as the act of parliament requires. (6)

An acknowledgment by the defendant that his trade is a nuisance, is admissible, though not conclusive evidence against him, upon an indictment for setting up his trade in another place. (7)

In declaring for a nuisance, the immediate cause of the injury must be stated; and under an averment of the remote cause, and an allegation, that by means of the premises the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate causes. (8)

The allegations in a plea to an action of trespass for shooting a dog, that "he attacked the defendant," and "was accustomed to attack and bite mankind," are both material, and must be proved. (9) And if the defendant justify the shooting the plaintiff's dog, by pleading that he attacked him, and that "he was accustomed to attack and bite mankind," the plaintiff can call witnesses to prove the general quietness of the dog. (10)

A., a hawker, went to the house of B. to sell goods, and a dog of B.'s coming out of the house, A. knocked out one of his eyes, for which B.'s wife caused A. to be apprehended: — It was held, that it was for the jury to say, whether A. struck the dog for his own preservation and fairly to protect himself, or whether it was a wilful and malicious trespass on his part. (11)

If a justification be pleaded for the destruction of a dog, it must be shewn, that at the time of the dog being shot, he was either in the act of destroying the property of the defendant, or that it was absolutely requisite for the preservation of his property (12); and the mere circumstance of the defendant having put up a notice, that all dogs trespassing on his land would be shot, will not be a sufficient justification. (13)

But the servant of the owner of an ancient park, may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely

Canal company must prove a compliance with their act of incorporation.

Acknowledgment of nuisance by defendant.

Damage from mischievous animals.

(1) *Web v. Paternoster*, Poph. 151.

& C. 317., sed vide *Rex v. Trafford*, 1 B. & Ad. 874.

(2) *Per Parke B. in Wallis v. Harrison*, 4 M. & W. 544.

(7) *Rex v. Neville*, Peake's N. P. C. 125.

(3) *Ibid.*

(8) *Fitzsimons v. Inglis*, 5 Taunt. 534.

(4) Vide etiam *Winter v. Brockwell*, 8 East, 308. *Iiggins v. Inge*, 7 Bing. 682.

(9) *Clark v. Webster*, 1 C. & P. 104.

Mason v. Hill, 5 B. & Ad. 15. *Bridges v. Blanchard*, 1 A. & E. 536.

(10) *Ibid.*

(11) *Hanway v. Boulbee*, 4 *ibid.* 350. 1 M. & Rob. 15.

(5) *Hewlins v. Shippam*, 5 B. & C. 221. *Fentiman v. Smith*, 4 East, 107.

(12) *Janson v. Brown*, 1 Camp. 41. *Wells v. Head*, 4 C. & P. 568.

(6) *Stafford Canal Comp. v. Hallen*, 6 B.

(13) *Corner v. Champneys*, 2 Marsh. 584.

EVIDENCE.

necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing deer at the moment when it was shot, if the chasing of the deer and the shooting the dog were all one and the same transaction. (1)

LIMITATION OF
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COSTS—JUDG-
MENT.

LIMITATION OF
ACTION AND
PARTICULARS
OF DEMAND.

5. LIMITATION OF ACTION — PARTICULARS OF DEMAND — DAMAGES — COSTS — JUDGMENT.

The time within which actions upon the case must be commenced, and particulars of demand, has been previously discussed. (2) It may however be observed, that in actions on the case, in which the gist of the action is the consequential damage, the time of limitation begins to run from the time at which the consequential damage occurred. (3) Where a statute directed an action to be brought within six months after the matter or act done, and the injury was sinking a sewer, whereby the walls of the plaintiff's house cracked: — It was held, that the action must be brought within six months from the time of the walls' cracking. (4)

DAMAGES.

It must appear, that the damage resulted to the plaintiff from the act or omission of the defendant; and that by reason of the nuisance, the plaintiff cannot enjoy his right in as ample a manner as formerly.

The defendant's act must not only be detrimental but wrongful, either in respect of doing such act at all, or the doing it in an improper manner.

It has been previously stated, that for a common nuisance in a public highway the remedy is by indictment and not by action, unless there be some special damage alleged. (5)

Where there is a direct special damage, an action on the case lies for not repairing a highway (6); and also for a nuisance therein, if an individual be liable to repair, but otherwise where the county or parish have to repair the highway. (7)

The plaintiff, in order to maintain this action, ought to shew a particular damage. Thus, it was considered in *Chichester (Sir John) v. Lethbridge* (8), and in *Hubert v. Groves* (9), that the mere obstruction of the plaintiff's trade, or, as it was resolved in *Paine v. Partrich* (10), the delaying him in his journey a little while, by reason whereof he was damnified, or some important affair was neglected, were not such special damages as to support an action on the case; but that the particular damage ought to be direct and not consequential, as for instance, the loss of his horse, or some corporal hurt—in order to prevent multiplicity of actions.

In *Rose v. Miles* (11) the plaintiff declared, that before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored, from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff

(1) *Protheroe v. Mathews*, 5 C. & P. 581.

(2) *Antè*, 1025. tit. CASE.

(3) *Roberts v. Read*, 16 East, 215., et vide *Gillon v. Boddington*, R. & M. 161. *Howell v. Young*, 5 B. & C. 268.

(4) *Lloyd v. Wigney*, 6 Bing. 489.

(5) *Allen v. Ormrod*, 8 East, 4.

(6) 1 Inst. 56. (a.)

(7) *Russell v. Devon (Men of)*, 2 T. R. 671.

(8) *Willes*, 71.

(9) 1 Esp. N. P. C. 148.

(10) *Carth.* 191.

(11) 4 M. & S. 102.

from navigating his barges so laden, *per quod* the plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land: — It was held, that this was a special damage for which an action upon the case would lie; Lord Ellenborough observing, “ In *Hubert v. Groves* (1) the damage might be said to be common to all; but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it, when he is obstructed. It did not rest merely in contemplation. Surely, this goes one step further; this is something substantially more injurious to this person, than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload and to carry his goods over land, by which he has incurred expense, and that expense caused by the act of the defendants. If a man’s time or his money are of any value, it seems to me, that this plaintiff has shewn a particular damage.” (2)

The defendant can prove that the damage was occasioned by mere accident, no blame being imputable to the defendant or his agent. (3)

It is a good defence to shew, that the injury so far arose from the negligence of the plaintiff himself, that he might by ordinary care and caution have avoided the injury: — or that the obstruction was caused by the license of the plaintiff. (4)

By stat. 3 & 4 Vict. c. 24., if in any action of trespass on the case, the plaintiff recover less damages than 40s., he will not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, unless the judge certify that a question of right was involved. (5)

In *Gillett v. Green* (6), which was an action on the case for the infringement of a patent, it appeared, that a prior action had been tried between the same parties, in which the plaintiff obtained a verdict, and the judge certified under stat. 5 & 6 Will. 4. c. 83. s. 3. that the validity of the patent came in question before him. The certificate was given in evidence on the trial of a second action, which was tried before Lord Abinger on July 13. 1840, when the plaintiff again obtained a verdict for nominal damages. Ten days before the second trial stat. 3 & 4 Vict. c. 24. came into operation, but no application was made to the Lord Chief Baron at the trial to certify, under that statute, that the action was brought to try a right. The master refused to tax the plaintiff treble costs under stat. 5 & 6 Will. 4. c. 83. s. 3., on the ground that the case fell within the provisions of stat. 3 & 4 Vict. c. 24. s. 2. Upon such facts Mr. Baron Parke observed, “ This is certainly an unfortunate case; but it is clear that it falls within the act of 3 & 4 Vict., which applies to ‘ any action of trespass on the case.’ Then it is said, the Lord Chief Baron has still the power of certifying; but that is not so: the statute expressly directs that the plaintiff shall not recover costs where the damages are under 40s., unless

LIMITATION OF ACTION—PARTICULARS OF DEMAND—DAMAGES—COSTS—JUDGMENT.

Judgment of Lord Ellenborough in *Rose v. Miles*.

COSTS.

Stat. 3 & 4 Vict. c. 24.

An action on the case is within the operation of stat. 3 & 4 Vict. c. 24. s. 2., notwithstanding the provisions of stat. 5 & 6 Will. 4. c. 83. s. 3.

Judgment of Mr. Baron Parke in *Gillett v. Green*.

(1) 1 Esp. N. P. C. 148.

(3) *Crofts v. Waterhouse*, 3 Bing. 321.

(2) *Vide etiam Hart v. Basset*, Sir T. Jones, 156. *Wilkes v. Hungerford Market* Comp. 2 Bing. N. C. 281.

Lack v. Steward, 4 C. & P. 106.

(4) *Antè*, 2370. tit. LICENSE.

(5) Stat. 3 & 4 Vict. c. 24., *antè*, 228.

(6) 7 M. & W. 347.

**LIMITATION OF
ACTION—PAR-
TICULARS OF
DEMAND—
DAMAGES—
COSTS—JUDG-
MENT.**

The power of
judging as to
"the right"
under stat. 3 &
4 Vict. c. 24.
is vested in the
judge at Nisi
Prius.

Judgment of
Mr. Justice
Maule in *Shut-
tleworth v.
Cocker*.

the judge 'shall immediately afterwards certify' that the action was brought to try a right, &c. It may even be a question, whether the judge could grant the certificate after another cause had been called on." (1)

In *Shuttleworth v. Cocker* (2), which was an action for a nuisance, the plaintiff alleged, that he was possessed of a certain messuage, and that the defendant being possessed of a certain mill and workshop, so wrongfully used certain engines, funnels, chimneys, and manufactories, as that a noise, smoke, and deleterious dust came therefrom, and injured the plaintiff's house, and made it uninhabitable: the defendant pleaded not guilty:—It was held, that the action was brought to try a right beyond the mere right to recover damages, and was within the principle of stat. 3 & 4 Vict. c. 24. s. 2., and that *ls.* damages only having been given by the jury, the judge was empowered to certify, to give the plaintiff his costs; Mr. Justice Maule observing, "It is quite beside the intention of the act, that any opinion shall be expressed, whether any question of right came in issue at the trial, because the real object which the legislature had in passing it, was to prevent actions for damages. I think, therefore, that there is no doubt that this is a case in which the learned judge had a right to grant his certificate. Then if that be so, all that has been said with respect to what passed at the trial, has nothing to do with the question now before the court, because it is clear, that the power of judging as to the right is vested in the judge at Nisi Prius, without being subject to any review of the court from which the record issued."

In an action on the case for negligently exposing ploughshares in a highway, whereby the plaintiff sustained severe injury; the jury having given a verdict for *ls.* damages, and the judge, having refused to certify, thinking the case not to be within the statute:—It was holden (3), that the plaintiff was not entitled to costs.

JUDGMENT.

The judgment in actions of case has been previously noticed. (4)

On motion for judgment on a defendant indicted for a nuisance, when a verdict subject to a reference to an arbitrator has been consented to, the defendant is entitled to notice of the motion, and also to copies of the affidavits on which the motion is to be made. If the verdict remain undisturbed by the award, the prosecutor may either move for judgment pursuant to the verdict, or for an attachment against defendant for the non performance of the award. (5)

(1) In *Thompson v. Gibson*, 8 M. & W. 281., which was an action for a nuisance to the plaintiff's market, and the last cause to be tried at an assizes, the verdict was found for the plaintiff with nominal damages, and the judge adjourned the court to his lodgings. No application was made in court for a certificate under stat. 3 & 4 Vict. c. 24. (*ante*, 228.), that the action was brought to try a right; but the plaintiff's counsel followed the judge to his lodgings, and there within a quarter of an hour after the delivery of the

verdict obtained from him such a certificate:—It was holden to be good, because the certificate is to be "the result of the judge's impression at the time," "that is, upon no other matter than the facts of the cause, and as soon as conveniently may be after the verdict."

(2) 9 Dowl. P. C. 88., vide etiam *Barber v. Hollier*, 1 ibid. N. S. 32.

(3) *Marriott v. Stanley*, 2 Scott, N. R. 60.

(4) *Ante*, 1026.

(5) *Regina v. Gore*, 8 Dowl. P. C. 102.

PARTNERS.

1. GENERALLY, pp. 2376—2378.

2. WHO CAN OR CANNOT BE PARTNERS, pp. 2378, 2379.

3. WHO ARE OR ARE NOT PARTNERS, pp. 2379—2385.

WHO ARE PARTNERS — *There must be a communion of profit — Although the shares in a partnership must be joint, it is not requisite that they should be equal — CONTINGENT INTEREST — WHO ARE NOT PARTNERS — To constitute a communion of profit, the interest in the profit must be mutual — Persons acting as factors, brokers, or servants — Annuitants — Where a trader enters into dealings unconnected with his trade — Conveyance of a chattel — Interference as an adviser — Party cannot be liable as a partner, unless he was a partner at the time of the contract — PERSONS ASSOCIATED TO ACQUIRE A TURNPIKE ACT — MEMBERS OF CLUBS, OR OF PRIVATE SOCIETIES — MEMBERS OF JOINT STOCK COMPANIES — Judgment of Mr. Justice Parke in Dickinson v. Valpy — Judgment of Lord Abinger in Pitchford v. Davis — Judgment of Chief Justice Tindal in Fox v. Clifton — MEMBERS OF MINING CONCERNS.*

4. WHAT CAN OR CANNOT BE THE SUBJECT OF PARTNERSHIP, pp. 2385, 2386.

Partnership may exist in any business which is not a mere personal office — Where subject of the contract is malum prohibitum, or malum in se — Judgment of Lord Mansfield in Holman v. Jackson — Contracts contrary to law — Usurious contracts — Where non omission of the directions of an act of parliament is not pernicious to the public.

5. ACTIONS BY PARTNERS, pp. 2386—2396.

Generally — BONDS — Effect of a bond given to a firm, and the subsequent retirement of one of its members — Judgment of Chief Justice De Grey in Wright v. Russel — Judgment of Chief Justice Mansfield in Weston v. Barton — Bond made to partners, their heirs and assigns, &c. — Bond may be drawn to make the obligor answerable to all changes in a partnership firm — GUARANTEES — ASSUMPSIT — Where a joint interest must be shewn — When deed ought to be produced to shew, that the plaintiff had a right to sue — BILLS OR NOTES — Rights of partners under accounts current with their creditors — Party with whom the contract has been made can maintain assumpsit per se — When business carried on in the names of several, who are not in fact partners — Where one member of a partnership becomes bankrupt, the other co-partners may sue in the partnership name — WHEN ACTION CANNOT BE MAINTAINED — Where one partner a member of two firms — Payment to one partner is a payment to the firm — Where one of several plaintiffs cannot recover — When assignees cannot maintain assumpsit or trover — ACTIONS BY PARTNERS INTER SE — Question of partnership inter se — Torts by partners inter se — Covenant inter se — DEBT ON AN AWARD — Judgment of Mr. Justice Burrough in Winter v. White — ASSUMPSIT — Personal office or employment — RECOVERY OF GENERAL BALANCE — CONTRIBUTION — WHEN PARTNERSHIP DISSOLVED.

6. ACTIONS AGAINST PARTNERS, pp. 2396—2420.

I. GENERALLY, pp. 2396—2398.

Identity of partners — Notice to one partner equivalent to all — Payment by one of several partners, is a payment by all — Release to one partner will operate as a release to his co-partners — Covenant not to sue, will not operate as a release.

II. COMMENCEMENT OF LIABILITIES, pp. 2398—2400.

III. INCOMING PARTNERS, pp. 2400—2402.

IV. DORMANT PARTNERS, p. 2402.

V. RETIRING PARTNERS, pp. 2402—2408.

VI. DECEASED PARTNER'S ESTATE, pp. 2408, 2409.

VII. LIABILITY OF PARTNERS FOR THE ACTS OF THEIR CO-PARTNERS, pp. 2409—2420.

*One partner may pledge the credit of his co-partners to any amount — Promising payment of a partnership debt — A partner giving a partnership bill, and undertaking to the acceptor to provide for it when due — A payment by one partner, will take a case out of the Statute of Limitations — Signature of one partner binds the firm — Indorsement on a note different from that of the firm — Whether a contract signed by some of the firm binds the others, is a question of fact — Acts and assurances of one partner bind the firm — Performance of a particular undertaking — Reference to arbitration — GUARANTEE — Judgment of Lord Eldon in *Exp. Nolte* — Execution of power of attorney — RELEASE BY ONE PARTNER — Stay of proceedings — Substitution of service — Service in ejectment — Entry of appearance for co-partners — WHEN THE CONTRACT IS SEVERAL IN LAW — Judgment of Mr. Justice Bayley in *Lloyd v. Freshfield* — Judgment of Lord Commissioners Eyre and Ashurst in *Exp. Agace* — WHERE THE CONTRACT IS BY DEED — FRAUDULENT ACTS OF A CO-PARTNER — Judgment of Lord Eldon in *Exp. Bonobus* — Judgment of Lord Kenyon in *Arden v. Sharpe* — TORTS BY A CO-PARTNER.*

7. DISSOLUTION OF PARTNERSHIP, pp. 2421—2423.

Generally — When a partnership by act of the partners may be dissolved at any time — Bankruptcy — Sale under a fieri facias — Civil death of one of the partners — Court of equity will dissolve a partnership — Insanity of one of the members — Wilful acts of fraud or bad faith — Want of prudence or ability, not grounds for a dissolution — Death of one of the partners — Notice of a dissolution given by a partner, is conclusive as against him.

8. EVIDENCE, pp. 2423—2428.

All who sue must be partners, and partners at the time the contract was made — Dormant partner retiring, but goods supplied previous to the dissolution — Presumption of the right of one partner to bind the other, may be rebutted — Effect of receipts — PROOF OF PARTNERSHIP — ADMISSIONS OF PARTNERS — COMPETENT OF CO-CONTRACTORS — PROOF BY DISSOLUTION.

1. GENERALLY.

GENERALLY.

Puffendorf (1) thus describes a partnership : — “*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inae redit lucri inter singulos pro ratâ dividatur.*”

Mr. Collyer (2) has adopted a construction essentially similar, having defined a partnership, as between the parties themselves, to be a “voluntary contract between two or more persons for joining together their money, goods, labour, and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business, or adventure.”

The *delectus personæ* is so essentially necessary to the constitution of a partnership, that even the executors and representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners.

An ostensible partner is he whose name appears to the world as that of a partner. A nominal partner is an ostensible partner, having no interest in the firm. A dormant partner is he whose name and transactions as a partner are professedly concealed from the world. When they are actually unknown to the world, he is, more strictly speaking, a secret partner.

The parties must unite their money, goods, labour, or skill, for the purposes of trade : one partner, therefore, may bring into the trade money,

Delectus personæ so requisite, that an executor does not succeed to the condition of a partner.

Ostensible partner.

Nominal partner.

Dormant partner.

Union of pro-

(1) Lib. v. c. 8.

(2) On Partnership, 2d ed. 2.

another goods, and a third labour or skill, and they will thenceforth be partners between themselves, provided they share proportionally the profit and loss of the concern. (1)

If a broker agree to participate in the profits of the goods which he is employed to sell, such agreement will not make him a partner with his principal in the goods themselves, whatever it may do in the profits; but his being a broker will be strong evidence against his partnership in the goods. (2)

Although one person supply goods for an adventure, and another only his time, trouble, and credit, yet if there be words in the agreement implying a joint undertaking, these words will be deemed evidence of an intention to share jointly the goods, and the parties will be adjudged partners therein, and the evidence will be rendered stronger in favour of the partnership if the agent partner be not a broker. (3)

"Partners themselves are clearly joint tenants in the stock and all effects." "They are seised *per my et per tout*." (4) However, though they are joint tenants of all the partnership stock during their lives, yet, at least in such part of it as is moveable, there is no survivorship, either at law or equity. (5)

The right of lien is vested in the partners individually in the partnership stock for the amount of his share, and for moneys advanced by him beyond that amount for the use of the co-partnership (6); but, as observed by Lord Hardwicke in *West v. Ship* (7), "at the same time, when an account is to be taken, each is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought, and nothing is to be considered as his share, but his proportion of the residue on balance of the account."

The lien which a partner has upon the partnership stock "is not considered as appropriated to the stock brought in, but to every thing coming in lieu during the continuance or after the determination of the partnership." (8)

Upon the death of a partner, his partnership property devolves, after payment of all legal and equitable demands, to his personal representatives as tenants in common with the surviving partners (9); but rights of action survive to the partnership. (10)

The term "good will" is applied either to an advantage arising from the fact of sole ownership simply, without reference to other persons;—or as an advantage arising from the fact of sole ownership to the exclusion of other persons. (11)

GENERALLY.

perty and labour.

BENEFICIAL INTERESTS.

Partners are joint tenants in the stock and effects.

Each of the partners has a specific lien on the partnership stock, for the share and advances made by him.

Judgment of Lord Hardwicke in *West v. Ship*.

Share of deceased partner of the partnership effects, devolves to his executor.

Term "good will" defined.

(1) *Peacock v. Peacock*, 16 Ves. 49. *Reid v. Hollinshead*, 4 B. & C. 878. 7 D. & R. 44. *Meyer v. Sharpe*, 5 Taunt. 74. *Cheap v. Cramond*, 4 B. & A. 663.

(2) *Smith v. Watson*, 2 B. & C. 401.

(3) *Reid v. Hollinshead*, 4 ibid. 867. *Collyer on Partnership*, 112.

(4) *Per Lord Hardwicke in West v. Ship*, 1 Ves. sen. 242.

(5) Co. Litt. 182. (a.), *vide etiam* Com. Dig. Merchant, (D.). *Jeffereys v. Small*, 1 Vern. 217.

(6) *West v. Ship*, 1 Ves. sen. 242. *Exp. Ruffin*, 6 Ves. 119.

(7) 1 Ves. sen. 241.

(8) *Per Lord Hardwicke in West v. Ship*, ibid. 243. *Shipp v. Harwood*, 2 Swanst. 586.

(9) *Jackson v. Jackson*, 7 Ves. 535. 9 ibid. 591. *Hall v. Digby*, 4 Bro. P. C. 224. *Bell v. Phyn*, 7 Ves. 453. *Bulmain v. Shore*, 9 ibid. 500.

(10) *Smith v. Smith*, 5 Ves. 189. *Forster v. Hale*, ibid. 308. *Martin v. Crompe*, 1 Ld. Raym. 340.

(11) *Collyer on Partnership*, 102.

GENERALLY.

"Good will" arising from the fact of sole ownership, to the exclusion of other persons.

"Good will" arising from the fact of "sole ownership," simply without reference to other persons.

Partners can convert their joint property, into the separate property of an individual.

The latter species of good will is founded in special contract, and is a commodity upon which a valuation may be fixed. (1)

The former species of good will is not founded in special contract, but in a combination of accidental circumstances, as the existence and celebrity of the house, the skill and affluence of the trader, or the prejudices and necessities of the customer. This, therefore, is not a tangible interest; it is not a commodity on which a specific value can be placed, or for which a definite allowance can be made (2): — neither is the good will in a business of a personal nature assets in the hands of an administrator. (3)

Partners may, by their acts, convert the joint property of the general partnership into the separate property of an individual, or into the joint property of two or more partners, or *e converso*; and, if done *bond fide*, and for a valuable consideration, are binding upon third persons.

But if the joint property be converted *bond fide* into separate property of one partner, it immediately becomes the fund for the payment of the separate creditors of that partner in the first instance; and then, if any thing remains, of the joint creditor. (4)

2. WHO CAN OR CANNOT BE PARTNERS.

WHO CAN OR CANNOT BE PARTNERS.

Provisions have been made by various statutes by which persons incorporated for certain purposes can sue and be sued by certain officers therein named.

Stats. 1 & 2 Vict. c. 96., 6 Geo. 4. c. 42., and 4 & 5 Vict. c. 14.

Stat. 7 Will. 4. & 1 Vict. c. 73.

Thus, stats. 1 & 2 Vict. c. 96. (after reciting stat. 7 Geo. 4. c. 46.) and 6 Geo. 4. c. 42. make provisions for regulating the co-partnerships of bankers, and stat. 4 & 5 Vict. c. 14. authorises spiritual persons to become partners in banks and other commercial companies.

By stat. 7 Will. 4. & 1 Vict. c. 73. the crown can grant certain powers and immunities to members of trading and other companies by patent; *e.g.* unincorporated companies may receive privileges, as if they were incorporated; individual liability of members may be limited; a power of suing and being sued by certain officers; and that such officers and members may be competent witnesses. (5)

(1) *Kennedy v. Lee*, 3 Mer. 441. *Farr v. Pearce*, 3 Madd. 74.

(2) *Crutwell v. Lye*, 1 Rose, 123. *Farr v. Pearce*, 3 Madd. 78.

(3) *Spicer v. James*, Rolls, M. T. 1830, cit. Collyer on Partnership, 104.

(4) Collyer on Partnership, 113.

(5) Where in a declaration the defendant was described as the secretary of a public company, and a cause of action against the company was set forth, the court, after verdict for the plaintiff, refused to allow an amendment in the declaration, by inserting that the company were trading under letters patent of her majesty, empowering them to sue and be sued in the name of one of the two public officers to be appointed by them for that purpose, and that the defendant was one of such officers, duly appointed to sue

and be sued for and on behalf of the company, and duly registered as such officer, pursuant to stat. 7 Will. 4. & 1 Vict. c. 73., except upon the terms of the plaintiff's paying the costs of the motion, and of a motion in arrest of judgment, and of foregoing the costs of the trial. *Galloway v. Blandin*, 1 M. & G. 247.

Where judgment has been obtained against the public officer of a banking co-partnership, sued on their behalf, under stat. 7 Geo. 4. c. 46. ss. 9, 12, 13., the proper mode of proceeding to execution against a particular partner (not being such officer), is by *scire facias*; but the court will not allow a suggestion to be entered for that purpose on affidavit, shewing the individual to be a partner. *Bosanquet v. Ransford*, 11 A. & E. 520.

Any person of sound mind, and not under any legal restraint, or an infant, may be a partner. (1)

WHO CAN OR
CANNOT BE
PARTNERS.

An alien *ami* may be a partner; and it seems, that by the custom of London a feme covert trading separately from her husband may be a partner. (2)

Alien.

All traders, and other persons who do not come strictly under that denomination, may be partners; and a liability to the bankrupt laws is not a necessary ingredient in a partnership. (3)

Liability to
the bankrupt
laws, not a ne-
cessary ingre-
dient in a part-
nership.

Persons, without being partners generally in trade, may be partners in a particular adventure (4), as if two persons agree to share the profit and loss of certain goods which are in the hands of a factor for sale (5), or if a number of persons associate together, and subscribe sums of money for the purpose of obtaining a bill in parliament to make a railway. (6)

Partners in a
particular ad-
venture.

A partnership between persons as attorneys, when any of them are not duly qualified, is illegal. (7)

Partnership
between attor-
neys, one of
whom is not
duly qualified.

A feme covert (8), an Englishman domiciled in a foreign country at war with this country, and an alien enemy (9), cannot be partners. (10)

Feme covert.
Alien enemy.

A person in a state of intoxication is incapable of contracting a partnership agreement, because he has not an "agreeing mind." (11)

Person in a
state of intoxi-
cation.

In a mere personal office there cannot be a partnership — such as a sheriff's bailiff (12), or replevin clerk. (13)

Personal office.

3. WHO ARE OR ARE NOT PARTNERS.

A partnership is created by an agreement for a participation in profits, or their application. (14)

WHO ARE OR
ARE NOT PART-
NERS.

To constitute a partnership between the parties themselves, there must be a communion of profit between them. A communion of profit implies a communion of loss, for "every man who has a share of the profits of a trade, ought also to bear his share of the loss." (15) But a partnership may be without participation of profit by a party lending his name, though contracting, that he shall suffer no loss. (16) In such a case he will still be a partner, enjoying, in addition to the advantages of partnership, the indemnity afforded him by his companions. (17)

There must be
a communion
of profit.

By a communion of profit is intended, a joint and mutual interest in

Although the

(1) *Vide antè*, 2047. tit. *INFANT*. *Holt v. Ward*, Str. 939. *Warwick v. Bruce*, 2 M. & S. 205.

(2) *Beard v. Webb*, 2 B. & P. 93.

(3) *Coope v. Eyre*, 1 Hen. Black. 37. *Waugh v. Carver*, 2 ibid. 235., et vide *Bovill v. Hammond*, 6 B. & C. 149. *Cheap v. Cramond*, 4 B. & A. 663.

(4) *Exp. Gellar*, 1 Rose, 297.

(5) *Salomons v. Nissen*, 2 T. R. 675.

(6) *Holmes v. Higgins*, 1 B. & C. 74.

(7) *Hopkinson v. Smith*, 1 Bing. 13. In re *Jackson*, 1 B. & C. 270. In re *Clark*, 3 D. & R. 260. Stat. 22 Geo. 2. c. 46. s. 11.

(8) *Cosio v. De Bernales*, R. & M. 102.

(9) *C. & P. 266*. *Gow on Partners*, 2.

(10) *M. Connell v. Hector*, 3 B. & P. 113., et vide *Albrecht v. Susemann*, 2 V. & B. 323.

O'Mealey v. Wilson, 1 Camp. 482. *Roberts v. Hardy*, 3 M. & S. 533.

(10) *Exp. Baglehole*, 18 Ves. 528. 1 Rose, 271.

(11) *Per Lord Ellenborough in Pitt v. Smith*, 3 Camp. 33., et vide *Fenton v. Holloway*, 1 Stark. 126.

(12) *Jons v. Perchard*, 2 Esp. N. P. C. 508.

(13) *Brandon v. Hubbard*, 4 Moore, 363.

(14) *Exp. Langdale*, 2 Rose, 444. 18 Ves.

300. *Tench v. Roberts*, 6 Madd. 145.

(15) *Per De Grey C. J. in Grace v. Smith*, 2 W. Black. 999. *Dry v. Boswell*, 1 Camp.

329. *Collyer on Partnership*, 21.

(16) *Exp. Watson*, 19 Ves. 459.

(17) *Fereday v. Hordern*, Jacob, 145.

**WHO ARE OR
ARE NOT PART-
NERS.**

shares in a partnership must be joint, it is not requisite that they should be equal.

profit; first, the interest must be joint, for although persons may be jointly concerned in the purchase of goods, yet if they be not jointly concerned in the profit arising from the goods when purchased, they are not partners *inter se*. (1)

Although the shares in a partnership must be joint, it is not necessary that they should be equal: thus, where two persons are engaged in running a coach, one of them finding horses for one part of the road, and the other finding horses for another part of the road, and the profits of each party are calculated according to the number of miles covered by his own horses, and one party receives the fares and renders an account thereof to the other party every week — these parties are partners. (2)

**CONTINGENT
INTEREST.**

A contingent interest in the profits will make a man a partner *pro tanto*, though he may have parted with every other interest as a partner. Thus, where a retiring partner, by an agreement in writing, assigns and sells all the stock, debts, &c. to the continuing partner, who agrees to pay a debt owing by the retiring partner, and also to pay him an annuity of 100*l.* *per annum*, for the due payment of which the agreement recited, that the father of the continuing partner, who was not a party thereto, would be security: — It was held to be an executory agreement; and that the father refusing to become security, the partnership stock, &c. was not thereby transferred to the continuing partner. (3)

**WHO ARE NOT
PARTNERS.**

If two persons agree to share the profits of a trade or adventure, they will be partners in those profits; but if one be a mere servant or agent of the other, and receive his share of the profits in lieu of wages, then, as there is no mutuality between the parties, they are not partners. (4)

To constitute a communion of profit, the interest in the profit must be mutual.

In order to constitute a communion of profit between the parties, the interest in the profit must be mutual; that is, each person must have a specific interest in the profits as a principal trader, or he is not a partner.

In *Barklie v. Scott* (5) Mr. Justice Burton observed, "If a parent deposit 1000*l.* in a partnership concern as a capital for an infant son, and reserve no power over either it or the profits, he does not thereby make himself liable as a partner;" but that it would be otherwise, "if he embark it in his son's name, reserving to himself the power of drawing it or any profits out," or of "calling the other partners to an account, or of having the money or any profits thereof, paid to him as a trustee for his son, though liable afterwards to account with him for them."

If a person merely receive out of the profits a compensation for his trouble in the character of tenant, agent, or servant of the concern, he is not a partner.

Where A. purchased two bullocks, and agreed to depasture them upon the lands of B., and when fattened to sell them, and divide with him the net profits: — this was held to be no partnership, but a mode of paying for the pasture. (6)

A., having neither money nor credit, offered to B., that, if he would order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. should have half for his trouble; B. having lent his

(1) *Hoare v. Dawes*, Doug. 371. *Coope Exp. Hamper*, 17 Ves. 404. *Exp. Rawlandson*, 1 Rose, 91., et vide *Exp. Watson*, 19 Ves. 459. *Mair v. Glennie*, 4 M. & S. 240.

(2) *Fromont v. Coupland*, 2 Bing. 171. 1 C. & P. 275. *Finchle v. Stacey*, Sel. Ca. Ch. 9.

(3) *Exp. Wheeler*, Buck, 25.

(4) *Collyer on Partnership*, 23. *Withington v. Herring*, 3 M. & P. 30., sed vide

(5) 1 *Hudson & Brooke* (Irish), 87.

(6) *Wish v. Small*, 1 Camp. 331. n., vide *Benjamin v. Porteus*, 2 Hen. Black. 590.

credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone:—It was held, that such contract did not constitute a partnership as between themselves, but only an agreement for a compensation for trouble and credit, though B. was liable as a partner to third persons, creditors. (1)

WHO ARE OR
ARE NOT PART-
NERS.

Where a merchant employed a broker to purchase goods on speculation, and agreed verbally to allow him a certain proportion of the profits arising from the sale as a remuneration for his trouble, and by way of brokerage, and that he should also bear a proportion of the losses:—It was held, that the broker could not be considered such a partner with the merchant, as to vest in him a property in goods so purchased, or in the proceeds thereof, as against the assignees of the latter, after he became bankrupt; although, as to third persons, he might have been liable as a partner. (2)

Persons acting
as factors; bro-
kers;

Persons acting merely in the character of servants in an adventure, and receiving a certain share of the profits in lieu of wages, are not partners in the undertaking. (3)

or servants.

But where A., a merchant and insurance broker, agreed to pay B. a certain salary for superintending his mercantile concerns, and also agreed "to allow Mr. B. one-half of the profit arising from my account of insurances from the commencement of the said account until the present period, or those that may hereafter be done," the parties, having acted on this agreement, were held to be partners in the insurance business. (4)

Where there was an agreement between the sole owner of a lighter and his man, that the latter should work her, and that the net profits should be equally divided between them:—It was held, that they were partners in the concern, and that the man was liable for repairs as well as his master. (5)

But if the agreement had been, that the man, in consideration of working the lighter, should receive half the gross earnings, it would not have constituted a partnership, being a mode of paying the man for his labour. (6)

Money lent to a trader by a partner who retires from business, at legal interest, with an additional annuity for a certain term of years, is not a continuance of the partnership (7); in fact, where money is advanced to a trader, the true criterion to consider is, "whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan, in the latter a partnership." (8)

Annuitants.

But where a person retired upon an annuity, receiving also a per centage on the profits of the trade, he was held to be a partner by reason of the latter situation, but not of the former. (9) If a person were to receive an annuity in lieu of the profits of a trade, and determinable on the event of the trade ceasing, it seems clear, that he would be considered a partner with the grantor of the annuity. (10) So if a person, in compensation for

(1) *Heseth v. Blanchard*, 4 East, 143.

(2) *Smith v. Watson*, 3 D. & R. 751. 2 B. & C. 401., sed vide *Coldwell v. Gregory*, 1 Price, 119. *Dixon v. Cooper*, 3 Wils. 40. *Benjamin v. Porteus*, 2 Hen. Black. 590.

(3) *Wilkinson v. Fraser*, 4 Esp. N. P. C. 182. *Mair v. Glennie*, 4 M. & S. 240. *Dry v. Boswell*, 1 Camp. 330.

(4) *Knowles v. Houghton*, Lib. Reg. 1804,

A. 1008. Exp. *Rowlandson*, 1 Rose, 91. Exp. *Langdale*, 18 Ves. 300.

(5) *Dry v. Boswell*, 1 Camp. 329.

(6) *Ibid.*

(7) *Grace v. Smith*, 2 W. Black. 998.

(8) *Per Blackstone J. ibid.* 999.

(9) *Young v. Astell*, cit. 2 Hen. Black. 242.

(10) *Blozam v. Pell*, cit. 2 W. Black. 999.

WHO ARE OR ARE NOT PARTNERS.

Where a trader enters into dealings unconnected with his trade.

Conveyance of a chattel.

Mere interference as an adviser.

A party cannot be liable as a partner, unless he was a partner at the time of the contract.

Persons associated to acquire a turnpike act.

MEMBERS OF CLUBS ;

OF OR PRIVATE SOCIETIES.

MEMBERS OF JOINT STOCK COMPANIES.

Judgment of

money left with or lent to a firm, receives an annuity varying in its amount with the profits, he will be a partner in the concern. (1)

But if A., a trader, enter into a course of dealings with B. in matters unconnected with his trade, as, for instance, in discounting bills merely, and in the course of such transaction introduces C. "as his partner," this will not be sufficient to make C. chargeable as a general partner, where he has not held himself out to the world as such; because the introduction of C. to B. should be taken *secundum subjectam materiam*; that is, as applying to the transaction in which A. was concerned with B., the discounting of bills, to which transaction only it should be confined. (2)

The signature of a person's name to the conveyance of a chattel is not necessarily an avowal of his partnership in such chattel. (3)

"A stipulation, that the house shall be governed and directed by a person's advice, does not constitute him a partner, nor give him any legal interest in the firm; it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership." (4)

Acts subsequent to the time of delivering goods on a contract, may be admitted as evidence to shew, that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear, that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner, (not even an acknowledgment, that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered, though he will be liable in an action on the bill of exchange. (5)

Where a person entered into an express contract with a committee of individuals, associated together for the purpose of obtaining an act of parliament for making a turnpike road, to do certain work for a specified sum: and afterwards caused his name to be inserted in the list of subscribers for two shares:—It was held, that he was not thereby precluded from recovering upon such express contract. (6)

Clubs which are not constituted for any purposes of profit, are exposed to liabilities similar in many respects to those of partnership. Thus, if a member of a club order goods for the benefit of all, every member who concurs in the order, or afterwards approves of it, is liable, unless it appear that the creditor, at the time of sale, gave credit to that member only. (7)

There are some societies not engaged in trade, but which, not partaking of a corporate character, are dealt with in a court of equity as partnerships; as private societies for the relief of the members in case of sickness, &c. (8)

Every member of a joint stock company is liable *in solido*, for debts contracted on account of the co-partnership.

In *Dickinson v. Valpy* (9) Mr. Justice Parke observed, "If there is a con-

(1) *Exp. Wheeler*, Buck, 48.
(2) *Per Lord Kenyon in De Berghom v. Smith*, 1 Esp. N. P. C. 29.

(3) *M^r Iver v. Humble*, 16 East, 169.
(4) *Per Jebb J. in Barklie v. Scott*, 1 Hudson & Brooke (Irish), 95.

(5) *Saville v. Robertson*, 4 T. R. 720.

(6) *Lucas v. Beach (Bart.)*, 1 M. & G. 417.

(7) *Delauney v. Strickland*, 2 Stark. 416, *vide post*, 2385.

(8) *Collyer on Partnership*, 31. cit. *Bamont v. Meredith*, 3 V. & B. 180.

(9) 10 B. & C. 142.

tract to carry on any business by way of present partnership between a certain definite number of persons, and the terms of that contract are unconditional and complete, then the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the meantime enter into contracts, it seems to me to be clear, that he is not bound by them, on the simple ground that he has never authorised them." (1)

A project having been formed for the establishment of a company for the manufacture of sugar from beet-root, a prospectus was issued, stating the proposed capital to consist of 10,000 shares, of 25*l.* each. The directors began their works, and entered into contracts respecting them, and manufactured and sold some sugar; but only a small portion of the proposed capital was raised, and only 1400 out of the 10,000 shares were taken:— It was held, that a subscriber, who had taken shares and paid a deposit on them, was not liable upon such contracts of the directors, without proof that he knew and assented to their proceeding on the smaller capital, or expressly authorised the making of the contract; Lord Abinger observing (2), "The question is, whether the directors were the agents of the defendant in carrying on the business with so small a capital? I thought at the trial, and am still of the same opinion, that where a prospectus is issued, and shares collected, for a speculation to be carried on by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled. But if it be shewn that he knows that the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts. In this case, there was very little, if any, evidence to shew that, and I am satisfied with the finding of the jury."

Whether the company turn out successful or otherwise, if the shareholder neglect to perform the conditions which enable him to share the profits, he cannot be considered an actual partner. On the other hand, to charge a person as an actual partner in any company, it is not necessary to shew, that he executed the deed of settlement, if it can be proved from his letters or admissions, that he was a partner according to the terms of such deed. (3)

Signing the deed of settlement is conclusive evidence of partnership against those who sign it (4), and they will be considered as partners from the time of the payment of their respective deposits. (5)

Signing a prospectus of a future company does not make a man a partner to the world: thus, in *Bourne v. Freeth* (6) Mr. Justice Bayley said, "that the plaintiffs, when they saw the defendant's name to the prospectus, had no right to infer from the terms of it, that he had become a partner at the time when he signed it; they ought, before they delivered goods on his credit, to

WHO ARE OR
ARE NOT PART-
NERS.

Mr. Justice
Parke in
Dickinson v.
Valpy.

Judgment of
Lord Abinger
in *Pitchford v.*
Davis.

Where a per-
son does not
perform the
conditions to
enable him to
share the pro-
fits.

Signing the
deed of settle-
ment.

Signing a pro-
spectus.

(1) Vide *Howell v. Brodie*, 6 Bing. N. C. 44., vide etiam *Fox v. Clifton*, 6 Bing. 776. 9 *ibid.* 115.

(2) *Pitchford v. Davis*, 5 M. & W. 3.

(3) *Harvey v. Kay (Bart.)*, 9 B. & C. 356.

(4) *Bird v. Aston*, cit. 6 Bing. 786. 788. Touchst. by Atherley, 71.

(5) *Lawler v. Kershaw*, M. & M. 93.

(6) 9 B. & C. 632. 4 M. & R. 512.

WHO ARE OR
ARE NOT PART-
NERS.

Judgment of
Chief Justice
Tindal in *Fox*
v. Clifton.

have inquired whether he had become a partner subsequently; and if they had so inquired, they would have found that he had not."

The effect of becoming a subscriber to an intended company in regard to the creation of a partnership between the members, as well *inter se*, as in reference to the public, was fully considered in the case of *Fox v. Clifton* (1); where it appeared, that a prospectus was issued for a distillery company, with a capital of 600,000*l.* and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up. All persons who did not execute the deed within thirty days after it was ready, were to forfeit all interest in the concern. No more than 7500 shares were ever allotted; only 2300 persons paid the first deposit; only 1106 the second; and only 65 signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern:—It was held, that an application for shares, and payment of the first deposit, did not constitute a partner, one, who had not otherwise interfered in the concern; and that the insertion of his name by the secretary of the company, in a book containing a list of the subscribers, was not a holding out as a partner; Chief Justice Tindal observing, "If the right to participate in the profits of a joint concern is to be taken, as undoubtedly it ought to be, as a test of partnership, these defendants were not entitled at any time to demand a share of profits, if profits had been made, inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no further, than that the defendants had offered to become partners in a projected concern, and that the concern proved abortive before the period at which the partnership was to commence; and, therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants; for they began to act in the name of the whole, before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors, must rest upon the security of the directors, who made such contract, and of those subscribers, who, by executing the deed, have declared themselves partners, and of any who have by their subsequent conduct recognised and adopted the acts and contracts of the directors; but they have not the security of the present defendants, who are not proved by the evidence to stand in any one of such predicaments." "The holding oneself out to the world as a partner, as contra-distinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner."

(1) 6 Bing. 776, 799, 800. 4 M. & P. 676. *Bourne v. Freeth*, 9 B. & C. 632. *Dickinson* 9 *ibid.* 115. S. C. after the third trial, et vide *v. Valpy*, 10 *ibid.* 128., *anté*, 2382.

A club was formed, by the regulations of which, the members paid entrance money and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds; but no member of the committee had authority to draw cheques, except three, who were chosen for that purpose, and whose signatures were countersigned by the secretary:—It was held, in an action brought against two of the committee by a tradesman, who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover, without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club. (1)

WHO ARE OR
ARE NOT PART-
NERS.

CLUBS.

Mining concerns are, to some purposes, trading concerns; but they are not so to all, viz. they are not, as in ordinary partnership trade, subject to dissolution on the death or bankruptcy of any of the partners, and the shares are transferable without the consent of the other partners. In these particular instances they have not all the incidents of a trading concern; in other respects, it has been repeatedly held that they have. (2)

MEMBERS OF
MINING CON-
CERNS.

The members of a mining company have authority by law (in the absence of any proof of a more limited authority) to bind each other by dealings on credit, for the purpose of working the mines, if it appear to be necessary or usual in the management of them. (3)

Liability of
members of
mining com-
panies for the
expenses.

Where a mining company was formed, the capital to be 30,000*l.* in 3000 shares of 10*l.* each, and 2000 shares only were actually subscribed for, of which the defendant took 100:—It was held, that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to shew, that he authorised the directors to proceed to the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors. (4)

4. WHAT CAN OR CANNOT BE THE SUBJECT OF PARTNERSHIP.

Generally speaking, a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced (5); but if parties enter into a contract of partnership in violation of the law, it will be void, and confer no right on either party as against the other. (6)

WHAT CAN
OR CANNOT BE
THE SUBJECT
OF PARTNER-
SHIP.

Partnership
may exist in
any business
which is not a
mere personal
office.

Whether the subject of a contract be *malum prohibitum*, or *malum in se*, there can be no partnership founded upon it, so as to give the contractors a remedy either against each other, or against third persons, at law or in

Where subject
of the contract
is *malum pro-*

(1) *Todd v. Emily*, 7 M. & W. 427., vide *Fleming v. Hector*, 2 ibid. 172. *Tyrrell v. Woolley*, 2 Scott, N. R. 171.

(2) *Fereday v. Wightwick*, 1 Russ. & M. 45., vide etiam *Bentley v. Bates*, 4 Jur. 552.

(3) *Hawken v. Bourne*, 8 M. & W. 708. *Tredwen v. Bourne*, 6 ibid. 461.

(4) *Tredwen v. Bourne*, 6 ibid. 461.

(5) *Waugh v. Carver*, 2 Hen. Black. 235., et vide *Bovill v. Hammond*, 6 B. & C. 149. Collyer on Partnership, 30.

(6) *Armstrong v. Lewis (in error)*, 2 C. & M. 274. 4 M. & Sc. 1.

WHAT CAN
OR CANNOT BE
THE SUBJECT
OF PARTNER-
SHIP.

*hbitum or ma-
lum in se.*

Judgment of
Lord Mans-
field in *Holman*
v. Jackson.

Contracts con-
trary to law.

Usurious con-
tracts.

equity (1): but, as observed by Lord Mansfield in *Holman v. Jackson* (2), "The objection that a contract is immoral or illegal, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*."

If a partnership be contrary to law, no action can be founded on it by the parties implicated, even if it be brought in disaffirmance of the contract. (3)

A contract originally entered into for the purpose of evading the usury laws, and not *bond fide* with the view of partnership, cannot be supported as a legal contract of partnership. (4)

In cases of usury the question is, Whether or not it was the intention of the parties to enter into an agreement having the semblance of a partnership agreement, with a view to evade the usury laws? but an agreement, having the form of a partnership agreement, but in which profits beyond the legal rate of interest are reserved to one of the parties, is legal, unless it appear to have been executed by way of shift or contrivance to cover usury, because, at all events, the principal for which such profits and interest are taken, is hazarded to third persons. (5)

But the omission of the directions of an act of parliament, where the consequence is not pernicious to the public in general, will not render the partnership illegal, so as to deprive them of the powers of recovering upon a legal contract. (6)

Where non
omission of the
directions of an
act of parlia-
ment is not
pernicious to
the public.

ACTIONS BY
PARTNERS.
GENERALLY.

5. ACTIONS BY PARTNERS.

Partners have the same rights to maintain actions as any individual person, and the primary principles which apply to one, equally apply to the other.

BONDS.

Effect of a
bond given to a
firm, and the
subsequent re-
tirement of one
of its members.

Judgment of
Chief Justice
De Grey in
*Wright v. Rus-
sel*.

If a bond be given to a firm, without any provision for a change taking place in the firm, the rights of the partners under this bond will cease, as to all future matters, upon the incoming, retirement, or death of a partner.

In *Wright v. Russel* (7) Chief Justice De Grey said, "The law is, that the surety shall not be bound beyond the scope of his engagement, as understood at the time he entered into it. Where there is the least difference between the condition and the breach assigned, the surety will not be bound. Here Wright takes a clerk, when sole, with security for his good behaviour in his service. He then, by his own act, takes in a partner.

(1) *Sullivan v. Greaves*, Park on Insur-
ance, 8. *Mitchell v. Cockburne*, 2 Hen. Black.
379. *Aubert v. Maze*, 2 B. & P. 371.

(2) Cowp. 341.

(3) *Booth v. Hodgson*, 6 T. R. 405. *Arm-
strong v. Lewis* (in error), 2 C. & M. 274.,
ante, 263—278. tit. ASSUMPSIT.

(4) *Morse v. Wilson*, 4 T. R. 353. *Jes-
tons v. Brooke*, Cowp. 793.

(5) Collyer on Partnership, 40. *Moris-
set v. King*, 2 Burr. 891. *Gilpin v. Enderbey*
(in error), 5 B. & A. 954. *Fereday v.*

Hordern, Jacob, 144. Where the illegal
contract of partnership is not executed, but
executory only, none who were parties to it
can, by action or otherwise, recover the
money advanced for the purpose of establish-
ing the partnership. Exp. Bell, 1 M. & S.
755.

(6) *Brown v. Duncan*, 10 B. & C. 23.
L. & W. 91. *Hodgson v. Temple*, 5 Trist.
181. *Johnson v. Hudson*, 11 East, 180.

(7) 2 W. Black. 934. 3 Wils. 532.

ACTIONS BY
PARTNERS.

From that moment the suretyship is at an end. If there is one, there may be twenty partners taken in. Is the surety liable, if Baird disobeys the orders of any one of those partners? Is Baird to be subject to all the obligations that arise from this new service, and the surety answerable for all? Or can the surety be called upon to insure the money of all the partners? Certainly not. I will not say how far the bond may be, or may not be, at an end, even with respect to Wright's own proper money; but it certainly cannot extend to the money of other people, which is the case now before the court." (1)

If a firm of bankers, five in number, take a bond conditioned for the repayment "to them of any money advanced by them five, or any or either of them," the bond will not extend to sums advanced by the survivors after the death of one of them: thus, in *Weston v. Barton* (2) Chief Justice Mansfield observed, "The words of the condition on which the question depends again and again refer to the obligors' capacity of bankers; they were bankers, only as they were partners in their banking house, as it is called; and this security is conditioned to pay any money advanced by 'them five, or any or either of them.' Taking those last words by themselves, it might at first be conceived, that, if any one of the five advanced money this bond should secure it; but the words are afterwards explained, when it is seen, that the money is to be paid to the five. Now, it could never be intended, that money advanced by one of them singly, should be repaid to the five; and this shews, that the words 'advanced by them, or any or either of them,' must be confined in their meaning to money advanced by any or either of them in their capacity of bankers, on behalf of all the five." (3)

Judgment of
Chief Justice
Mansfield in
Weston v.
Barton.

And conversely, if one firm of bankers take from another firm of bankers, namely A. and B., a bond conditioned for the repayment of all sums of money for which they A. and B., or either of them, should draw upon the obligee by means of bills, the bond will not extend to a bill drawn by B. after the death of A. (4)

If an instrument be made to partners, their heirs and assigns, for the purpose by mortgage or otherwise of securing debts due or to become due to them, and afterwards a nominal partner be introduced into the firm, and after his accession, the firm make further advances to the debtor, it may be a question how far such subsequent advances are secured by the deed, and whether any distinction is to be drawn between such a case and *Pemberton v. Oakes* (5), from the circumstance of the incoming partner being only nominal. (6)

Bond made to
partners, their
heirs and as-
signs.

"But a bond or other instrument may be drawn so as to make the obligor or covenantor answerable, not only to the present, but to all future partners in the house." (7)

If a bond be given to a firm by the name which it has used for many years, without alteration, evidence may be admitted to prove to what indi-

Bond may be
drawn to make
the obligor an-
swerable to all
changes in a
partnership
firm.

(1) Vide etiam *Strange v. Lee*, 3 East, 434. *Arlington (Lord) v. Merricke*, 2 Saund. 412. *Dance v. Girdler*, 1 N. R. 34. Collyer on Partnership, 368. *Pemberton v. Oakes*, 4 Russ. 154., sed vide *Barclay v. Lucas*, 1 T. R. 291. *Cambridge (University of) v. Baldwin*, 5 M. & W. 580.

(2) 4 Taunt: 673.

(3) Et vide *Thomas v. Da Costa*, 2 Moore, 316. Exp. *Watson*, 19 Ves. 459.

(4) *Simson v. Cooke*, 1 Bing. 452.

(5) 4 Russ. 154.

(6) Collyer on Partnership, 440.

(7) Per Lawrence J. in *Strange v. Lee*, 3 East, 434. *Simson v. Ingham*, 2 B. & C. 65. 2 D. & R. 249. *Simson v. Cooke*, 1 Bing. 452.

ACTIONS BY
PARTNERS.

viduals trading under that name the bond was given. Consequently, those partners to whom the bond was in fact given may recover in an action on the bond, although the bond does not appear upon the face of it to have been made to them in particular, but to the firm by its general name. (1)

Where a bond is given to the trustees of a trading company, conditioned to secure the faithful services of a clerk to the company, this bond will remain in full force so long as such clerk acts in such capacity, and notwithstanding the fluctuations of the company. (2)

Where a submission is made of all matters in difference between the parties, and one of the parties consists of a partnership firm, the submission embraces only matters in difference between the partnership jointly and the other party, and not between the partners severally and the other party. Therefore, a submission of this kind will not enure to the benefit of one partner only. (3)

GUARANTEES.

Guarantees are not to be construed strictly according to the letter, but according to the intention of the parties, and in the absence of evidence to the contrary, will be strictly construed against the guarantor. (4)

Circumstances may arise which may much enlarge the rights of partners to whom a guarantee is given: thus, sometimes a guarantee, though given only to one partner, may enure to the benefit of the whole firm. (5)

In *Walton v. Dodson* (6) it was held, that a guarantee given to one of two partners for goods sold by them in the way of their trade would enure for the benefit of both, there being evidence, that the partners did not carry on any separate trade; and that a guarantee, without an address, would enure to the benefit of those to whom, or for whose use, it was delivered.

Guarantee will cease upon a change in the partnership.

In *Dry v. Davy* (7) the following guarantee was given to the firm of M. and D., the actual members of which at the time were M., D., and N.:—"G. C. is desirous of commencing business in your line, and wants the usual credit for six months. If you think well to supply him, I will be answerable for the amount of 100*l.*:"—It was held, that on N. withdrawing from the firm (which continued under the names of M. and D.), the guarantee ceased, no intention appearing on the instrument, that the responsibility should continue after such change in the partnership.

ASSUMPSIT.

Where a joint interest must be shewn.

Partners can maintain *assumpsit*. But where several plaintiffs bring an action of *assumpsit*, unless they rely upon a contract expressly made with all, they must prove a joint interest arising by implication, as by evidence that they are partners, and jointly interested in the subject-matter; for, if a contract be made by the joint agent of all, or by one partner on behalf of all, they may sue jointly upon it, although their names have not been expressly mentioned. (8)

When deed ought to be produced, to shew that the plaintiff had a right to sue.

Where the directors of a private company, formed under a deed of settlement, sued upon a contract made with themselves as directors, and on the trial it appeared, that there was another director, not named as plaintiff, who had become bankrupt, and had ceased and declined to act or attend the board of directors when the contract was made:—It was held (on *non assumpsit*), that the plaintiffs ought to have produced the deed to shew, that

(1) *Moller v. Lambert*, 2 Camp. 548.

(2) *Metcalf (Bart.) v. Bruin*, 12 East, 400. 2 Camp. 422.

(3) *Garland v. Noble*, 1 Moore, 187.

(4) *Hargrave v. Smee*, 3 M. & P. 584.

Davy v. Pendergrass, 5 B. & A. 192.

(5) *Garrett v. Handley*, 4 B. & C. 664.

7 D. & R. 144.

(6) 3 C. & P. 162.

(7) 10 A. & E. 30.

(8) 3 Stark. Ev. 3d ed. 801.

they had authority, in the character of directors, to sue for the company, and also to shew, that the office of director was determined by bankruptcy, or by voluntarily ceasing to act. (1)

A bill or note given to a firm is a security only to those to whom it is made payable; but it may be so framed as to comprehend future as well as present partners, and for that purpose it seems to be sufficient to make the bill or note payable to the partners or their order. (2)

The rights of partners under accounts current with their debtors will be limited according to the rules of calculation laid down in *Clayton's case*. (3) Therefore, when one of several partners dies or retires, and there is a balance due to the firm at that period, such balance will be gradually diminished by the sums paid in subsequently by the debtor, unless such sums be specifically appropriated at the time of payment. (4)

But if money be owing to two partners, and after the death of one it be paid to a third person, the survivor may maintain an action for money had and received to his own use. (5)

The party with whom the contract has been expressly made may alone sustain the action, although it turn out that another person whose name was not mentioned is secretly interested. (6) "If you can find out a dormant partner you may make him pay, because he has had the benefit of your work, but a person with whom you have no privity of communication shall not sue you." (7)

Where business has been carried on in the names of several, one of them may still support an action of *assumpsit*, provided he expressly prove, that the others were not in fact partners. (8) And a party in whose name the business has been carried on as a co-partner is competent to prove, that in fact he was not a partner. (9)

If one member of a partnership become bankrupt, the solvent partner may use the names of the assignees of the bankrupt in bringing actions against the debtors of the firm; but the assignees are entitled to an indemnity against the costs when they apply for it. (10)

Windsor herald and Blue Mantle poursuivant-at-arms are in the situation of co-partners; at least, they can maintain a joint action for the profits of any business which is begun while they are jointly on duty. (11)

One co-parcener cannot sue separately for his portion of rents accruing to him and his fellows (12); and an action will not lie at the suit of one of three co-parceners to recover his proportion of rents of the estate received by an agent, where the agent claims the rents under a devise to himself. (13)

ACTIONS BY PARTNERS.

BILL OR NOTE.

RIGHTS OF PARTNERS UNDER ACCOUNTS CURRENT WITH THEIR DEBTORS.

Party with whom the contract is expressly made, can maintain *assumpsit per se*.

When business carried on in the names of several, who are not in fact partners.

Where one member of a partnership becomes bankrupt, the other co-partners may sue in the partnership name.

Windsor herald, &c.

WHEN ACTION CANNOT BE MAINTAINED.

(1) *Phelps v. Lyle*, 10 A. & E. 113., vide *etiam Wilson v. Craven*, 8 M. & W. 595.

(2) *Pease v. Hirst*, 10 B. & C. 122.

(3) 17 Ves. 514. 1 Mer. 529. Collyer on Partnership, 450.

(4) *Bodenham v. Purchas*, 2 B. & A. 39. *Pemberton v. Oakes*, 4 Russ. 154.

(5) *Smith v. Barrow*, 2 T. R. 476.

(6) *Lloyd v. Archbottle*, 2 Taunt. 324. *Mawman v. Gillett*, *ibid.* 325.

(7) *Per Mansfield C. J.* in *Lloyd v. Archbottle*, 2 Taunt. 327., *sed vide Skinner v. Stocks*, 4 B. & A. 437. *Leveck v. Shaftoe*, 2 Esp. N. P. C. 468. *Lucas v. De la Cour*, 1 M. & S. 249.

(8) *Teed v. Elworthy*, 14 East. 210. *Atkinson v. Laing*, 1 D. & R. 16. *Parsons v. Crosby*, 5 Esp. N. P. C. 199.

(9) *Glossop v. Colman*, 1 Stark. 25.

(10) *Whitehead v. Hughes*, 2 C. & M. 318. 2 Dowl. P. C. 258.

(11) *Townsend v. Neale*, 2 Camp. 190.

(12) *Decharms v. Horwood*, 4 M. & Sc. 400. 10 Bing. 526.

(13) *Ibid.* *Semble*, that money had and received was not the proper form of action in which to raise the question. *Ibid.*

ACTIONS BY
PARTNERS.

Where one partner a member of two firms.

The partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiff's house is also a member, for transactions which took place while he was partner in both houses, whether the action be brought in the lifetime of the common partner or after his decease. But after his decease, the surviving partners of the one house may sue the surviving partners of the other house, upon transactions subsequent to the decease of the common partner. (1)

Payment to one partner is a payment to the firm.

Payment to one partner is payment to the firm. (2)

After a dissolution, either partner may receive a debt due to the firm.

In *King v. Smith* (3) Lord Tenterden held, that after a dissolution of partnership between two partners, either partner may receive a debt due to the firm, notwithstanding a stipulation in the deed of dissolution that one shall receive all the debts. Thus, in an action brought by B. against C. on a bill drawn by B. and accepted by C., after the dissolution of the partnership of A. and B., but a debt due from C. to that partnership, it was held, that it was no answer for C. to say, that, by the terms of the dissolution, A. only was to receive the debts of the firm. (4)

Where one of several plaintiffs cannot recover.

It is a good defence to shew that one of several plaintiffs cannot recover, although he may have been guilty of fraud against the rest. Thus A., B., and C. cannot recover on a bill of exchange drawn by them and accepted by the defendant, A. having (in fraud of his partners) engaged to provide for the acceptance when the bill should be due. (5)

A. being partner with B. in one mercantile house, and with C. in another; the house of A. and B. indorsed a bill to the house of A. and C., after which B., acting for the house of A. and B., received securities to a large amount from the drawer of the bill, upon an agreement by B. that the bill should be taken up and liquidated by B.'s house, and, if not paid by the acceptors when due, should be returned to the drawer:—It was held, that the securities being paid, and the money received by B. in satisfaction of the bill, A. was bound by this act of his partner B., whether in fact known to him or not at the time, not only in respect of his partnership interest in the house of A. and B., but also individually in other respects; and, therefore, that he could not, in conjunction with C., his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with B., in discharge of the same. (6)

Where illegal acts of one partner, will affect his co-partners.

So if one partner be precluded by the illegality of his act from recovering in the particular transaction, his partners, although innocent, cannot recover. (7)

Thus, if goods be sold and packed by a partner living in Guernsey, for the purpose of being smuggled into this country, the parties who live in England, although ignorant of the transaction, cannot jointly with the other maintain an action for the goods, for the act of one partner is the act of all. (8)

(1) *Bosanquet v. Wray*, 6 Taunt. 597.

(2) *Anon.* 12 Mod. 446. *Duff v. East* India Comp. 15 Ves. 198.

(3) 4 C. & P. 108.

(4) Vide etiam *Bristow v. Taylor*, 6 M. & S. 156. 2 Stark. 50., sed vide *Henderson v. Wild*, 2 Camp. 561.

(5) *Richmond v. Heapy*, 1 Stark. 202. *Sparrow v. Chisman*, 9 B. & C. 241. *Jacaud*

v. French, 12 East, 317. *Bolton v. Puller*, 1 B. & P. 539. *Henderson v. Smith*, 2 Camp. 561. *Jones v. Yates*, 9 B. & C. 532.

(6) *Jacaud v. French*, 12 East, 317.

(7) *Biggs v. Lawrence*, 3 T. R. 454.

(8) *Ibid.*, vide *Clugas v. Penultima*, 4 *ibid.* 466. *Waymell v. Reed*, 5 *ibid.* 599., *anti.* 268. tit. ASSUMPSIT.

Where A. and B. being partners, their agent, after an act of bankruptcy by A., but before an act of bankruptcy by B., paid a sum of money on the joint account to C., it was held, that the assignees under a joint commission could not recover this money as had and received to the use of A. and B. before they became bankrupts, or as money received to their use as assignees since the bankruptcy (1), even although A. knew of the bankruptcy of B.; for a solvent partner may dispose of the partnership effects in discharge of a partnership debt. (2)

So if A. in such a case, after a secret act of bankruptcy by B., dispose of the partnership effects for a valuable consideration, and afterwards commit an act of bankruptcy, the assignees of both, under a joint commission, cannot maintain trover against the *bond fide* vendee. (3)

Where the parties contest the question of partnership *inter se*, it seems that such evidence as would be sufficient to establish their partnership in a suit by a stranger, will raise a presumption of the fact of partnership *inter se*. (4)

As wrongs unconnected with fraud in the settlement of contracts or accounts are in their nature personal, partners will have the same remedies between themselves, in respect to these matters, as other persons have. Thus, if one tenant in common destroy the thing in common, the other may bring trover, because it amounts to a wrongful conversion. (5)

Although trover may be maintainable by one partner against another, in the case of a wrongful conversion, yet the general rule is, that one joint tenant, or tenant in common, cannot bring trover against his companion for a thing still in his possession, because the possession of one is the possession of both; if he do, it is good evidence upon not guilty. (6) And hence, the mere taking and refusal to deliver up by one of two joint tenants, or tenants in common, will not give the other a right of action against him. (7)

Upon the bankruptcy of one of two partners, the assignees become tenants in common with the solvent partner, his representatives or assigns, and cannot sue any of these parties in trover for the partnership goods. (8)

One partner may maintain an action of covenant against his co-partner, whether the covenant be to pay any sum, or to do any act for the purpose of only launching the partnership (9), or whether it be to perform any of the articles after the partnership has actually commenced. (10)

An action of covenant will lie, although there may be accounts between the parties which require unravelling in equity. (11) And where partnership covenants have not been infringed for any length of time, the action of covenant is the proper remedy (12); but if there have been "a studied, intentional, prolonged, and continued inattention to the application of

ACTIONS BY PARTNERS.

When assignees cannot maintain *assumpsit*.

When assignees cannot maintain trover.

ACTIONS BY PARTNERS INTER SE.

Question of partnership *inter se*.

TORTS BY PARTNERS INTER SE.

For wrongs unconnected with fraud, partners have the same remedy against each other as strangers.

COVENANT INTER SE.

One partner may maintain covenant against his co-partner.

(1) *Smith v. Goddard*, 3 B. & P. 465.

(2) *Biggs v. Fellows*, 8 B. & C. 402.

(3) *Fox v. Hanbury*, Cowp. 449.

(4) *Peacock v. Peacock*, 2 Camp. 45.

(5) Bull. N. P. 34. (b.)

(6) *Ibid.* *Brown v. Hedges*, 1 Salk. 290.

Holliday v. Cammell, 1 T. R. 658.

(7) *Fennings v. Grenville (Lord)*, 1 Taunt. 241.

(8) *Fox v. Hanbury*, Cowp. 445. *Smith v. Stokes*, 1 East, 363. *Smith v. Oriell*, *ibid.* 368. *Salomons v. Nissen*, 2 T. R. 674.

(9) *Walker v. Harris*, 1 Anst. 245.

(10) *Want v. Reece*, 1 Bing. 18. Collyer on Partnership, 162.

(11) *Fenning v. Leckie*, 13 East, 7.

(12) *Marshall v. Colman*, 2 J. & W. 266.

ACTIONS BY
PARTNERS.

One of several
partners en-
gaging in an-
other partner-
ship or trade.

one party calling upon the other to observe his contract," equity will interpose. (1)

There is frequently a covenant not to engage in any business, except on account and for the benefit of the co-partnership. In case of a breach of this covenant, the aggrieved party may of course bring his action; but he may also file a bill for an account of the profits made in such separate trade, and for payment of a proportion of those profits. (2) But if it be decreed, that a person is entitled to a share in the profits of a separate business, he also becomes liable for all losses from the period at which his profits commenced.

Covenants to
refer disputes
to arbitration.

Covenants to refer disputes to arbitration are sometimes agreed upon:—"There are prudential ways of drawing these articles. There might have been an agreement for liquidated damages, to enforce a specific performance, if an action could not produce sufficient damages, or equity would not entertain a bill for a specific performance" (3); and courts of equity will not assist an arbitration. (4)

Action for li-
quidated da-
mages.

If a covenant be such, that its breach must of necessity be uncertain in its nature and amount, then, if liquidated damages be reserved, they will be deemed the real damages; and a verdict in an action on the covenant will be found for the amount of the liquidated damages, and equity will not relieve against them. (5)

Certain da-
mage.

But if the breach of covenant be attended with *certain* damage, although liquidated damages be reserved *eo nomine*, they will be considered by a jury only in the nature of a *penalty*, and the real damages will be measured by the sum omitted to be paid. (6)

Uncertain da-
mage.

But if the real damage be uncertain, it will be referred to the prothonotary to ascertain what damages, if any, the plaintiff had sustained, and how much, if any thing, ought to be paid to the plaintiff. (7)

It seems from the foregoing case, that, in order to give an effectual remedy for the recovery of a sum of money as stipulated damages, in a case where they exceed the positive loss, a distinct and separate amount should be assessed as the measure of compensation on the breach of each several contract. (8)

DEBT ON AN
AWARD.

If several partners submit *all* differences between them to arbitration, and the arbitrator award, that a sum of money shall be paid by A., one of the partners, to B., another partner, B. may sue A. in an action of debt on the award; for in such case the sum awarded is virtually the final balance of the partnership account.

Judgment of

In *Winter v. White* (9) Mr. Justice Burrough, in reference to the fore-

(1) *Per* Lord Eldon in *Marshall v. Colman*, 2 J. & W. 266. *Lingen v. Simpson*, 1 S. & S. 600.

(2) *Somerville v. Mackay*, 16 Ves. 382. 2 Hovenden's Supp. 450.

(3) *Per* Lord Eldon in *Street v. Rigby*, 6 Ves. 818., et vide *Astley v. Weldon*, 2 B. & P. 346.

(4) *Agar v. Macklew*, 2 S. & S. 418.

(5) *Lowe v. Peers*, 4 Burr. 2225. *Far-rant v. Olmuis*, 3 B. & A. 692. *East India Comp. v. Blake*, Finch, 117. *Small v. Fitz-williams* (Lord), Prec. Ch. Ca. 102. *Rolfe v. Peterson*, 2 Bro. P. C. 436. *Woodward v. Gyles*, 2 Vern. 119.

(6) *Kemble v. Farren*, 6 Bing. 141, 5 M. & P. 425.

(7) *Charrington v. Laing*, 6 Bing. 242. 3 M. & P. 587. In *Randal v. Everest*, M. & M. 41., Lord Tenterden seemed to consider that liquidated damages are out of the question in *all* cases where the agreement is not under seal; see vide 7 Jarman's Conveyancing, 85. *Criades v. Bolton*, 3 C. & P. 243. Collyer on Partnership, 168.

(8) 7 Jarman's Conveyancing, 87., et vide dict. Bayley J. in *Davies v. Penton*, 6 B. & C. 223.

(9) 1 B. & B. 363. 3 Moore, 674., vide *Brookes v. Enderby*, 4 Moore, 501.

going principle, observed, "If the award is well made, I cannot discern any objection to this action; it is an action of debt on the award, for the sum awarded to be paid by the defendant to the plaintiff? The action is not founded on a contract. Debt lies on the award, because the subject-matter of reference by the award *transit in rem judicatam*. The award creates the duty; the party is not driven to an action on the bond. I conceive it is not essential to an action on an award, where the submission is by bond, that the plaintiff should be able to recover the same sum by an action on the bond: I am sure it is no where so decided. The award is in the nature of a judgment or decree: the bonds, and their conditions, are only to be looked to, in order to see whether the matter awarded is authorised by the agreement to submit."

To maintain *assumpsit* between partners, there must be an *express* promise to pay on the part of the defendant. (1)

As general principles, "one partner cannot maintain an action against his co-partners for work and labour performed, or money expended on account of the partnership" (2), unless, on a balance struck, a sum be found due to him alone. (3) And where one partner has a claim upon his co-partner for a sum of money due on account of the partnership, but not constituting the balance of a separate account, or a general balance of all accounts, his only mode of recovering the amount is by bill filed in a court of equity, praying for an account, and usually, also, for a dissolution. (4)

But there are some particular cases in which one partner may, even in an action at law, recover money due to him from his co-partner from matter connected with the partnership. Thus, if one partner give the other his promissory note, or his separate acceptance for value received on the partnership account, an action will lie on such note or bill. (5) So, if one partner draw upon all the others by name, and they individually accept, he may recover against them; because, by such an acceptance, a separate right is acknowledged to exist; and it seems, that an action is maintainable between partners, for contribution in respect of damages recovered against one of them.

But, generally speaking, money cannot be recovered by partners *inter se*, which, when the cause of action accrued, might be placed as an item in the partnership account. It must either have been the basis of the account when the partnership commenced, a sum separated from the account while the partnership continued, or the balance of the account when the partnership ceased, or when a general adjustment of its affairs took place. (6)

Particular transactions may be abstracted from the partnership account, and justify actions between the partners. The case of *Sharp v. Warren* (7), although not a case of trading partnership, is illustrative of this position:—in which it appeared, that the auditor of a benefit club, who was himself

ACTIONS BY PARTNERS.

Mr. Justice Burrough in *Winter v. White*.

ASSUMPSIT.

To maintain *assumpsit* between partners, there must be an express promise.

Generally, one partner cannot maintain an action against his co-partner for work and labour performed.

Money expended on account.

When one co-partner may recover from the other money advanced.

When particular transactions may be abstracted from the partnership account.

(1) *Fromont v. Coupland*, 2 Bing. 170. 9 Moore, 319., sed vide *Moravia v. Levi*, 2 T. R. 483. n. *Foster v. Allanson*, ibid. 479. *Rackstraw v. Imber*, Holt's N. P. C. 368.

(2) Per Lord Tenterden in *Holmes v. Higgins*, 1 B. & C. 76., et vide *Harvey v. Crichton*, 5 M. & S. 336., *Milburn v. Codd*, 7 ibid. 419. *Bovill v. Hammond*, 6 ibid. 149.

(3) *Smith v. Barrow*, 2 T. R. 476.

(4) Collyer on Partnership, 174, 175.

(5) *Preston v. Strutton*, 1 Anst. 50.

(6) Collyer on Partnership, 179. *Vening v. Leckie*, 19 East, 7. *Gale v. Leckie*, 2 Stark. 107. *Coffee v. Brian*, 10 Moore, 341. 3 Bing. 54., sed vide *Robson v. Curtis*, 1 Stark. 78.

(7) 6 Price, 132.

ACTIONS BY
PARTNERS.Judgment of
Mr. Baron
Graham in
Sharp v.
Warren.

a member, was intrusted with the funds of the society for safe custody, which funds he applied to his own use, and refused to pay over, and he ran away with the box :—It was held, that the steward of the club might maintain an action against him for the amount, Mr. Baron Graham observing, "I am of opinion, that in a case of this sort *indebitatus assumpsit* will lie. The defendant's carrying away the money and leaving the society, makes him liable to them, as if he were not himself a member of the society ; and it might be recovered as money had and received. The defendant had placed himself out of the protection of his situation in the society, by his conduct in withdrawing, under the circumstances, and he had no longer any further interest in common with them."

Purchase of
goods by one
co-partner for
the other.

Where the plaintiff and defendant agreed to buy goods on their joint account, the defendant undertaking to furnish the plaintiff with half the amount in time for payment, and the plaintiff paid the whole, it was held, that an action lay for the moiety, although an account was still to be taken between them as partners in the subsequent disposal of the stock. (1)

Wrongfully
carrying money
to a joint ac-
count.

So, if one partner wrongfully carry money belonging to the other to the joint account, an action lies for money had and received. (2)

But where A., B., and C. had been members of a trading company, and after its dissolution B. and C., being sued as members of the company, retained A., who was an attorney, to defend them :—It was held, that A., as a member of the company, was jointly liable to contribute to the expense of the defence ; and could not maintain an action for his costs against B. and C. (3) So an agent, employed by a company of subscribers for an application to parliament for an intended railway, being himself a subscriber, cannot maintain an action for his services, either against the body of the subscribers, or against the chairman. (4)

Bill of ex-
change.

But an action is not maintainable by one partner against another, on a bill of exchange given in respect of an unascertained balance. (5)

PERSONAL
OFFICE OR
EMPLOYMENT.

If a personal office or employment be purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased, is not necessarily a trustee of the profits for the other partners after the term of the partnership has expired. (6)

RECOVERY OF
GENERAL BAL-
ANCE.

One partner may maintain an action against his co-partner to recover the whole or an aliquot part of the general balance of a partnership account. Even where partners have covenanted to account at certain times, if in pursuance of the covenant an account be entered into and a balance struck, and the debtor partner expressly promise to pay, the creditor partner may maintain an action of *assumpsit* against his co-partner on such express promise, notwithstanding the covenant. (7)

So on the other hand, where no account has been settled, but there has been an agreement by the retiring partner or his representative to take a certain sum of money in consideration of relinquishing the account, this is a valid consideration to support an action of *assumpsit* for the recovery of the sum agreed upon. (8)

(1) *Venning v. Leckie*, 13 East, 7.(2) *Smith v. Barrow*, 2 T. R. 476.(3) *Milburn v. Codd*, 7 B. & C. 419.(4) *Holmes v. Higgins*, 1 ibid. 74.(5) *Verley v. Saunders*, 2 Chitt. 127.(6) *Clarke v. Richards*, 1 Y. & Col. 351.(7) *Moravia v. Levi*, 2 T. R. 483. *see* *Foster v. Allanson*, ibid. 479. *Collyer on Partnerships*, 184.(8) *Wells v. Wells*, 1 Vent. 40.

ACTIONS BY
PARTNERS.

Where A. and B. had been partners in certain transactions for the purchase and sale of wool, having also had other dealings together; and they settled a general account, in which was an item to B.'s *debit* "to loss on wool," and which shewed a balance of 15*l.* against him; and B. signed the account, and admitted the balance due:—It was held, that A. might afterwards maintain an action to recover the amount of the item for the loss on the wool; and that it was no answer to such action, that, after the account was settled, the plaintiff had assented to a proposal of the defendant, that he would take out the balance in butcher's meat. (1)

Provided the balance be complete (2), it is immaterial, whether it were settled at the dissolution or during the continuance of the partnership. (3) But in a case where the balance was only the aggregate of a number of sums due upon a series of weekly accounts, it was holden, that an action would not lie by one partner against his co-partners to recover this balance. (4)

Provided the balance be complete, the time is unimportant at which it was settled.

It makes no difference whether the balance is settled by a court of judicature, or by the parties themselves out of court. Therefore it has been held, that debt lies on a decree of a colonial court made for payment of a balance due on a partnership account; and there seems no doubt, that a decree of a court of equity fixing the balance due on a partnership account, might, if necessary, be enforced in a court of law, though the items of the account cannot be sued for. (5)

So where two proprietors of a stage-coach, A. and B., dissolved their partnership in November; during their partnership monthly accounts were made up, on each of which a balance was struck in favour of A., and these balances were never carried forward from one account to another; and B. had paid A. the balance on the November account, which was made up to the time of the dissolution:—It was held, that A. might maintain an action for the balance in his favour on the September and October accounts, Chief Justice Tindal observing, "every month's account is quite distinct from all the others, and no balance is carried forward from any of them." (6)

Whether contribution may be obtained in an action of *assumpsit* by one partner against another, for money laid out to the defendant's use, has been questioned. (7)

CONTRIBUTION.
Contribution in an action of *assumpsit*, as between partners.

But it seems, that contribution can be had at law only in insulated transactions where there is no general partnership. In such cases, however, it is evident, that a clear cause of action may arise unshackled by any accounts. (8)

If the whole damages in *assumpsit* be levied on one of several defendants, he may sue the others for their contributions. (9)

Damages in *assumpsit* levied on one partner.

(1) *Wray v. Milestone*, 5 M. & W. 21.
(2) *Coffee v. Brian*, 3 Bing. 54.
(3) *Preston v. Strutton*, 1 Anst. 50.
(4) *Fromont v. Coupland*, 2 Bing. 170.
9 Moore, 319.
(5) *Henley v. Soper*, 8 B. & C. 16.
(6) *Brierly v. Cripps*, 7 C. & P. 709.
(7) 7 Jarman's Conveyancing, 17. Collyer on Partnership, 189. Gow on Partnership, 79. *Abbot v. Smith*, 2 W. Black. 947. *Holmes v. Williamson*, 6 M. & S. 158. *Blackett v. Weir*, 5 B. & C. 388., sed vide

Merryweather v. Nizan, 8 T. R. 186. In re *Webb*, 2 Moore, 500. *Wooley v. Batte*, 2 C. & P. 417.

(8) *Graham v. Robertson*, 2 T. R. 282., et vide *French v. Fenn*, 1 Co. B. L. 536. *M'Ireath v. Margetson*, 4 Doug. 278.

(9) Per Bayley J. in *Ansell v. Waterhouse*, 6 M. & S. 390., et vide *Herries v. Jamieson*, 5 T. R. 556. *Holmes v. Williamson*, 6 M. & S. 158. *Merryweather v. Nizan*, 8 T. R. 186.

ACTIONS BY
PARTNERS.

So also when the whole damages awarded by an arbitrator have been levied upon one of two joint contractors, he has been held to be entitled to contribution at law. In *Burnell v. Minot* (1) A. and B., who were not partners in trade, entered into a joint undertaking with C.; they failed to perform their contract; C. then applied to A. for compensation, and in default thereof, threatened him with an action; A. not choosing to defend an action without the privity of B., agreed to refer the amount of the damages to an arbitrator; the arbitrator awarded a certain sum to be due which A. paid, and of which he brought his action against B. to recover a moiety:—It was held, that such an action was maintainable.

But the aggrieved partner can proceed in a court of equity: thus, where five persons in partnership as coach proprietors had incurred a partnership debt, which the creditor after the death of one of the partners recovered in an action against the survivors in a bill filed for that purpose by the partners, who had paid the damages and costs of the action against the representatives of the deceased partner, Sir John Leach decreed contribution not only for the damages, but also for the costs. (2)

WHEN PART-
NERSHIP DIS-
SOLVED.

The rule that actions of contracts are not maintainable between partners on the partnership account, arises from their situation *inter se*, and not from their situation *quoad* third persons. When therefore the partnership is actually at an end, as the partnership account is also at an end for all future purposes, it follows that the way is clear for any action between the parties, arising from causes subsequent to the dissolution, although these causes may originate in their situation of partners *quoad* third persons. (3)

When an account is taken at the dissolution of a partnership, *assumpsit* will lie without proof of an express promise. (4)

Upon an account taken at the dissolution, *assumpsit* will lie for the balance.

By articles of partnership, it was agreed, that just and true accounts should be made out half yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners, and after the death of two of the other partners it was discovered, that the accounts were fraudulent:—It was held, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. (5)

ACTIONS
AGAINST
PARTNERS.
GENERALLY.

Identity of partners.
Acts and admissions of one partner bind the other.

6. ACTIONS AGAINST PARTNERS.

1. Generally.

If two or more unite in partnership for carrying on a particular trade or other purpose, they become in point of law so identified with each other, that the acts and admissions of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. Thus,

(1) 4 Moore, 340.

(2) *Thomas v. Litchfield*, Rolls, H. T. 831, cit. Collyer on Partnership, 192., vide *Browne v. Gibbins*, 5 Bro. P. C. 491.

(3) Collyer on Partnership, 192. *Osborne v. Harper*, 5 East, 225. 1 Smith, 411.

Wright v. Hunter, 1 East, 20. *Hutton v. Eyre*, 1 Marsh. 603.

(4) *Rackstraw v. Imber*, Holt's N. P. C. 368.

(5) *Oldaker v. Lavender*, 6 Sim. 239.

partners are at law joint tenants, part owners, and tenants in common, and one cannot sell the share of another. (1)

The constitution of partnership furnishes a presumption, that each individual partner is an authorised agent for the rest; but this presumption has no operation where a party who would rely upon it has received express notice to the contrary, or where the transaction between himself and the individual partner is a fraud upon the rest.

Persons, as previously stated, who are known to share the profits of a trade, are *prima facie* liable as partners to all who deal with them in respect of that trade, whatever be the private agreement between them. (2) Thus, Rogers entered into the following agreement with Thomas:—"I do agree to give T. half the profits he makes on my goods instead of a commission, after shipping, freight, and every expense paid; I pay T.'s passage out. February 9. 1809;" and it was proved that T. had a specific interest in the profits under the name of commission:—It was held, that, although by the agreement, the parties intended to avoid a partnership, yet Thomas was a partner in the profits *quoad* third persons. (3)

If A. B. suffer his name to be used in the business, and hold himself out as a partner, he is liable, though the customer did not at the time of dealing know the existence of the partnership, or that A. B.'s name was used (4), the principle being to prevent the extension of unsound credit (5); and very slight circumstances will, it seems, be sufficient to justify a jury, that a person has held himself out to the world as a partner. (6)

Where several are concerned together in partnership, notice to one is equivalent to notice to all, provided the transaction be *bond fide*. (7) If a bill be accepted by a firm, and dishonoured by one of the partners, it is not necessary to give notice of dishonour to the other partners. (8) If one of several defendants resides above forty miles from London, it is not necessary to give the ten days' notice of trial required by the statute. (9)

Payment by one of several partners on their joint account is payment by all (10); and where two houses are partners in a particular transaction, payment by one house on account of that transaction is payment by both. (11) Payment by one of the obligors in a joint and several bond is payment by all. (12)

From the identification which exists between the members of a firm, the release of one partner will operate as a release to his co-partners: thus, if upon the dissolution of a partnership, the joint creditors execute a compo-

Notice to one partner equivalent to all.

Payment by one of several partners is a payment by all.

Release to one partner will operate as a release to his co-partners.

(1) *Abbott on Shipping* by Shee, 89, 90. *Ouston v. Hebden*, 1 Wils. 101. Under stat. 3 & 4 Will. 4. c. 42. ss. 8 & 9. the plea of abatement for the non joinder of another as co-defendant will not be allowed unless it be stated in the plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. But the plaintiff may reply bankruptcy, and certificate or insolvency.

(2) *Bloxham v. Pell*, cit. 2 W. Black. 999. *Wagh v. Carver*, 2 Hen. Black. 235.

(3) *Exp. Rowlandson*, 1 Rose, 89. *Exp. Hamper*, 17 Ves. 404.

(4) *Young v. Axtell*, cit. 2 Hen. Black. 242.

(5) *Ibid. Spencer v. Billing*, 3 Camp. 312. *Swan v. Steele (Clerk)*, 7 East, 210. 3 Smith, 119.

(6) *Parker v. Barker*, 1 B. & B. 9. 3 Moore, 226. *Goode v. Harrison*, 5 B. & A. 150.

(7) *Bigbold v. Waterhouse*, 1 M. & S. 259. *Alderson v. Pope*, 1 Camp. 404. n.

(8) *Porthouse v. Parker*, *ibid.* 82.

(9) *Perry v. Jackson (Bart.)*, 4 T. R. 516.

(10) *Innes v. Stephenson*, 1 M. & Rob. 145.

(11) *Cheap v. Cramond*, 4 B. & A. 663.

(12) 5 Bac. Abr. Obligation (D. 4.), 810. Collyer on Partnership, 432.

ACTIONS
AGAINST
PARTNERS.

Covenant not
to sue, will not
operate as a
release.

sition deed to that partner who winds up the affairs of the partnership, such deed is in the nature of a release, and will discharge the other partner from his liability for the joint debts. (1)

But a release given to one of two partners may, by means of recitals and provisoes, be limited in its operation to that one partner only, and may even leave that partner open to actions on account of his co-partner. (2)

Two partners, A. and B., on the 26th of August, 1809, agreed to dissolve partnership, as from the 1st of January, 1810, and that neither of them should, after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase should be on his own private account. On the 27th of October, 1810, A. assigned his property to his creditors, who covenanted not to sue him; and that if they did, the deed of assignment should be a release to him; which deed was signed by B. A., after signing the deed of dissolution, having contracted debts in the name of the firm, B. paid them:—It was held, 1st, that B. was liable for those debts, the covenant not to sue A. not operating as a release to B.; 2dly, that supposing it had, the creditors would have had an equitable claim on B., which would have justified his paying the money; and, therefore, that B. was entitled to recover it from A. as money paid to his use. (3)

COMMENCE-
MENT OF LIA-
BILITIES.

When no time
is mentioned in
the deed of
partnership for
the commence-
ment of the lia-
bilities of the
partners.

II. Commencement of Liabilities.

If no time be mentioned in the deed of partnership for the commencement of the liabilities of the partners, their liabilities will commence from its date, unless before that time the parties have held themselves out to the world as partners. A. and B., general partners in trade, were indebted to C. for advances paid by him on the joint account of the three in a special joint adventure, and with a view to liquidate that balance, C. agreed with A. and B. to join with them in another adventure, of which he was to have one moiety; and it was agreed, that A. and B. should purchase goods for the adventure, and pay for them; and the returns of such adventure were to be made to C., to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to A. and B.:—It was held, that this agreement constituted a partnership between the three in the adventure at and from the time of the purchase of the goods for the adventure by A. and B., although C. did not go with them to make the purchase, nor authorise them to purchase on the joint account, but A. and B. alone in fact made the purchase; and although C. also purchased in his own name, and paid for goods to be sent out at the same time, in which B. was to share the profit or loss, and these goods were consigned for sale and return to the same person who went out as supercargo on the joint account of the three. (4)

In *Buttley v. Lewis* (5) it was held, that where A. and B. agree to become partners from a subsequent day, upon certain terms, which were to be

(1) *Exp. Slater*, 6 Ves. 146.

(2) *Solly v. Forbes*, 4 Moore, 448. 2 B.

& B. 38.

(3) *Hutton v. Eyre*, 1 Marsh. 603. 6 Taunt. 289.

(4) *Gouthwaite v. Duckworth*, 12 East. 421., vide etiam *Saville v. Robertson*, 4 T. R. 720.

(5) 1 M. & G. 155.

embodied in a deed to be executed on such subsequent day; but the deed was executed on a day later than that appointed; — B. was bound by the contract of A. entered into in the name of the firm between the day appointed for the execution of the deed and that on which it was actually executed, although alterations were introduced into the deed at the time of its execution.

ACTIONS
AGAINST
PARTNERS.

Where several persons agree to become partners in a particular adventure, and there is no stipulation between them, that the partnership shall not be consummate until after the order of the goods, then, whether the order be given by one or more of the adventurers, their joint interest in the goods will commence from the moment of the order, and their joint liability to the seller from the time of the delivery. Therefore, where three persons engaged in a joint speculation for the purchase and importation of corn, but no partnership fund was raised for the speculation, and the parties met the expenses in thirds, and two only of the three had the management of the speculation, one of these two being the consignee, and the other the salesman of the corn, it was nevertheless very truly said, that if there had been a claim in that case by the seller of the corn, no doubt he would have been entitled to proceed against all the parties, and might have called upon them all for payment. (1)

Where several persons agree to become partners in a particular adventure.

The separate loan of money to one of several adventurers for the purpose of founding the partnership, will not constitute the firm the joint debtors of the lender. (2) Thus, in *Smith v. Craven* (3) Lord Lyndhurst said, "It was agreed, that each of these three persons should contribute a third, for the purposes of this joint speculation. It is expressly found by the case, that Craven did contribute his share. Nothing is stated on the case which tends to shew, that Craven knew how the other two-thirds were raised by Wharton and Thompson, his partners in this transaction. How could he know, that they did not meet their shares with funds of their own? He might suppose that Wharton, to whom the corn was consigned, might raise his share upon the security of the proceeds. In point of fact, Wharton raised the money from the plaintiffs on his own credit; but it does not appear he had Craven's authority for so doing, nor is it found that Craven had any knowledge of his proceedings in this respect;" —and Mr. Baron Bayley also observed, "If I supply my agent with money, which he misapplies, and raises money elsewhere, can the person from whom he obtains the money sue me for the amount?" "Wharton having given collateral security, the plaintiffs, as his agents, and on his credit, not knowing any thing of the other parties, pay the money, and pay it in discharge of that which is the individual debt of their principal, and of him alone. As agents, they had no notice that they made the payment, except on the individual behalf of Wharton; he only was trusted, and the advances were made on his credit alone; the plaintiffs were not deluded by the prospect of a partnership security, and the claim must be restricted to Wharton alone."

Separate loan of money to one of several adventurers, for the purpose of founding a partnership.

Judgments of Lord Lyndhurst and Mr. Baron Bayley in *Smith v. Craven*.

Where goods or money are supplied separately to one of several adventurers before the partnership is consummate, but they all draw a bill, or give an acceptance for the value of the supply, the contract which was originally

Goods or money supplied separately to one of several

(1) *Smith v. Craven*, 1 C. & J. 500.
Browne v. Gibbins, 5 Bro. P. C. 491. *Gardiner v. Childs*, 8 C. & P. 345. Collyer on Partnership, 357.

(2) *Saville v. Robertson*, 4 T. R. 720.
(3) 1 C. & J. 508.

ACTIONS
AGAINST
PARTNERS.

adventurers,
before the part-
nership is con-
summate.

Judgment of
Mr. Justice
Bayley in
Greenslade v.
Dower.

separate becomes joint under the security, and they who are parties to the security become in consequence jointly liable. (1)

But to render all the drawers or acceptors liable on a bill or note so given before the commencement of the partnership, all must join in the security; for, in such case, one has no more implied authority to bind the rest by bill, than he has to bind them by a mere order for goods. Thus, in *Greenslade v. Dower* (2) Mr. Justice Bayley said, "If several persons are in trade together, a bill accepted by one in the names of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill, and one drawn for the purpose of founding the partnership. Originally, each partner would have to bring in his proportion of the capital; and it would be very unjust to let the acceptance of one for the capital bind all the others: no authority of that nature can be implied; nor does it arise by operation of law, the debt not being a partnership debt."

INCOMING
PARTNERS.

Incoming part-
ner will not be
liable in re-
spect of debts
contracted by
the firm pre-
viously to his
joining it.

III. *Incoming Partners.* (3)

An incoming partner will not be liable in respect of debts contracted by the firm previously to his joining it; and his liability for contracts made by the firm before his accession is not to be presumed. (4)

The primary consideration for the jury is, between what parties was the contract actually made? If, indeed, it be clear from the evidence, that, upon the accession of a partner to the house, a new promise was made by the entire new firm in respect of the old debt, in such case there is a deliberate *novatio debiti*, and the new partner must be charged under the contract. But if no such new promise be proved; if, for instance, the incoming partner was a dormant partner, and joined in no act to ratify the contract, he will not be concluded by it; for neither was he a party to it originally, nor does the mere act of joining the partnership amount to a ratification.

In *Howell v Brodie* (5) it appeared, that the defendant from 1829 till 1833 advanced various sums with a view to a partnership in a market about to be erected; he knew that the money was applied towards the erection, and was consulted in every stage: in October, 1833, by a written agreement, it was settled that the market should be valued, and that defendant should have a seventh share:—It was held, that he was not liable as a partner till October, 1833, notwithstanding profits had been made, but not accounted for to him, before that time.

In adventures, an incoming partner is not liable for the price of the goods (6), because, supposing it to be shewn, that at one period of the transaction there was a partnership subsisting, it is not therefore to be inferred, that there was a partnership in the particular original purchase.

This principle of exemption from liability is liable to exceptions, and which is illustrated by *Exparte Peele* (7), in which Lord Eldon said, "I

In adventures,
an incoming
partner is not
liable for the
price of the
goods.

Judgment of
Lord Eldon in
Exp. Peele.

(1) Collyer on Partnerships, 359.

(2) 7 B. & C. 635.

(3) *Ante*, 2047. tit. INFANT.

(4) *Catt v. Howard*, 3 Stark. 5.

(5) 6 Bing. N. C. 44.

(6) *Young v. Hunter*, 4 Taunt. 582.

(7) 6 Ves. 602. 1 Hovenden's Supp. 631.

agree it is settled, that if a man gives a partnership engagement in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say, that, though in its nature not a partnership transaction, yet there was some authority beyond the mere circumstance of partnership to enter into that contract, so as to bind the partnership, and then it depends upon the degree of evidence." "Slight circumstances might be sufficient, where in the original transaction the party to be bound was not a partner, but at the subsequent time had acquired all the benefit, as if he had been a partner in the original transaction; and it would not be unwholesome for a jury to infer largely, that that obligation, clearly according to conscience, had been given upon an implied authority. So here, if this was a case in which it was found upon the trial, that this man was a partner upon a large existing partnership, with a regular series of transactions, books, &c., a knowledge of what his partner had been doing might be inferred against him, that which in common prudence he ought to have known. But that is not the case of this partnership; it was a treaty. It is not even yet agreed how the stock and partnership were to be formed. In the course of that treaty, Ford, ignorant of law, permits acts to be done, which the law holds to be partnership acts. It is a very different consideration, whether this man, so trepanned into a partnership, had got regular books, &c.; and it is difficult to say, not only that knowing this he had agreed to it, but that he knew it; in which case I am afraid he must be bound. This fact has not been sufficiently inquired into." (1)

If, after the accession of a partner, a bill be accepted by the new firm in respect of a contract made by the old firm, that is a ratification of the contract by the new firm, and every member of the new firm, whether dormant or ostensible, will be bound; for the party who actually accepts the bill professes to act as the agent of all the partners, both dormant and ostensible. (2)

Where in an action by A., the drawer and payee of a bill of exchange, against B., C., and D. as acceptors, D. pleaded that B., C., and D. were partners, and that the bill was accepted by B. and C. without his knowledge, prevents a covenant in respect of a debt contracted by B. and C. before the partnership, and not in respect of a debt relating to the partnership. Upon a replication of *de injuriâ* to this plea, issue must be found for the plaintiff if it appear, that the consideration of the bill was a debt, which arose partly before and partly after the commencement of the partnership. (3)

Where A. entered into partnership with B. and C., who had previously carried on the same trade together, and who shortly afterwards became bankrupt; and by an agreement, to which A. and the assignees of B. and C. were parties, it was agreed, that A. should realise the assets and liquidate the debts of the firm, and that the official assignee of the bankrupts should be empowered by A. to collect the outstanding debts, and pay the amount to S. and Co., bankers, to the account of A., being allowed the usual percentage:—It was held, that A. could not alone sue the official assignee, in an action of money had and received, for moneys collected by him under

Bill accepted after the accession of a partner, for a contract made previously to his becoming a partner.

Debt owing partly before, and partly after, the partnership.

Where an incoming partner cannot sue without the joinder of the official assignee of his co-partners.

(1) Vide *etiam Helsby v. Mears*, 5 B. & L. 504. 8 D. & R. 289.

(3) *Wilson v. Lewis*, 2 M. & G. 197. 9 Dowl. P. C. 18.

(2) *Collyer on Partnerships*, 365. *Hoby v. Roebuck*, 2 Marsh. 434. 7 Taunt. 157.

ACTIONS
AGAINST
PARTNERS.

this agreement, which remained in his hands, and of which he had rendered an account to A. (1)

DORMANT
PARTNERS.

Persons who are not partners *inter se*, may be partners *quoad* third parties.

Suffering name to be used in business.

It has likewise been held, that persons who shared profits, but who by operation of law were not partners *inter se*, might be partners *quoad* third persons. (2)

If a person suffer his name to be used in a business, or otherwise hold himself out as a partner, he is so to be considered, whatever may be the agreement between him and the other partners, although he may receive no profits, for "the contract of one is the contract of all." (3) This rule of law arises, not upon the ground of the real transaction between the partners, but "upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose, that they lent their money upon the apparent credit of three or four persons, when in fact they only lent it to two of them, to whom, without the others, they would have lent nothing." (4)

A dormant partner will be liable to the whole amount of a debt due during his co-partnership, whether his connexion with the firm be or be not known to the creditor at the time of the contract. Thus, in *Robinson v. Wilkinson* (5) Mr. Baron Graham said, "A party has always a right against a concealed partner, of whom he has previously had no knowledge, as soon as he discovers him, unless that ignorance were his own fault, as if he had not used due diligence in finding him."

In *Beckham v. Knight* (6) it was held, that if a contract in writing, *inter partes*, be entered into by the ostensible partners of a firm in their own names, without any mention of a dormant partner, the party contracted with, cannot sue the dormant partner on the contract:—But this decision was subsequently overruled by the court of Exchequer. (7)

Dormant partner only liable during the time that he is actually a partner.

A dormant partner is only chargeable to third persons in respect of contracts entered into by the firm during the time that he is actually a partner, and is receiving the emoluments and profits of the business, for third persons have never trusted to his credit (8); but where the partnership of a dormant partner is known to one particular creditor, he will be liable to that creditor, until he has notice of the partner's retirement. Due notice ought, therefore, to be given to such creditor. (9)

RETIRING
PARTNERS.

After a legal notice, no new contract can bind a retiring partner.

After a legal notice of a partner's retirement, no new contract by the continuing firm can bind the partner who retires; and hence, after the retirement of one or more partners, the remaining partner cannot put the part-

V. Retiring Partners.

- (1) *Lewis v. Edwards*, 7 M. & W. 300.
- (2) *Hesketh v. Blanchard*, 4 East, 144.
- (3) *Guidon v. Robson*, 2 Camp. 304.
- (4) *Per Eyre C. J. in Waugh v. Carver*, 2 Hen. Black. 246. *Young v. Axtell*, cit. ibid. 242., vide *Alderson v. Pope*, 1 Camp. 404. *n. Teed v. Elworthy*, 14 East, 214.
- (5) 3 Price, 544.

- (6) 4 Bing. N. C. 243.
- (7) *Beckham v. Drake*, M. T. 1841.
- (8) *Evans v. Drummond*, 4 Esp. N. P. C. 89. *Carter v. Whalley*, 1 B. & Ad. 11. *Brooke v. Enderby*, 2 B. & B. 71. 4 Moore, 501.
- (9) *Evans v. Drummond*, 4 Esp. N. P. C. 89.

nership name to negotiable securities so as to bind the old firm, but his liabilities for the past will remain. (1)

As to the original creditors of the firm, express notice of a partner's retirement must be conveyed to them, though it is not material in what manner it is given. (2) A change in the form of checks in a banking house is, without any advertisement in the Gazette, or circular letter to the customers, sufficient notice of an alteration of the firm to a creditor who uses such checks. (3)

To those who have had no dealings with the original firm, notice of the dissolution of a partnership inserted in the Gazette is equivalent to actual notice: thus, in *Godfrey v. Turnbull* (4) Lord Kenyon said, "If the dissolution be notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no previous dealing with the partners, it seems sufficient, at least to be left to the jury, from thence to infer notice. In the present instance there is no proof of any actual notice to Mr. Godfrey the plaintiff; but the publication in the Gazette is proved, antecedent to his taking the note. The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every Gazette of the dissolution of partnerships, which seems to point out, that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them." (5)

Where a *bond fide* dissolution has taken place, the retiring partners are not to be bound by instruments negotiated in the name of the original firm after such dissolution: thus, in *Abel v. Sutton* (6) Lord Kenyon observed, "To contend that this liability to be bound by the acts of his partner extends to a time subsequent to the dissolution is, in my mind, a most monstrous proposition. A man in that case could never know when he was to be at peace, and retired from all the concerns of the partnership." (7)

Upon the partnership ceasing, the partners become tenants in common of the partnership property undisposed of from that time. They become, therefore, tenants in common of all partnership securities undorsed, which were not issued before the dissolution. If, therefore, it be necessary to put such securities in circulation while the accounts are unliquidated, all the late partners must join in making them negotiable; or in the words of Lord Kenyon, "If a bill is sent into circulation after the dissolution of a partnership, beyond all controversy, all the partners must join in the indorsement; and one, by putting the partnership name, cannot bind the rest." (8)

Generally where divers debts are due from a person, and he pays money to his creditor, the debtor may, if he pleases, appropriate the payment to the discharge of any one or other of those debts; if he does not appropriate it, the creditor may make an appropriation; but if there is no

ACTIONS
AGAINST
PARTNERS.

Original creditors should have express notice of the retirement.

Persons who have had no dealings with the original firm.

Judgment of Lord Kenyon in *Godfrey v. Turnbull*.

When a *bond fide* dissolution has occurred, but instruments subsequently negotiated in the name of the original firm.

Judgment of Lord Kenyon in *Abel v. Sutton*.

Upon the dissolution of the partnership, the members become tenants in common.

CONTRACTS
WHEN DIS-
CHARGED,
EITHER BY
OPERATION OR

(1) *Stables v. Eley*, 1 C. & P. 614. *Parhis v. Carruthers*, 3 Esp. N. P. C. 248. *Graham v. Hope*, 1 Peake's N. P. C. 208. *Wood v. Braddick*, 1 Taunt. 104. *Ault v. Goodrich*, 4 Russ. 430. *Pinder v. Wilks*, 1 Marsh. 248. 5 Taunt. 612.

(2) *McIvor v. Humble*, 16 East, 169.

(3) *Barfoot v. Goodall*, 3 Camp. 147., vide etiam *Kirwan v. Kirwan*, 2 C. & M. 617.

(4) 1 Esp. N. P. C. 371.

(5) Vide etiam *Wrightson v. Pullan*, 1 Stark. 375. 2 Chitt. 121.

(6) 3 Esp. N. P. C. 108.

(7) Vide etiam *Kilgour v. Finlyson*, 1 Hen. Black. 155. *Wrightson v. Pullan*, 1 Stark. 375. *Puterson v. Zachariah*, ibid. 71.

(8) Collyer on Partnerships, 375. *Abel v. Sutton*, 3 Esp. N. P. C. 110., et vide *Carvick v. Vickery*, Doug. 653.

ACTIONS
AGAINST
PARTNERS.

LAW, OR SPECIAL AGREEMENT.

When there is a cash account current between a firm and a customer, and the account is in favour of the latter.

When a sum becomes the specific property of the new partnership.

Judgment of Chief Justice Abbott in *Thompson v. Brown*.

Time when appropriation must be made.

appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation according to the order of the items of the account, the first item on the *debit* side of the account being discharged or reduced by the first item on the credit side. (1)

Where the plaintiff kept a general account with A. as his banker and army agent, and B. became a partner with A. for a limited period, and retired on its expiration without the knowledge of the plaintiff, and A. afterwards became bankrupt, until which period the account continued between the plaintiff and A.:—It was held, that payments made by the latter to the plaintiff after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, B. might consider such payments as being made in reduction of the balance due at the expiration of the partnership, and that he was not accountable to the plaintiff for any sum received by A. on account of the latter subsequently to such expiration. (2)

But wherever a sum of money can be deemed as the specific property of the new partnership, it will be applicable to the discharge of the debts of that partnership only (3): thus, in *Thompson v. Brown* (4) Chief Justice Abbott said, "The general rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual;—that would be allowing the creditor to pay the debt of one person with the money of others."

To render an appropriation of payment by the act of the party valid, it must be made at the time of payment if made by the payor, and within a reasonable time after payment if made by the payee. It is not necessary, however, that a person owing money on two different accounts, should declare the appropriation of it at the time of payment; it is sufficient, if it can be collected from other circumstances, that he intended at the time of payment to appropriate it to one account specifically. (5)

If payment be made to the creditor of any sum in respect of an account current, the creditor making no appropriation at the time of payment, and if after such payment the debtor and creditor continue their mutual dealings, or do any other mutual act in respect of the same account, the creditor will be barred by such subsequent transactions from establishing an appropriation of the payment. (6)

In *Reed v. White* (7) a joint contract for goods sold was considered to be waved by the creditor taking the separate security of one of two joint contractors, Lord Ellenborough observing, "If the plaintiff, dealing with White separately, has adopted him, he has discharged the others, and must have a verdict against him." "The question is, whether it was intended as a settlement with him alone, and adopting him as the single debtor?"

If upon the retirement of a partner, a creditor of the firm give up a secu-

(1) Collyer on Partnership, 376., vide etiam *Clayton's case*, 1 Mer. 572.

(2) *Brooke v. Enderby*, 4 Moore, 501. 2 B. & B. 70., et vide *Bosanquet v. Wray*, 6 Taunt. 597. 2 Marsh. 319.

(3) *Newmarch v. Clay*, 14 East, 239.

(4) M. & M. 40.

(5) *Shaw v. Picton (Clerk)*, 4 B. & C. 715.

(6) *Simson v. Ingham*, 2 B. & C. 65.

(7) 5 Esp. N. P. C. 122.

ity which he has against them, and take in exchange a fresh security from the new firm, this will be binding on the creditor, and operate as a discharge to the retiring partner. (1)

ACTIONS
AGAINST
PARTNERS.

When creditor receives interest from the new firm, of a debt due from the old.

If a creditor receive interest from the new firm for a debt due from the old, this is not an adoption of the new firm as his sole debtors. In *Daniel v. Cross* (2), where, after the decease of a partner, the creditor of the old firm had received interest for their debts from the new firm, Lord Loughborough held, that such receipt of interest would not discharge the estate of the deceased partner: thus, in *Gough v. Davies* (3) it was holden, that a person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm, and the constitution of a new one, which consists of some of the members of the old bank and of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent. Nor are those circumstances sufficiently strong to justify such a case being left to a jury.

If a partner by right of the articles, or by permission of his co-partners, retire from the firm on the very ground of its insolvency, this act, *per se*, is not fraudulent, and cannot render him liable to the creditors of the remaining firm, though of course, it will be otherwise if his retirement arise from or be connected with some fraudulent agreement between himself and the remaining partners. (4)

How far partners can irresponsibly retire from a firm, with a knowledge of its insolvency.

A retiring partner can receive from his co-partner a sum of money for his share in the concern, although both knew that the partnership was insolvent. Thus, in *Ex parte Peake* (5) Sir Thomas Plumer observed, "May not one partner dissolve publicly his partnership with the other, he knowing the then state of it, but having a better opinion of it, or choosing for his own advantage to give a sum of money if the other will convey his interest to him? They certainly might make such an agreement, no fraud being practised or intended." "The mere circumstance of the partnership being at that time in such a state, that their joint effects were not sufficient to pay their joint debts, will, *per se*, be sufficient to invalidate a dissolution of partnership, made fairly between the partners themselves." In this case "there was no contrivance between the bankrupt and the retiring partner to put their joint effects into a state to benefit the latter" (6); *Anderson v. Malby* (7), therefore, does not apply."

Judgment of Sir Thomas Plumer in *Exp. Peake*.

But if two co-partners enter into a contract for the purpose of defrauding their joint creditors, the one agreeing to permit the other to withdraw money out of the reach of the joint creditors, such a contract is fraudulent and invalid. (8)

But it matters not what notice is given of a partner's retirement, if he still retain his name in the firm; until his name be removed, he will be liable for partnership contracts. Thus, after the dissolution of partnership

WHEN A RETIRING PARTNER LIABLE.

(1) *Evans v. Drummond*, 4 Esp. N.P.C. 89.

(2) 3 Ves. 277.

(3) 4 Price, 200.

(4) *Parker v. Ramsbottom*, 3 B. & C. 257.

Collyer on Partnership, 400.

(5) 1 Madd. 346.

(6) *Vide etiam exp. Carpenter*, Mont. & M'Ar. 1.

(7) 4 Bro. C. C. 423. 2 Ves. jun. 244.

(8) *Ibid*.

ACTIONS
AGAINST
PARTNERS.

Effect of re-
tiring partner
retaining his
name in the
firm.

between A. and B., and the advertisement of it in the Gazette, A. accepted a bill bearing date previously to the dissolution, for the accommodation of a third person, who indorsed it for value:—It was decided, that another partner who permitted his name to remain over the place of business as a member of the firm, after the dissolution of the partnership, notice of it, and indorsement of the bill, was liable as a partner to a *bond fide* holder. (1)

A retired partner may give authority by parol to a continuing partner to indorse bills in the partnership name, after the dissolution of the partnership. And where the retired partner stated, that he left the assets and securities of the firm in the hands of the continuing partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name:—It was held, that the jury were justified in finding that the continuing partner had authority to indorse promissory notes so left in his hands in the partnership name. (2)

In *Smith v. Winter* (3) it appeared, that A. indorsed to S. and Co. as a security for advances made to him by them, certain promissory notes made by B. While the notes were running, A. stopped payment, and a deed was executed by him and several of his creditors, and among them by S. and Co., whereby his affairs were placed in the hands of inspectors, and the creditors, parties to the deed, agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years. After the execution of this deed by A. and S. and Co., and before the notes became due, B. signed a written consent to the creditors signing the deed, and giving time to A. without prejudice to their claims on her, B.:—It was held, that her liability on the notes to S. and Co. was thereby revived.

One of four partners having retired, the other three continued the business, assuming the funds, and charging themselves with the partnership debts. A., a creditor of the old firm, was informed of this arrangement, and his account was, with his consent, transferred from the old firm to the new, with whom he continued to have dealings, drawing upon them and making them payments for above twelve months, when they failed in his debt:—It was holden, that the retired partner was still liable to A. for the balance due to him by the old firm, though if A. had drawn for that balance at any time during the solvency of the new firm, it would have been paid. (4)

Where, on the dissolution of a partnership, it was agreed between two partners, that one should take upon himself to discharge a debt due to the plaintiff, who was informed of it, and expressly agreed to exonerate the other partner from all responsibility:—It was adjudged, that this arrangement did not constitute any defence to an action brought by the plaintiff against both partners, the debt not being satisfied by the one, nor any new security having been given. (5)

C., M., and N. carried on business under the name of J. K. and Sons; and being indebted to A., C. retired from the partnership, and M. and N. agreed to liquidate all the concerns of the partnership. M. afterwards retired, and advertisements of the dissolution of both partnerships were at the same time inserted in the Gazette. N. then took in a new partner, and

When there is
an account
current be-
tween a firm
and a creditor,
and upon the
retirement of
the partner the
creditor con-
tinues his
money.

When creditor
sanctions an
agreement, that
one member of
a firm shall
pay the debts
of the firm.

(1) *Williams v. Keats*, 2 Stark. 290. *Dolman v. Orchard*, 2 C. & P. 106. *Brown v. Leonard*, 2 Chitt. 120.

(2) *Smith v. Winter*, 4 M. & W. 454.

(3) *Ibid*.

(4) *David v. Ellice*, 7 D. & R. 690. 5 B. & C. 196. 1 C. & P. 368.

(5) *Lodge v. Dicus*, 3 B. & A. 611.

business was carried on in the original name of J. K. and Sons. A.'s account was transferred to the new firm, and he received accounts and payments from them; but it did not appear that he ever saw the Gazette, or that either he or the new partner ever agreed to the substitution of the responsibility of the new firm for that of the old:—It was held, that the three original partners were not released from their responsibility, but were liable at the suit of A. (1)

If upon the retirement of a partner, the creditor of a firm take the securities of the remaining partner for his debt, this is not *per se* a discharge of the retiring partner, because a creditor giving time to one of three joint debtors does not discharge the others. (2)

If a person hold a co-partnership bill, and, upon the retirement of one of the partners, indorse it over to the new firm for payment, at the same time expressly reserving his rights against all the parties to it, in case it should not be paid by the new firm, the retiring partner will still be liable in an action on the bill. (3)

If a firm borrow trust moneys, of which one of the partners is a trustee, a retiring partner will not be exempt from liability in respect of such trust moneys, unless he have given a consideration to, or received a release from the *cestui que trust* or his agent (4); partners, therefore, in borrowing trust money of their co-partner, ought to see, that he has authority to lend and power to release.

In *Dickenson v. Lockyer* (5) Lord Loughborough observed, "Bence being jointly bound with Lockyer and Woodward, agrees with them, that they shall pay this debt, and relieves himself; and, upon that consideration, he gives them his share of the fund, with which this debt was to be paid. That can never be made a payment. The question in this court is, Whether the trustee of a bond can, without the *cestui que trust*, release the obligor? This is a very particular case; for he [Bence] is debtor with the two others. They cannot by management among themselves destroy that security [a bond]. There was no real payment of money into the hands of Lockyer, as money belonging to the estate of Furze, to be laid out according to the will. Three co-obligors in a bond, by a transaction between themselves agree, that one shall be discharged, and the whole security rest upon the two without the privity of the executor." "But no act of Bence can affect those claiming under Furze, for Lockyer was the proper hand to pay." "It is not necessary to inquire, what would have been the case, if actual payment had been made, and the money was in the hands of Lockyer. It would have depended a good deal upon the authority given by the executrix to him to act. If the two others had actually paid their shares of the bond into the hands of Lockyer, perhaps with all the evidence of the confidence reposed in Lockyer, and his being trustee in the will, it would be very difficult for the court to make them answerable; but what they have done is nothing like that. By the agreement with him they have reduced the security of the trust from the bond of the three to the personal security of the two. All the consideration was personal to Bence and Lockyer, not in the least affecting the estate;

When the retiring partner has been held liable for the partnership debts, for want of a sufficient consideration moving to the creditor, for his assent to the retiring partner's exemption.

One of a firm borrowing trust moneys, of which one of the partners is a trustee, the retiring partner will not be exempt from liability.

Judgment of Lord Loughborough in *Dickenson v. Lockyer*.

(1) *Kirwan v. Kirwan*, 2 C. & M. 617.

(2) *Bedford v. Deakin*, 2 B. & A. 210.

(3) *Featherstone v. Hunt*, 1 B. & C. 113.

(4) Collyer on Partnerships, 398.

(5) *Dickenson v. Lockyer*, 4 Ves. 36. 1

Hovenden's Supp. 428.

**ACTIONS
AGAINST
PARTNERS.**

therefore the representative of Bence must account. Let an account be taken of what is due upon the two bonds, the plaintiffs to be at liberty to prove the debt under the commission. I will not give costs. It is a very hard case; they all meant well; and if he had asked for an authority, I have no doubt he would have had it." (1)

**DECEASED
PARTNER'S ES-
TATE.**

Partnership contract is joint, and upon the death of a partner, the contract against him is extinguished.

VI. Deceased Partner's Estate.

At law, upon the death of a partner, the legal remedies against him in respect of the partnership contracts are extinguished, and the creditor, being precluded from suing the representatives of the deceased, can maintain an action against the surviving partners only. In equity Lord Eldon considered, that, with certain limitations, a creditor could only be permitted to receive satisfaction for his debt out of the estate of the deceased partner, through the medium of the equities subsisting between the partners themselves. Such equities between the partners as regarding the interests of third persons being, that their joint debts shall be satisfied out of the joint estate; but if that were insufficient, then, subject to the claims of their separate creditors, out of their separate estates proportionally; and if any of them were insolvent, then out of the remaining separate estates proportionally. (2)

But, as observed by Mr. Collyer (3), "Whatever may have been the opinion of Lord Eldon upon this important subject, it is now established beyond controversy, that in the consideration of courts of equity, a partnership debt is several as well as joint; and that upon the death of a partner, the joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate, without reference to the question, whether the joint estate is solvent or insolvent, or to the state of accounts amongst the partners." (4) In *Thorpe v. Jackson* (5) Mr. Baron Alderson stated, "I conceive that partnership trading debts are only one, and that the most frequent case of the general rule, which is, that wherever a court of equity sees that in a contract, joint in form, the real intention of the parties is, that it shall be joint and several, it will give effect to such intention."

Judgment of Mr. Baron Alderson in *Thorpe v. Jackson*.

Estate of a deceased partner liable to the partnership's liabilities at his death.

Whatever doubts may exist as to the time and manner of the joint creditor's remedy against the deceased partner's estate, there can be no question as to the right to be paid out of that estate to the full amount of his demand against the original firm, in case of the insolvency of the surviving partners: thus, in *Vulliamy v. Noble* (6) Lord Eldon said, "Nor can it any more be made a question, that a deceased partner's estate must remain

(1) Vide etiam *Smith v. Jameson*, 5 T. R. 601.

(2) Collyer on Partnership, 404. In illustration of the "equities subsisting between partners," vide *Sleech's case*, 1 Mer. 539., *Stephenson v. Chiswell*, 3 Ves. 566. *Lane v. Williams*, 2 Vern. 292. *Jacomb v. Harwood*, 2 Ves. sen. 265. *Gray v. Chiswell*, 9 Ves. 118. *Exp. Kendall*, 17 ibid. 519. *Campbell v. Mullett*, 2 Swanst. 576. *Bishop v. Church*, 2 Ves. sen. 100. 371. *Thomas v. Frazer*, 3 Ves. 399. *Burn v. Burn*, ibid. 573. 1 Hovenden's Supp. 410.

(3) On Partnership, 407.

(4) For decisions tending to establish that, upon the death of a partner, a partnership contract is to be considered as joint and several, vide *Stephenson v. Chiswell*, 3 Ves. 566. 1 Hovenden's Supp. 409. *Deceyus v. Noble*, 1 Mer. 529. *Sleech's case*, ibid. 539. *Sumner v. Powell*, 2 ibid. 37. *Cowell v. Sils*, 2 Russ. 191. *Wilkinson v. Henderson*, 1 M. & K. 532. *Thorpe v. Jackson*, 2 Y. & C. 553. *Braithwaite v. Britain*, 1 Keen, 206.

(5) 2 Y. & C. 562.

(6) 3 Mer. 619.

liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they must be, before his liability ceases."

So, likewise, where stock has been misapplied, the creditor may elect to consider the proceeds of the stock as a debt due from the deceased partner's estate, or to have the stock specifically replaced. (1)

The same acts of the creditor which operate in discharge of the retiring partner will be equally effectual in favour of the deceased partner's estate. Therefore, if, in respect of his claim on the original partnership, the creditor take the joint security of the new firm, at the same time relinquishing the securities of the old firm; and, *a fortiori*, if there be express evidence of his receiving a consideration for abandoning his original rights, the deceased partner's estate will be absolved from liability on account of the debt. (2)

On the other hand, the taking the sole security of the surviving partner will not, *per se*, be evidence of an intention to relinquish the remedies against the original firm. In such case the liability of the estate of the deceased partner must continue. (3)

Receipt of interest from the surviving partner for a debt due from the original firm does not discharge the estate of the deceased partner. (4)

If the testator limit the extent of his assets to be employed in the partnership trade, such limit can in no way affect the creditors of the partnership at the time of his death. (5)

But with regard to the creditors of the new partnership formed by the survivors and executors of the deceased partner, they have no claim upon the general assets of the testator, but only upon such assets as are directed by the will to be employed in the partnership trade; — because, in addition to the security of the assets directed to be employed in the trade, such creditors have likewise the individual security of the executor, who is liable, in respect of their debts, not only to the extent of all his own property, but also in his person, and may be also proceeded against as a bankrupt, though he is but a trustee. (6) In fact, "an executor carrying on his testator's trade, pledges to the creditors of that trade his own responsibility." (7)

And the responsibility of the executor is not altered by the circumstance that he does not continue the trade for his own benefit, but only for the benefit of an infant child of a deceased partner. (8)

Executors trading in co-partnership with surviving partners.

VII. Liability of Partners for the Acts of their Co-partners.

As a general principle, "one partner may pledge the credit of the other to any amount;" and during the time that parties hold themselves out to the world as partners, no arrangement between themselves can limit or prevent their ordinary responsibilities to third persons, unless the latter

LIABILITY OF PARTNERS FOR THE ACTS OF THEIR CO-PARTNERS.

One partner may pledge the credit of his co-partners to any amount.

(1) *Baring's case*, 1 *ibid.* 611., *vide etiam Clayton's case*, *ibid.* 572., *vide etiam Warde's case*, *ibid.* 624. *Houlton's case*, *ibid.* 616.

(2) *Collyer on Partnership*, 419.

(3) *Jacomb v. Hurwood*, 2 *Ves. sen.* 265.

(4) *Daniel v. Cross*, 3 *Ves.* 277.

(5) *Hankey v. Hammock*, *Buck*, 211. *Exp. Garland*, 10 *Ves.* 126.

(6) *Exp. Garland*, 10 *Ves.* 120. *Wightman v. Townroe*, 1 *M. & S.* 412. *Exp. Richardson*, *Buck*, 202.

(7) *Per Sir John Leach*, *In re Hodson*, *Buck*, 209., *vide ante*, 1888—1893. *tit. EXECUTORS AND ADMINISTRATORS.*

(8) *Wightman v. Townroe*, 1 *M. & S.* 412.

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AGAINST
PARTNERS.**

Debtor of a partnership, authorising one of the partners to receive debts due to him, and to apply it in liquidation of his debt.

Promising payment of a partnership debt.

A partner giving a partnership bill, and undertaking to the acceptor to provide for it when due.

A payment by one partner will take a case out of the Statute of Limitations.

Stat. 9 Geo. 4. c. 14. s. 1.

Signature of one partner binds the firm.

assent to such arrangement; and this rule applies to nominal and dormant partners. (1)

If a debtor of a partnership, "instead of paying what he owes, gives one of the partner's authority to receive moneys on his account, in the confidence that they will be applied in satisfaction of his debt, retainer of these moneys by the partner receiving them is equivalent to payment." (2)

But where a person is indebted to a firm, and also separately to one of the partners, payment to that partner is not payment to the firm, unless the money be specifically appropriated to such purpose. (3)

Where two houses are partners in a particular transaction, payment to one house on account of that transaction is payment to both. (4)

A promise by one partner to pay a debt as a partnership debt is a promise by the firm. (5)

Where one of several partners gives a partnership bill, and undertakes to the acceptor to provide for it when due, this is in the nature of a release to the acceptor of any action which might have been brought by the partnership on the bill. (6)

If a firm of three be dissolved by the retirement of one, and after the dissolution a creditor of the three draw on the three, and the two accept in the style of the three, the two are liable. (7)

Payment of principal or interest by one of several partners on account of a joint debt will operate as a new promise to pay by all the joint promisers, and be an answer to a plea of the Statute of Limitations. (8)

Stat. 9 Geo. 4. c. 14. s. 1. does not alter the decisions on this subject, but payment of interest is the only act on the part of one of several joint contractors which affects the others; for under that statute no joint contractor is to lose the benefit of the Statute of Limitations, so as to be chargeable by reason only of a written acknowledgment made by the others.

But after the death of one maker of a joint and several promissory note, payment of interest by the survivor will not take the case out of the statute as executors of the deceased (9); nor will payment of interest by the executor of the deceased take it out of the statute as against the survivor. (10)

Generally, the signature of one partner in matters of simple contract relating to the partnership binds the firm, for every partner may be considered as an agent for the rest of the partnership.

If one of several persons jointly interested in a cargo effect an insurance for the benefit of all, he may give notice of abandonment for all. (11) If one partner for himself and partner sign a note for the weekly payment under the Lords' Act, such note will be binding on the firm. (12) If one of several joint lessees, partners in trade, sign a notice to quit in the names of all, this will be valid for all (13), though it will be otherwise if they are not

(1) Collyer on Partnership, 427.

(2) *Per* Sir John Leach in *Pritchard v. Draper*, 1 Russ. & M. 195.

(3) *Pritchard v. Draper*, *ibid.* 191.

(4) *Jacaud v. French*, 12 East, 317.

(5) *Lacy v. McNeil*, 4 D. & R. 7.

(6) *Richmond v. Heapy*, 1 Stark. 202.

(7) *Sparrow v. Chisman*, 9 B. & C. 241. *Tomlins v. Lawrence*, 3 M. & P. 599.

(8) *Exp. Liddiard*, 2 Mont. & Ayr. 87.

(9) *Pittam v. Foster*, 1 B. & C. 248., et

vide Chippindale v. Thurston, M. & M. 411. L. & W. 78.

(10) *Atkins v. Tredgold*, 2 B. & C. 25. S D. & R. 200.

(11) *Slater v. Lawson*, 1 B. & Ad. 397.

(12) *Hunt v. Royal Exchange Assurance Comp.* 5 M. & S. 47., *ant* 2177. *ut* *Insurance*.

(13) *Meux v. Humphry*, 8 T. R. 25. *Burton v. Isitt*, 5 B. & A. 267.

(14) *Doe v. Hulme*, 2 M. & R. 433.

partners in trade. (1) And it seems, one partner can appoint a bailiff to distrain. (2)

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If a partner, accustomed to issue notes on behalf of the firm, indorse a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account; — the proper question for the jury is (in an action brought upon it by the indorsee), Whether the name used, though inaccurate, substantially describes the firm; or whether it so far varies, that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner? and which was so held in *Faith v. Richmond* (3), where a partner in “the Newcastle and Sunderland Wall’s End Coal Company” drew a note in the name of “the Newcastle Coal Company,” and made it payable at a bank where the first mentioned company had no account.

Indorsement on a note different from that of the firm.

In *assumpsit* on a contract for the delivery of coals from a colliery, it appeared, that the agreement (for supplying such coals, and for the demise of a coal wharf) purported to be made between the plaintiff and the partners in the colliery, three in number, and was executed by the plaintiff and two of the partners: — It was held, that, admitting such contract to be one by which partners might bind an absent co-partner or themselves, yet the judge at the trial ought not to decide, as matter of law, that the contract signed by two bound them, but should desire the jury to say, whether it was intended to do so or not, if there are circumstances from which an intention can be inferred, that no party should be bound unless all the partners signed: — as the nature and terms of the agreement; the distance of time at which it was to come into operation; the declarations and conduct of the parties respecting it; and the manner in which previous contracts between them, of the same kind, had been executed. (4)

Whether a contract signed by some of the firm binds the others, is a question of fact.

“The act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners.” (5) Thus, where two houses are partners in consignments, the acknowledgment by one house of the receipt and sale of goods is binding on both houses. (6)

Where acts and assurances of one partner bind the firm.

One F., a partner in the plaintiff’s house, transferred certain stock out of the defendant’s name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm; F. having been convicted of another forgery, committed under similar circumstances, was executed: — It was held, that the defendant might recover the amount in an action against the surviving partners for money had and received to her use. (7)

In *Morans v. Armstrong* (8) the plaintiffs were creditors of the defendant, and the junior partner of their firm, in common with his other creditors, agreed to accept a composition, and to sign a composition deed, which they afterwards refused to do, and brought an action for the full demand, declaring on the original consideration; the declaration also contained the money counts: — It was held, that the plaintiffs could not, on the pleadings, recover

(1) *Goodtitle v. Woodward*, 3 B. & A. 689.,
sed vide per Parke J. 10 B. & C. 634.

(2) *Robinson v. Hofman*, 4 Bing. 562.

(3) 11 A. & E. 339.

(4) *Latch v. Wedlake*, 11 A. & E. 959.

(5) Per Lord Tenterden in *Sandilands v. Marsh*, 2 B. & A. 679.

(6) *Cheap v. Cramond*, 4 ibid. 663., et
vide etiam *Pritchard v. Draper*, 1 Russ. & M.
191. *Gray v. Palmers*, 1 Esp. N. P. C. 135.

(7) *Marsh v. Keating*, 1 Scott, 5.

(8) 1 *Armstrong & Macartney* (Irish),
25.

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even the amount of the composition; because a promise by one partner was binding on all; and evidence was not admissible to shew, that the partner who made a promise in a money transaction has nothing to do with the money transactions of the firm.

A solvent partner may, after a secret act of bankruptcy committed by his co-partner, make the firm liable by accepting a bill for a previous liability. (1)

Performance
of a particular
undertaking.

One partner will be liable in respect of the particular undertaking of his co-partner, made with reference to business transacted by the firm (2), although it may be out of the ordinary course of their business.

Carriage of
parcels.

Thus, if a part proprietor of several coaches enter into a special contract for the carriage of parcels, the contract extends to every coach of which he is proprietor, by which parcels are sent, and binds his co-partners in such other coaches. (3)

But if the special contract entered into by one of several coachowners for the carriage of goods be a mere collusive contract between the parties, in fraud of the other partners (4), it will not be binding as against the co-partners.

Loans.
Purchases.
Sales.

Co-partners are liable for money lent to one partner for his own expenses while engaged in the partnership business (5); for goods purchased by one partner (6); and for goods sold (7), even after an act of bankruptcy, if *bona fide*. (8)

Pledges.

Partners in particular adventures pledge and sell the partnership effects (9); but care must be taken to distinguish a partnership in a particular adventure from a mere joint purchase, or sub-purchase made without any view to a joint sale. (10)

Reference to
arbitration.

But one partner has no implied authority to bind his co-partner to a submission to arbitration, respecting the matters of the partnership. (11)

GUARANTEE.

If a guarantee can be deemed "an assurance made by one partner with reference to business transacted by both, it will bind both," whether or not it was assented to by both. (12) In *Hope v. Cust* (13) Lord Mansfield said, "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners, it binds all." (14)

Guarantee
given out of
the regular
line of busi-
ness.

If the firm adopt the guarantee of one of the partners, they will be bound by such adoption, although the guarantee may have been given out of the regular line of their business (15); and it will be for a jury to consider, whether or not the firm have adopted the act of their co-partner. (16)

(1) *Exp. Robinson*, 1 Mont. & Ayr. 18. *Quare*, Whether a partner can bind his co-partners by a parol submission to arbitration on a question respecting the legal liability of the partnership? *Boyd v. Emmerson*, 4 N. & M. 99. 2 A. & E. 184.

(2) — *v. Layfield*, 1 Salk. 292., vide *De Tastet v. Carroll*, 1 Stark. 88.

(3) *Helsby v. Mears*, 5 B. & C. 504.

(4) *Bignold v. Waterhouse*, 1 M. & S. 255.

(5) *Rothwell v. Humphreys*, 1 Esp. N. P. C. 406.

(6) *Hyat v. Hare*, Comb. 383. *Salomons v. Nissen*, 2 T. R. 674.

(7) *Lambert's case*, Godb. 244.

(8) *Fox v. Hanbury*, Cowp. 445.

(9) *Raba v. Ryland*, Gow's N. P. C. 132.

Exp. Gellar, 1 Rose, 297. *Thupper v. Hopthorne*, cit. Gow's N. P. C. 135. *Reid v. Hollinshead*, 4 B. & C. 867. *Collyer on Partnership*, 266.

(10) *Barton v. Williams*, 5 B. & A. 395.

(11) *Adams v. Bankart*, 1 C. M. & R. 681. 5 Tyrw. 425. 1 Gale, 48.

(12) *Per Abbott C. J.* in *Sandilands v. Marsh*, 2 B. & A. 679., et vide *Exp. Gordon*, 15 Ves. 286. 2 Hovenden's Supp. 406.

(13) *Cit. 1 East*, 53.

(14) Et vide *Exp. Nolte*, 2 G. & J. 306.

(15) *Crawford v. Stirling*, 4 Esp. N. P. C. 207.

(16) *Payne v. Ives*, 3 D. & R. 664., vide *Wilson v. Craven*, 8 M. & W. 584.

In *Ex parte Nolte* (1) Lord Eldon said, "If the partners, upon being duly informed, accede to the act of their partner giving the guarantee, it is not the mere circumstance of his having alone given the guarantee, but their having acceded to what he proposed, which constitutes the dealing between them and the parties secured. So, if the partners are informed of such a measure having been taken by a person who is a partner, though, perhaps, not in that particular transaction, yet, inasmuch as it may not easily be known to those who deal with such partner, in what dealings the other partners are, and in what they are not, interested; and they do not think proper, in answer to state, whether they authorised such partner so to act, or not, it is not too much to take it for granted, that they accede to the guarantee which their partner has proposed."

ACTIONS
AGAINST
PARTNERS.

Judgment of
Lord Eldon in
Exp. Nolte.

But they may give in evidence a disclaimer of the guarantee. (2)

One partner may likewise execute a power of attorney to some third person authorising him, on behalf of the firm, to vote in the choice of assignees, and sign the certificate (3); and in some cases, even where such power is informal, the choice will not be set aside. (4)

Execution of
power of at-
torney.

"If two partners commence an action, one may release the subject-matter of it" (5) Hence, if one of two plaintiffs, partners, release a defendant after action brought, without the consent of the other, a court of law will not set aside such release, unless fraud be clearly established. (6)

RELEASE BY/
ONE PARTNER.
If two partners
commence an
action, one
may release.

To an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash, and a set-off of a debt due from that one to the defendant:—It was held, that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement, Mr. Baron Parke observing (7), "In the case referred to, of *Jones v Yates* (8), the principle of the decision is, that if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act. In this case, no doubt the plaintiff Wallace, who has made this agreement, is barred by his own agreement to set off one debt against the other; and he cannot undo the transaction by joining the other two plaintiffs with him for that purpose. I am of opinion, therefore, that this is a good plea, supposing there was no fraud, and there is no imputation of any."

Judgment of
Mr. Baron
Parke in *Wal-
lace v. Kelsall*.

It seems, that one partner has the power of staying legal proceedings. Thus, where three partners sued as plaintiffs, and two out of the three agreed with the defendant to accept common bail, and stay proceedings for six weeks, it was held, that the agreement was binding on the third partner. (9)

Stay of pro-
ceedings.

In Ireland, the court will not substitute service of process upon one partner for another, or make an order, that such service should be deemed good service of the co-partner. (10) But service in ejectment on one partner is

Substitution of
service.
Service in
ejectment.

(1) 2 G. & J. 306.

(2) — v. *Layfield*, 1 Salk. 292.

(3) *Exp. Mitchell*, 14 Ves. 597.

(4) *Exp. Shaw*, 1 G. & J. 129.

(5) *Per Hullock B. in Barker v. Richardson*, 1 Y. & J. 366.

(6) *Arton v. Booth*, 4 Moore, 192. *Furnival v. Weston*, 7 ibid. 356. *Barker v. Richardson*, 1 Y. & J. 365., et vide *Legh v. Legh*, 1 B. & P. 447. *Jones v. Herbert*, 7 Taunt. 421. *Mountstephen v. Brooke*, 1 Chitt. 391. The power of one partner to give a release in these cases, arises more from the

practice in actions at law, than from the privileges of partnership; for one plaintiff may release a cause of action brought by two. *Per Dallas C. J.* 4 Moore, 494., vide *Ruddock's case*, 6 Co. 25. *Anon.* 3 Mod. 109. *Hacket v. Herne*, ibid. 135.

(7) *Wallace v. Kelsall*, 7 M. & W. 264.

(8) 9 B. & C. 532. 4 M. & R. 813.

(9) *Harwood v. Edwards*, Gow on Partnership, 65. Collyer on Partnership, 291.

(10) *Grant v. Prosser*, Smith & Batty (Irish), 95.

ACTIONS
AGAINST
PARTNERS.Entry of ap-
pearance for
co-partners.WHEN THE
CONTRACT IS
SEVERAL IN
LAW.

sufficient. (1) And in equity, service of a *subpoena* upon one partner may, upon notice, be made good service upon his co-partner abroad. (2)

In an action commenced against partners, one may enter an appearance for the rest. (3)

To charge a partnership as debtor, the contract which is the foundation of the charge must be joint in point of law. If goods be supplied to a partnership, a joint contract may in part be inferred from the general nature of the transaction; but, in the case of money lent, the evidence of a joint contract must be more specific; for, as Lord Eldon observed, "It is not enough to prove that money borrowed by an individual goes into the partnership estate to make the partners liable." (4)

Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership name with the same banker:—It was held, that the latter had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account, the money being advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. (5)

Thus, if a partner borrow a sum of money on his own security only, it does not become a partnership debt, although applied to partnership purposes, even with the knowledge of the other partner. (6)

Judgment of
Mr. Justice
Bayley in
*Lloyd v. Fresh-
field*.

In *Lloyd v. Freshfield* (7) Mr. Justice Bayley said, "In point of law, one of several partners may pledge the partnership name for money *bona fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lender cannot recover against the other partners, if the money be misapplied. The plaintiffs lend to K. alone; the sum is very large; and there is no document, not even a letter from L. [the client], stating that he wants any money, and no deed passes." It "was a negligent act, at least, in the plaintiffs to lend it [the money], and they therefore cannot call on an innocent party for its repayment." (8)

Contract with
an individual
partner un-
connected with
the partnership
business.Judgments of
Lords Com-
missioners

In *Ex parte Agace* (9) Lord Commissioner Eyre observed, "In partnerships both parties are authorised to treat for each other in every thing that concerns, or properly belongs to the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, if the transaction has no apparent relation to the partnership, then the presumption is

(1) *Doe d. Overton v. Roe*, 9 Dowl. P. C. 1039.

(2) *Carrington (Lady) v. Cantillon*, Bunb. 107. *Coles v. Gurney*, 1 Madd. 187. But service upon one of two solicitors, partners, of an order to deliver a bill of costs, is not sufficient, although a copy of the order be likewise left at the house of business. *Young v. Goodson*, 2 Russ. 255.

(3) *Harrison v. Jackson*, 7 T. R. 207.

(4) *Exp. Emly*, 1 Rose, 65. Collyer on

Partnership, 319. *Siffkin v. Walker*, 2 Camp. 308. *Emly v. Lye*, 15 East, 7. *Exp. Hunter*, 1 Atk. 223.

(5) *Emly v. Lye*, 15 East, 7.

(6) *Bevan v. Lewis*, 1 Sim. 376, vide *Lloyd v. Freshfield*, 2 C. & P. 325. *Smith v. Craven*, 1 C. & J. 500.

(7) 2 C. & P. 333.

(8) Et vide *Parkin v. Carruthers*, 3 Esp. N. P. C. 248.

(9) 2 Cox, C. C. 316.

the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances." "Here the debt due from Scollick to Owen had nothing to do with the partnership of Prothero and Spraggon; and at the time the bills were given, Owen himself asked Prothero the question, whether Spraggon knew of it, and he took Prothero's word for this." "I am perfectly satisfied, that this was a transaction with an individual partner, in a matter not relating to the partnership, and that therefore the partnership could not be bound by it without their subsequent concurrence." Lord Commissioner Ashhurst, "One partner is bound by the acts of his co-partner in all acts referable to the partnership trade; but where a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of dealing, he takes such a security at his peril." (1)

**ACTIONS
AGAINST
PARTNERS.**

Eyre and Ashhurst in *Exp. Agace*.

One partner can bind his co-partners in matters out of their usual course of business. Thus, in *Sandilands v. Marsh* (2) Chief Justice Abbott observed, "It has undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners."

One partner may bind his co-partner, in matters out of their usual course of business.

A person upon receiving a consideration may assent to such private arrangements of the firm as shall deprive him of the benefit of his joint contract. If, for instance, in consideration of a pecuniary advantage to himself, he agrees to rely upon the credit of a part of the firm instead of the whole, he must be taken to have deserted his contract with the whole, and betaken himself to a contract with the part only. (3)

Assent to private arrangements, by which the firm are discharged.

In *assumpsit* against two defendants, S. and M., for money had and received. It was pleaded as to 25*l.*, parcel, &c.; that on &c. the defendants were carrying on business in partnership, and employing many servants; that whilst they were such partners, the plaintiff deposited with them as such partners the said sum of 25*l.*, as a security for his faithfully accounting for all moneys received by him as their servant, to be repaid to him on quitting their employ; that they dissolved partnership; and it was thereupon agreed between them, that the defendant S. should take upon himself the payment of part of the debts, and retain in his employ certain of the servants; and that the defendant M. should take upon himself the payment of other debts, and retain in his employ others of the servants; and that in pursuance of such agreement, M. took upon himself the payment of 25*l.* to the plaintiff, and retained the plaintiff in his sole employ; that the plaintiff had notice of all the premises, and assented to such agreement and retainer by M., and in consideration thereof discharged S. from his promise as to the 25*l.* To which it was replied, that M. did not retain the plaintiff in his sole employ, nor did the plaintiff assent to such agreement and retainer, or discharge the defendant, &c., and issue thereon. After verdict for the defendant on this issue, it was held, that the plaintiff was entitled to judgment

(1) Vide etiam *Exp. Brown*, 1 Atk. 225. *Exp. Bonbonus*, 8 Ves. 549. *Denton v. Rodie*, 3 Camp. 493. *Exp. Bolitho, Buck, 109. South Carolina (Bank of) v. Case*, 8 B. & C. 427.

(2) 2 B. & A. 675.

(3) *Bolton v. Puller*, 1 B. & P. 539. Collyer on Partnership, 326.

ACTIONS
AGAINST
PARTNERS.

Firm exempted
from a custom
of trade.

WHERE CON-
TRACT IS BY
DEED.

When a part-
ner, in execut-
ing a deed,
does not bind
his co-partner.

One partner no
implied au-
thority to bind
his co-partner
by deed.

Judgment of
Lord Kenyon
in *Harrison v.*
Jackson.

non obstante veredicto, on the ground, that no contract was shewn which made M. solely liable to the plaintiff. (1)

By the custom of a particular trade, the firm may be exempted from liability on account of contracts entered into by its individual members: thus, a firm of coach proprietors are not under some circumstances liable in respect of goods supplied or repairs done by the order of one partner for the use of the concern. Thus, if several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner, for the use of the horses drawing the coach along his part of the road. (2)

Under some circumstances, where a partner executes a deed for himself and co-partner, it does not render the co-partner liable.

In *Elliot v. Davis* (3) one Davis intending to execute a joint and several bond for himself and his co-partner Marsh, executed one in this form:— "Know all men by these presents, that I, T. Davis, and G. Marsh;" and signed it "Davis and Marsh." He also sealed and delivered it as his deed. Marsh was ignorant of the transaction:— It was held, that he had no authority to bind Marsh; the bond became his several bond, and not the joint and several bond of Marsh. So likewise in *Strangford v. Green* (4), where G. had, in behalf of himself and partner, entered into a submission to an award, it was held, that G. was bound by the submission, though his co-partner was not, and that he was liable to an action for the non performance of the award.

An implied authority does not exist for one partner to bind his co-partner by deed. Thus, in *Harrison v Jackson* (5) Lord Kenyon said, "The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted, but that one partner might bind the rest. But the power of binding each other by deed is now, for the first time, insisted on, except in the *Nisi Prius* case cited (6), the facts of which are not sufficiently disclosed to enable me to judge of its propriety." "This would be a most alarming doctrine to hold out to the mercantile world. If one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners."

"A general partnership agreement, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose." (7) Generally, therefore, if a deed be expressed to be executed by A. "for himself and partners," it must be shewn that A. had authority by deed from his partner to execute. The partner's subsequent acknowledgment of A.'s authority will not be sufficient. (8) But a partner may bind his co-partner by deed, if he have a special power under seal for that purpose. (9)

(1) *Thomas v. Shillibeer*, 1 M. & W. 124.

(2) *Barton v. Hanson*, 2 Taunt. 49. 2 Camp. 97.

(3) 2 B. & P. 338.

(4) 2 Mod. 228.

(5) 7 T. R. 207.

(6) *Mears v. Serocold*, Sitt. Guildhall, E. T. 1785, cor. Lord Mansfield.

(7) *Per* Lord Kenyon in *Harrison v. Jackson*, 7 T. R. 207.

(8) *Steiglitz v. Egginton*, Holt's N. P. C. 141. *Brutton v. Burton*, 1 Chitt. 707.

(9) *Ibid.*, et vide *Horsley v. Marsh*, cit. 7 T. R. 209. *Appleton v. Binks*, 5 East,

148. *Berkeley v. Hardy*, 8 D. & R. 108.

But one partner has no implied authority to bind his co-partner to a submission to arbitration respecting the matters of the partnership. (1)

Although one partner has no implied authority generally to bind his co-partner by deed, yet if one partner execute a deed on behalf of the firm, in the presence and with the consent of his co-partners, that will bind the firm; and under such circumstances, the sealing and delivery by one, is deemed to be the act of all. (2)

One partner will be bound by the fraud of his co-partner, in contracts relating to the partnership, made with innocent third persons. Thus, if one of two partners purchase articles, such as are used in the partnership business, which he fraudulently converts to his own use, the innocent partner, provided there has been no collusion between the buyer and seller, is liable for the price of the goods (3); and a partner may, under particular circumstances, become liable for the fraud of his co-partner committed before the partnership began. (4)

Where A., B., and C. traded under the firm of A. and B. in the cotton business (C. not being known to the world as a partner), and A. and B. traded as partners alone under the same firm as grocers, and a bill given to them in the cotton business, in which C. was interested, was indorsed in the common firm of A. and B. by A. and B. only, to provide for a dishonoured acceptance in the grocery business, but such indorsement was unknown to C., of whom the indorsee had no knowledge at the time:—It was held, that C. was liable to be sued by him, he not knowing of the misapplication of the partnership fund at the time (5); because it would be repugnant to the nature of such securities, which are in themselves the tokens and evidences of credit, if a *bond fide* holder of them were bound to inquire into the causes of their origin (6): thus, it is no answer to a joint action against two partners by the indorsee of such bill to shew, that it was accepted for the private advantage of one without the knowledge of the other, although it appeared, that the indorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact. (7)

A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same upon commission. C., the managing partner, represented that he had made the purchases, and had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transactions were entirely fictitious, but B. was wholly ignorant that they were so. Upon the whole account, a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to have been resold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for:—It

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AGAINST
PARTNERS.

One partner may execute a deed to bind the partnership, in the presence and with the assent of his co-partners.

FRAUDULENT
CONTRACTS BY
A CO-PARTNER.

One partner will be bound by the fraud of his co-partner.

Partnership security negotiated through the fraud of one of the partners.

(1) *Adams v. Bankart*, 1 C. M. & R. 681., vide etiam *Antram v. Chace*, 15 East, 209.

(2) *Bell v. Dunsterville*, 4 T. R. 313., vide etiam *Burn v. Burn*, 3 Ves. 573. 1 Hoven-den's Supp. 410.

(3) *Bond v. Gibson*, 1 Camp. 185.

(4) *Willet v. Chambers*, Cowp. 814.

(5) *Swan v. Steele (Clerk)*, 7 East, 210. 3 Smith, 199.

(6) *Ibid. Lacy v. Woolcott*, 2 D. & R. 458.

(7) *Sanderson v. Brooksbank*, 4 C. & P. 286., vide etiam *Jacaud v. French*, 12 East, 317. ante, 2390. *Sparrow v. Chieman*, 9 B. & C. 241. *Richmond v. Heapy*, 1 Stark. 202. *Johnson v. Peck*, 3 *ibid.* 66.

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PARTNERS.**

was held, that B. was liable for the false representations of his partner; and that A. was entitled to retain the money which had been paid to him upon these fictitious transactions, as if they were real; and that the supposed purchases having been represented to have been made at a certain specified rate per pipe, A. might maintain an action for money had and received to recover the specific sum advanced for the number of pipes of wine unaccounted for. (1)

Conversion of
customers'
moneys;

If one of several partners convert to his own use the moneys of customers lodged in their hands as bankers, even though such moneys were not placed there by the customers themselves, but through the means of a secret felony committed previously by the fraudulent partner in a distinct character, the firm will nevertheless be liable, although not privy to the conduct of such partner;—because, where a partner possesses facilities to commit fraud, either by reason of the nature of his business, or from the trust reposed in him by his companions, the firm ought, *à fortiori*, to be responsible for his acts. (2)

or money from
dividends in
the funds.

Where bankers have been employed to receive dividends in the funds, and have in their own books credited their employers with the dividends as received, and have allowed them to draw without having any other funds in their hands, the bankers are bound by the entries so acted on, although not communicated to the parties interested; and therefore they cannot set up as a defence, that the entries have been fraudulently made by one of the partners, the money never having been received by the house. (3)

In all cases where the firm is bound by the fraud of one partner, the acts of the fraudulent partner must have been committed in his capacity of partner. Where fraud is committed by a partner *en autre droit*, and the co-partners have no notice of the transaction, it seems clear, that the firm will not be liable, although it may have derived benefit from such fraud. (4)

A firm cannot
acquire right
to property
from the fraud
of one of their
partners.

As the firm are generally bound by losses arising from the fraud of any of the co-partners, so, *à fortiori*, a firm cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy. (5)

Collusion with
one partner.

In *Longman v. Pole* (6) Lord Tenterden observed, "If a person colludes with one partner in a firm to enable him to injure the other partners, I think they can maintain a joint action against the person so colluding."

Judgment of
Lord Tenterden
in *Longman v. Pole*.

In some cases, the firm of the colluding partner may have a good defence at law, on the ground that the plaintiff's defrauded firm are from technical reasons incapable of suing in a court of law. In this case the parties defrauded must apply to a court of equity. (7)

If there be circumstances to shew a reasonable belief, that a security was given with the consent of the partnership, it lies upon the partners to prove the fraud. (8)

Where money

If money be advanced to an individual partner, for which he gives the

(1) *Rapp v. Latham*, 2 B. & A. 795.

(2) Collyer on Partnership, 298. *Stone v. Marsh*, R. & M. 364. 6 B. & C. 551. 8 D. & R. 71.

(3) *Hume v. Bolland*, R. & M. 371. Collyer on Partnership, 301.

(4) *Exp. Watson*, 2 Ves. & B. 414. *Smith v. Jameson*, 5 T. R. 601.

(5) *Kilby v. Wilson*, R. & M. 179., et vide *Snaith v. Burridge*, 4 Taunt. 684.

(6) M. & M. 223.

(7) *Jones v. Yates*, 9 B. & C. 532.

(8) *Frankland v. M^r Gusty*, 1 Knapp, P. C. C. 274. *Ridley v. Taylor*, 13 East, 178. *Exp. Kirby*, Buck, 511.

joint security of the firm, the circumstance that such money is carried to the separate account of that partner, even with the knowledge of the creditor, will not *per se* absolutely establish, that the contract was several in point of fact. (1)

In *Exparte Bonbonus* (2) Lord Eldon said, "In *Fordyce's case* Lord Thurlow and the judges had a great deal of conversation upon the law; and they doubted upon the danger of placing every man, with whom the paper of a partnership is pledged, at the mercy of one of the partners, with reference to the account he may afterwards give of the transaction. There is no doubt, now, the law has taken this course, that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *prima facie*, it will not bind them; but it will, if you can shew previous authority or subsequent approbation: a strong case of subsequent approbation raising an inference of previous positive authority. In many cases of partnership and different private concerns, it is frequently necessary, for the salvation of the partnership, that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions, therefore, must be looked to, as well as that at the time."

If a partnership firm be pledged by the acceptance of a bill of exchange by one partner in the name of the firm, the partnership, of whomsoever it may consist, whether they are named or not, and whether the partners are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached. (3)

Where a bill accepted in a partnership firm is applied, with the knowledge of the party who takes the bill, in part only to the separate use of the partner who actually accepts it, a secret partner not known to the party who takes the bill, is liable in respect of so much of the amount as is not to the knowledge of the taker applied to the separate use of the partner who accepts the bill. (4)

If the creditor can shew, that the firm have adopted as a joint debt the debt which was originally several, this is an answer to any charge of collusion against the creditor, and the firm will accordingly be answerable for repayment of the debt. In cases of this nature, subsequent approbation by the firm of the separate act of their co-partner will be equivalent to previous consent; and continued acquiescence on the part of the firm, in a series of separate contracts and engagements entered into by an individual partner, will be evidence of subsequent approbation, and will be strong to shew, that the particular partner engaged in these various transactions is, in truth, the agent of his co-partners. (5)

If collusion exist between a partner and his separate creditor, independently of the transfer to the latter of partnership securities, the firm are not liable to the separate creditor in respect of his contract. Thus, in *Arden v.*

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is advanced to one individual partner, for which he gives the joint security of the firm.

Judgment of Lord Eldon in *Exp. Bonbonus*.

Acceptance of a bill of exchange.

The adoption of a several debt, as a joint debt.

Fraud in a separate creditor holding partnership se-

(1) *Shirreff v. Wilks*, 1 East, 48.

(2) 8 Ves. 540. 2 Hovenden's Supp. 132.

(3) *Wintle v. Crowther*, 1 C. & J. 316. 1 Tyrw. 210.

(4) *Ibid*.

(5) *Collyer on Partnership*, §47.

ACTIONS
AGAINST
PARTNERS.

curities, when
remitted to his
several con-
tract.

Judgment of
Lord Kenyon
in *Arden v.*
Sharpe.

One partner
giving notice,
that he will not
be responsible
for bills drawn
in the partner-
ship name.

TORTS BY A
CO-PARTNER.

Where partners
not answerable
for the wrongs
of each other.

Partner when
responsible for
negligence.

CONTEMPT OF
COURT.

Sharpe (1) Lord Kenyon said, "This action, under the present proof, cannot be supported." "The party who brings the action was himself the person who took the bill, with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other; he cannot sue the partnership, the transaction indicates, that the money was for that partner's own use, and not raised on the partnership account; therefore, he shall not be allowed to resort to the security of the partnership, to whom, in the original transaction, he neither looked or trusted."

But although a bill or note, negotiated by one partner, may not be binding on the firm in the first instance, by reason of a collusive contract between that partner and the separate creditor who takes the security, yet it may afterwards become binding in the hands of an innocent and *bona fide* indorsee. (2)

It is not requisite, that there should be other circumstances to charge the creditor with fraud, independently of the bare taking of partnership securities. Thus, in *Hope v. Cust* (3), where a partner had given the guarantee of the firm as a security for his separate debt, Lord Mansfield directed the jury to inquire, 1. whether there was not positive fraud; or 2. whether there was not gross negligence, amounting to fraud, on the part of the creditor, and in either case to find a verdict against him. (4)

But the authority of one partner to bind another, by signing bills and notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder by the party signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts, and though the greater part of it were in fact so applied. Nor can he recover against the other partner the amount of the sum so applied to the payment of the partnership debts against such notice. (5)

Though partners are in general bound by the contracts, they are not answerable for the wrongs of each other.

In matters quite distinct from the partnership trade or business, and in acts or omissions in the course of the partnership trade or business in violation of law, those who are guilty of them will alone be responsible.

But partners, like individuals, are responsible for the negligence of their servants, upon the maxim of *qui facit per alium, facit per se*; and if one of the partners act, he is considered, in this instance, as the servant of the rest. In these cases the tort is looked upon as the joint and several tort of all the partners, so that they may either be proceeded against in a body, or one may be singled out, and sued alone for the whole of the damage done. (6)

If one of two partners, attorneys in the country, direct a rule of court to be served on the London agent of the firm, the one who gave the directions will be alone punishable in case of disobedience to the rule. (7)

(1) 2 Esp. N. P. C. 524.

(2) *Blair Miller v. Douglas*, Fac. Col. No. xli. p. 154. cit. in Collyer on Partnership, 334.

(3) Cit. 1 East, 53.

(4) Vide etiam *Shirreff v. Wilks*, 1 East, 48. *Green v. Deakin*, 2 Stark. 347., et vide *Jones v. Yates*, 9 B. & C. 532. Exp. *Goulding*, 2 G. & J. 118.

(5) *Galway (Lord) v. Mathew*, 10 East, 264. 1 Camp. 403.

(6) *Moreton v. Hardern*, 4 B. & C. 223. 6 D. & R. 275. *Nicoll v. Glennie*, 1 M. & S. 588. Att. Gen. v. *Stannysforth*, Bush. 97. Att. Gen. v. *Burges*, ibid. 223. *Res v. Manning*, Comyn, 616.

(7) In re *Holiday*, 9 Dowl. P. C. 1090.

7. DISSOLUTION OF PARTNERSHIP.

DISSOLUTION
OF PARTNER-
SHIP.

Generally.

A partnership may be dissolved, before the expiration of the term, by the mutual consent of the parties, or by the act of law. But a partnership at will may be dissolved at the express desire (1), or by the bankruptcy (2), outlawry, felony, or death of any of the parties.

A partnership may, after the determination of it by the contract of the partners, continue for the purpose of winding up engagements with third persons. (3)

A partnership without articles, and for an indefinite period, may be dissolved by any partner at any time, without previous notice, subject to the engagements of the partnership; but the existence of engagements with third persons cannot prevent the right of dissolution as among themselves. (4)

When a partnership by act of the partners, may be dissolved at any time.

A partnership for a term is presumed to endure for the term, provided the parties be in life and of legal capacity to continue it. But there may be cases in which, though no written contract provides for the duration of the partnership, an implied contract may exist as to the term of its duration. For instance, partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure. (5)

Partnership for a term.

The marriage of a feme sole partner is a dissolution of the partnership at will (6), for otherwise by her marriage she would introduce a stranger into the partnership, which might be adverse to the interests of the other partner.

Marriage of a feme sole partner.

And it seems, that a sale of the partnership effects under a separate execution against one partner, is *ipso facto* a dissolution of the partnership. (7)

Sale under a *fieri facias*.

A partnership may be dissolved by the civil death of a partner, as by his outlawry, or attainder for treason or felony.

Civil death of one of the partners.

A court of equity, upon a sufficient cause of complaint, will dissolve a partnership before the expiration of the term; that is, if the partnership cannot be carried on according to the intent of the articles of co-partnership: thus, a court of equity declared the partnership in the Opera House to be dissolved, the conduct of the parties making it impossible to carry it on upon the terms stipulated; accordingly, the decree was for a sale of the whole concern. (8)

Court of equity will dissolve a partnership.

"Where there are two partners, both of whom are to contribute their skill and industry, as well as capital, in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry

Insanity of one of the partners.
Judgment of Sir L. Kenyon.

(1) *Exp. Notes*, Watson on Partnership, 380. *Montagu on Partnership*, 108.

(2) *Fox v. Hanbury*, Cowp. 445. *Exp. Smith*, 5 Ves. 295.

(3) *Crawshay v. Collins*, 15 Ves. 296.

(4) *Featherstonhaugh v. Fenwick*, 17 *ibid*.

298. *Heath v. Sansom*, 1 N. & M. 104.

4 B. & Ad. 172., *vide Crawshay v. Collins*,

15 Ves. 228. *Peacock v. Peacock*, 16 *ibid*.

49.

(5) *Crawshay v. Maule*, 1 Swanst. 521.

(6) *Nerot v. Burnand*, 4 Russ. 260. *Wrexham v. Hudleston*, 1 Swanst. 517. n.

(7) *Fox v. Hanbury*, Cowp. 445. *Sayer v. Bennet*, *Montagu on Partnership*, App. 17. *Waters v. Taylor*, 2 V. & B. 300.

(8) *Waters v. Taylor*, 2 V. & B. 299.

Baring v. Dix, 1 Cox, C. C. 212. *Rort v.*

Spiers, 2 Bell, Comm. 642.

DISSOLUTION OF PARTNERSHIP

in *Sayer v.
Bennet.*

on his part, is a good ground to put an end to the partnership, not by the authority of either of the partners, but by application to a court of justice, and this for the sake of the partner who is rendered incapable, as well as of the other; for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another. If this, then, were the case of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership, and to make a precedent, for I confess I have not been able to find any. It is said, that equity should appoint some person to carry on the business for the benefit of the lunatic, as they would have done for an infant; but I say, God forbid. Mr. Sayer would never have entered into this partnership, if he had conceived that by so doing he certainly should in any event have subjected his business to the management and control of a court of equity." (1)

The lunacy of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the court for a decree of dissolution on the ground of such lunacy. (2)

One of two partners having continued the partnership business for some time after the lunacy of the other, and having then sold the business of the representative of the deceased lunatic partner, was held to be entitled to the partnership profits up to the period of sale. (3)

Wilful acts of
fraud or bad
faith.

Not only wilful acts of fraud and bad faith, but gross instances of carelessness and waste in the administration of the partnership, as well as exclusion of the other partners from their just management, so as to prevent the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract by a court of equity. (4)

So, also, a habit on the part of one partner of receiving moneys, and not entering the receipts in the books, or not leaving the books open to the inspection of the other partners, whether such conduct arise from a fraudulent intent or not, is good ground for a dissolution. (5)

Although this relief will not be administered for mere defects of temper in some of the parties, yet violent and lasting dissension seems to be a ground upon which a court of equity will decree a dissolution, as where the parties refuse to meet each other upon matters of business, a state of things which precludes the possibility of the partnership affairs being conducted with advantage. (6)

Ill temper.

But equity will not dissolve a partnership on slight grounds, as "because one is more sullen or less good tempered than the other." (7)

Want of pru-

Want of prudence or ability on the part of the person seeking relief is no

(1) *Per* Sir L. Kenyon in *Sayer v. Bennet*, 1 Cox. C. C. 107. 1 Montagu on Partnership, App. 18. Watson on Partnership, 382. *Kirby v. Carr*, 3 Y. & C. 184. *Per* Lord Eldon in *Waters v. Taylor*, 2 Ves. & B. 299., *sed vide etiam Huddleston's case*, cit. in *Pearce v. Chamberlain*, 2 Ves. sen. 34. *Wrexham v. Huddleston*, 1 Swanst. 517. n.

(2) *Jones v. Noy*, 2 M. & K. 125.

(3) *Ibid.*

(4) *Marshall v. Colman*, 2 J. & W. 266. *Goodman v. Whitcomb*, 1 ibid. 592. *Chap-*

man v. Beach, ibid. 594. *Norway v. Ross*, 19 Ves. 148. *Waters v. Taylor*, 2 Ves. & B. 304.

(5) *Goodman v. Whitcomb*, 1 J. & W. 592.

(6) *De Berenger v. Hammell*, 7 Jarman's Conveyancing, 26. *Collyer on Partnership*, 196.

(7) *Goodman v. Whitcomb*, 1 J. & W. 592. *Chapman v. Beach*, ibid. 594. *Marshall v. Colman*, 2 ibid. 266. *Norway v. Ross*, 19 Ves. 148. *Waters v. Taylor*, 2 V. & B. 304.

just ground for a dissolution, as where he has made larger advances of capital than he is bound to do, and has received none of the profits. (1)

By death of one of the partners the partnership is *ipso facto* dissolved (2), unless provided for by the deed of partnership.

Notice by one partner that the partnership has been dissolved is evidence against that partner, that it has been dissolved by competent means, even by a deed, if a deed be essential (3); and in such case an ejectment lies, upon the demise of one co-partner against another, for a house agreed to be occupied jointly during the partnership, without proof of a notice to quit. (4)

If, after a dissolution of partnership, and notice of it published in the Gazette, and sent round to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in the name of that firm, the other partners are not bound to apply for an injunction against his doing so, and are not liable upon such bills to a person ignorant of the dissolution of partnership. (5)

DISSOLUTION OF PARTNERSHIP.

dence or ability, not grounds for a dissolution.

Death of one of the partners.

Notice of dissolution given by a partner, is conclusive as against him.

Notice of dissolution may be rebutted.

8. EVIDENCE.

EVIDENCE.

It must be proved, that all who sue were partners at the time of the contract: one who has been subsequently admitted into the firm cannot join, although it were stipulated, that he should have a share in past transactions. (6)

All who sue must be partners.

It will not be sufficient to shew that one of the defendants became a partner after the time of the contract, or that he was by agreement afterwards permitted to share in the adventure. (7)

Must be a partner at the time the contract was made.

If a secret or dormant partner have retired from the firm, and goods have been supplied previous to the dissolution, and payments have been made by the parties who continue the business, subsequent to the dissolution, it is a question of evidence, whether such payments are to be applied to the previous or to a subsequent debt. (8)

Secret partner retiring, but goods supplied previous to the dissolution, and paid from money not belonging to the remaining partners.

As the authority of one partner to bind another is merely presumptive (9), the presumption may be rebutted by evidence, that the partner gave express notice to the plaintiff, that he would not be responsible for the acts of another. Thus, if A. being partner with B. give notice to a creditor to deliver no goods to B. without A.'s concurrence, the creditor cannot recover for goods delivered to B. without proof that A. adopted the sale, or derived benefit from the goods. (10)

Presumption of the right of one partner to bind the other, may be rebutted.

With respect to receipts by partners, it may be observed, that a receipt is an admission only; and the general rule is, that an admission, though evidence against the person who made it, and those claiming under him, is not

Effect of receipts.

(1) *Goodman v. Whitcomb*, 1 J. & W. 592.

(2) *Fullicamy v. Noble*, 3 Mer. 610.

(3) *Doe d. Waithman v. Miles*, 1 Stark. 181.

(4) *Ibid.*

(5) *Newsome v. Coles*, 2 Camp. 617.

(6) *Wileford v. Wood*, 1 Esp. N. P. C. 182.

(7) *Young v. Hunter*, 4 Taunt. 582., et vide *Lloyd v. Archbowl*, 2 ibid. 324. *Mawman v. Gillett*, cit. ibid.

(8) *Newmarch v. Clay*, 14 East, 299.

(9) *Rooth v. Quin*, 7 Price, 193.

(10) *Willis v. Dyson*, 1 Stark. 164.

EVIDENCE.

conclusive evidence, except as to the person who may have been induced by it to alter his condition. (1)

PROOF OF
PARTNERSHIP.

To constitute a private unincorporated partnership, no contract in writing is necessary; the acts and words of the parties are alone sufficient for that purpose. (2)

The evidence of partnership usually consists in the oral testimony of clerks, or other agents or persons who know, that the alleged partners have actually carried on business in partnership; it is unnecessary, even in criminal cases, to produce any deed or other agreement by which the co-partnership has been constituted. (3)

To establish a partnership between two defendants (4), a verdict on the issue directed out of a court of equity, to try whether the defendants were partners, and for what time, on a bill filed by one of them against the other, is admissible evidence to establish a partnership, the verdict having found them to be so.

Where several sue as indorsees of a bill, indorsed in blank, it is unnecessary to give any proof of their partnership or joint interest. (5)

Prima facie
evidence of a
partnership.

It is sufficient if the plaintiff in the first instance prove a partnership at a time anterior to the contract; when that is once established, a continuance of the partnership is to be presumed until a dissolution be proved, and proof of a dissolution will still be insufficient, unless reasonable proof be given of notice of the fact to the plaintiff; for although the partnership may in fact have been dissolved, yet if the parties do not announce it, they by their silence induce strangers to trust to the joint credit of the firm as before.

Dormant part-
ner.

It is sufficient to prove, that a co-defendant in *assumpsit* is a dormant partner with the rest. (6)

In an action against several, upon a contract on which they are liable as partners, the proof of partnership usually consists in evidence, that they have acted as partners in the particular business. Less evidence is usually sufficient in this case than is requisite, where partners sue as plaintiffs, for there they are cognisant of all the means by which the fact is capable of being proved: but where they are sued as defendants, the plaintiff may not be able to ascertain the real connection between the parties; it is sufficient for him to shew, that they have acted as partners, even although the partnership be by deed (7); and that by their habit and course of dealing, conduct, and declarations, they have induced those with whom they have dealt to consider them to be partners: hence, if a person has represented himself to be a partner, and has been trusted as such, he is bound by that representation, and it is no defence for him to shew, that he was not in fact a partner. (8)

The record of an issue out of the Exchequer, to try the fact of the partnership of A. and B., is admissible evidence in an action against A. and B to charge them as partners. (9)

(1) *Straton v. Rastall*, 2 T. R. 366.
Wyatt v. Hertford (Marquis of), 3 East, 147. *Heane v. Rogers*, 9 B. & C. 577.

(2) *Graves v. Key*, 3 B. & Ad. 318. n.
(3) *Peacock v. Peacock*, 16 Ves. 49.
Featherstonhaugh v. Fenwick, 17 ibid. 298.
Alderson v. Clay, 1 Stark. 405.

(4) 3 Stark. Ev. 3d ed. 801.

(5) *Whately v. Menheim*, 2 Esp. N. P. C. 608.

(6) *Rordasz v. Leach*, 1 Stark. 446.

(7) *Swan v. Steele (Clerk)*, 7 East, 309.

(8) *Alderson v. Clay*, 1 Stark. 406.

(9) 3 Stark. Ev. 3d ed. 804.

(10) *Whately v. Menheim*, 2 Esp. N. P. C. 608.

When it appeared, that the plaintiff knew that the defendants intended to dissolve their partnership, and that they were actually carrying that intention into execution, it was held to be incumbent on the plaintiff who relied upon a subsequent contract, to shew that their intention had been abandoned. (1)

When two of three defendants in *assumpsit* were outlawed, it was held, that a letter written by the third, who had pleaded *non assumpsit*, in which he admitted the partnership, was evidence of the fact. (2)

An admission by A. in the discussion of a particular transaction, that he is a partner with B., is not evidence to bind him as a partner in any other matter unconnected with the particular transaction. (3)

But if A. publicly and generally represent himself to be the partner of B., it will be evidence to prove his liability as a partner on a contract unconnected with the real object of the partnership. (4)

Although the declaration or admission of each individual member of a firm, that he is a partner, is evidence to charge himself, it is no evidence of the fact against any other party. (5)

When the fact, that several parties or partners has once been established, the act or declaration of the one relating to the subject-matter of the partnership, is evidence against the rest, although the partner whose acts or declarations so given in evidence be no party to the suit. (7)

Where a contract was made by one of several partners in his individual capacity, who at the time declared, that the subject-matter of the contract was his property alone:—It was held, that his declaration was evidence against all the partners. (8)

So, an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts or payments during the partnership, is evidence to charge the other partner. (9)

Where two partners are part owners of a vessel, an admission by one of them, as to a subject of co-part-ownership, but not of co-partnership, is not binding on the other. (10)

But a declaration of one of two partners is not evidence to charge another with respect to a transaction with him which occurred previously to the partnership, unless a joint responsibility in the subject-matter can be shewn. (11)

When one of several partners promised individually to pay the debt without making any mention of his partners, it was held to be conclusive evidence, that the debt was due from him individually. (12)

Where a person stands indifferent between litigant parties, or where the interest of a person be on one side greater than that on the other, the party

EVIDENCE.

Where plaintiff knew that the defendants intended to dissolve their partnership.

The declaration of one partner as to the fact of partnership, will not bind his co-partners.

The declaration of one partner respecting the fact of partnership, only binds the declarant.

ADMISSIONS BY PARTNERS. (6)

When the fact of partnership is established, the admissions of one partner will bind his co-partner.

COMPETENCY OF CO-CONTRACTORS.

(1) *Paterson v. Zachariah*, 1 Stark. 71.

(2) *Sangster v. Mazarredo*, *ibid.* 161.

(3) *De Berkow v. Smith*, 1 Esp. N. P. C.

59.

(4) *Ibid.*

(5) 3 Stark. Ev. 3d ed. 807. *Tinkler v.*

Walpole, 14 East, 226. *M'Iver v. Humble*,

16 *ibid.* 169. *Flower v. Young*, 3 Camp. 240.

Smith v. Fuge, *ibid.* 456. *Ditchburn v.*

Spracklin, 5 Esp. N. P. C. 31. *Strother v.*

Willan, 4 Camp. 24. *Weaver v. Prentice*,

1 Esp. N. P. C. 369.

(6) *Vide antè*, 1600—1633. tit. EVIDENCE.

(7) *Thwaites v. Richardson*, Peake's N.

P. C. 16. *Whitcomb v. Whiting*, Doug. 652.

Holme v. Green, 1 Stark. 488. *Nicholls v.*

Dowding, *ibid.* 81.

(8) *Lucas v. De la Cour*, 1 M. & S. 249.

(9) *Wood v. Braddick*, 1 Taunt. 104. *Pritchard v. Draper*, 1 Russ. & M. 191.

(10) *Jagers v. Binnings*, 1 Stark. 64.

(11) *Catt v. Howard*, 3 *ibid.* 3.

(12) *Murray v. Somerville*, 2 Camp. 99. n.

EVIDENCE.

will be an incompetent witness for the side on which his interest preponderates; but where the liability or interest on the side on which he is called, is counterbalanced or outweighed by an equal, or greater liability or interest on the other side, he will be competent (1); therefore, if a witness be called to prove that he himself is liable to the demand for which the action is brought, the plaintiff, by suggesting that he is a partner, cannot deprive the party of his testimony. (2)

Party to a joint contract.

In *assumpsit* for work and labour, the defendant pleaded that "the promise was made to the plaintiff and J. S., and not to the plaintiff alone;" to which it was replied, that the promise was made to the plaintiff alone, and not to the plaintiff and J. S.:—It was held, that J. S. was a competent witness for the defendant to prove, that the contract was entered into by the defendant with the plaintiff and himself jointly. (3)

In an action brought to charge A. as a partner to a trading company, a witness, who by other evidence than his own appeared to be a shareholder in the company, was held to be a competent witness to prove that A. was a partner. (4)

Retired banker.

In an action by A., a banker, against B., a customer, for the balance of an account, part of which arose whilst C. was a partner with B., it was held, that C., after whose secession from the partnership B. and C. executed mutual releases of all demands, is a competent witness to disprove an item charged by A. in the account, although debts due to and by the firm of B. and C. are still unsettled; and although, since the dissolution of the partnership, B., as continuing partner, has asked his creditors for time. (5)

Retired broker.

In an action of replevin against a broker, a person who at the time of the distress, was in partnership with him, but who at the time of the trial had ceased to be his partner, is a competent witness for him. (6)

Father and son carrying on trade in their joint names.

In an action by a tradesman for goods sold, his son is a competent witness for him, if as between father and son, the son has no interest in the trade, although the trade be carried on in their joint names, and although in a bill of parcels written by the son, and delivered with the goods, the defendant be made debtor to the father and son jointly. (7)

Incompetency of co-contractor.

In general, a co-partner with the defendant in the subject of the action is incompetent to be a witness for the defendant, where a verdict for the plaintiff would diminish the joint property, or he would be liable to any part of the costs, even although the tendency of his evidence be to charge himself with the whole debt. (8)

But in order to raise this objection, it must be shewn that he is a partner: it is not sufficient merely to suggest it (9): thus, in an action for goods sold and delivered, a witness is competent to prove that the goods were supplied

(1) *Phillipps' Ev.* 123., *anté*, 1726—1758. tit. EVIDENCE.

(2) *Birt v. Hood*, 1 Esp. N. P. C. 20. *Blackett v. Weir*, 5 B. & C. 385. *Cox v. Whalley*, cit. 10 East, 399.

(3) *Davies v. Evans*, 6 C. & P. 619.

(4) *Hall v. Curzon*, 9 B. & C. 646. 4 M. & R. 565.

(5) *Wilson v. Hirst*, 1 N. & M. 742. 4 B. & Ad. 760.

(6) *Duncan v. Meikleham*, 3 C. & P. 172. vide etiam *Hudson v. Robinson*, 4 M. & S. 475.

(7) *Barker v. Stubbs*, 1 M. & G. 44.

(8) Vide *Birt v. Hood*, 1 Esp. N. P. C. 20. *Young v. Bairner*, *ibid.* 103.

(9) *Ibid.*

on his credit, and for his use, although it be suggested that he is a partner with the defendant. (1)

In *assumpsit* for goods sold and delivered (2), the plaintiff's witness swore, that the defendant and W. B. were partners in trade, and that such goods were sold to them in partnership. The defendant called W. B. to prove that the goods were sold to him, and that the defendant had no concern in the purchase of them otherwise than as his servant; upon which Lord Kenyon said, "He is not a witness to prove this; for he comes to defeat the action of the plaintiff, against a man who is proved to be his partner, and by discharging the present defendant, he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff in this cause."

In an action on a joint contract against several partners (3), one of the defendants having suffered judgment to go by default is not admissible as a witness to prove the partnership of himself and the other defendants without their consent, although the proposed witness is released as to all other actions, save that, on which he is called to give evidence; for it is a general rule, that a party to the record cannot be called as a witness but by consent, and all the parties to the record must consent.

In an action against one partner (4), if the plaintiff give in a particular of his demand, and the defendant plead partnership in abatement, and that the defendant proves any of the items to have been furnished on the partnership account, he will be entitled to a verdict, although the plaintiff should be prepared to prove, that some of the items were furnished on the credit of the defendant only.

Where the joint liability results not from a contract expressly made with all the defendants, but from the fact of their partnership, it is competent to the defendant to prove a dissolution of the co-partnership previous to the contract; this, however, will not be in itself sufficient, where the defendants have openly acted as partners, unless notice to the plaintiff of the dissolution be also proved.

An infant partner must, on attaining his age, having continued to be a partner up to that time, give notice in order to relieve himself from future liability. (5)

Proof of notice is still requisite, although the plaintiffs had no dealings with the partners previous to the actual dissolution of partnership. (6)

But it seems, that if notice be given to all the parties with whom the partners have dealt, and be also advertised in the Gazette, it will be presumptive evidence of notice against one who had no previous dealings with the firm. (7)

Where one of the defendants has allowed judgment to go by default.

PROOF OF DISSOLUTION.
Previous to Contract.

Infant partners.

Notice is requisite, although no dealings occurred between the parties previous to the dissolution.

(1) *Birt v. Hood*, 1 Esp. N. P. C. 20.

(2) *Goodacre v. Bream*, Peake's N. P. C. 232.

(3) *Mant v. Mainwaring*, 8 Taunt. 139, *sed vide ante*, 1726—1758. tit. EVIDENCE.

(4) *Colson v. Selby*, 1 Esp. N. P. C. 452.

(5) *Goode v. Harrison*, 5 B. & A. 147.

(6) *Parkin v. Carruthers*, 3 Esp. N. P. C. 248.; there the partner allowed his name to continue in the firm. *Gorham v. Thompson*, Peake's N. P. C. 60. *Graham v. Hope*, *ibid.* 208.

(7) *Newsome v. Coles*, 2 Camp. 617. *Godfrey v. Turnbull*, 1 Esp. N. P. C. 371., where an advertisement in the Gazette is said to have been considered to be presumptive evidence of notice. But see another report of the same case, entitled *Godfrey v. Macauley*, Peake's N. P. C. 209. n.; by which it seems, that the jury were directed to consider the probability, that the plaintiff had seen the Gazette.

EVIDENCE.

Secret or dormant partner.

In the case of a mere secret or dormant partner, it is sufficient to prove an actual dissolution previous to the contract in question, for his liability depends upon the mere fact of partnership, and no credit has been given to him personally as a supposed member of the firm. (1)

But if it appear that the acting partner had stated the existence of the partnership to one dealing with the firm, notice of the dissolution would be requisite. (2)

When express notice has been given.
Printed circulars.

If express notice have been given of the dissolution of the partnership to those with whom the firm have had any dealings, the notice must be proved in the usual way; and where printed circular letters have been sent, or duplicates made out, it would be sufficient to produce and prove a duplicate original; but still it might be proper to give notice to produce the original.

Advertisement in Gazette or public newspaper.

Such notice may also be proved by means of an advertisement in the Gazette, or in a public newspaper; but a newspaper containing such a notice cannot be read in evidence without previous proof, either that the plaintiff read an impression of the same paper, or at least that he was in the general habit of reading that paper. (3) And notice in the Gazette, if admissible at all, is very weak evidence, if it be not supported by some evidence to shew that the plaintiff saw the Gazette. (4)

There seems indeed to be little, if any, difference between a notice in the Gazette and a notice in any other newspaper, with respect to contracts of partnership, and other matters which are not of a public and official nature. (5)

Minute of an agreement to dissolve partnership must be stamped.

Where a minute of an agreement between partners to dissolve the partnership may, in order to be advertised in the Gazette, and signed by the parties and attested, be produced in evidence to prove the dissolution, an agreement stamp is necessary. (6)

General notoriety.

Evidence of the general notoriety of the fact of dissolution is not sufficient (7), if no express notice have been given, and no advertisement published in the Gazette. (8)

(1) *Evans v. Drummond*, 4 Esp. N. P. C. 89. *Newmarch v. Clay*, 14 East, 239.

(2) *Ibid.*

(3) *Jenkins v. Blizard*, 1 Stark. 418.

(4) *Godfrey v. Macauley*, Peake's N. P. C. 209. *n. Semble*, that notice in the Gazette is notice to all the world. *Wright v. Pulham*, 2 Chitt. 120.

(5) 3 Stark. Ev. 3d ed. 813.

(6) *May v. Smith*, 1 Esp. N. P. C. 283.

(7) *Gorham v. Thompson*, Peake's N.P.C. 60.

(8) Those who may be desirous of acquiring information upon the "Law of Partnership" are referred to an excellent treatise upon that subject by Mr. Collyer.

QUO WARRANTO.

1. DEFINED, pp. 2430—2432.
2. TIME WITHIN WHICH AN INFORMATION WILL BE GRANTED, pp. 2432, 2433.
3. TO WHOM AND AGAINST WHOM INFORMATIONS, &C. WILL BE GRANTED, pp. 2433—2439.

INFORMATIONS, &C. BY THE ATTORNEY GENERAL — *The crown has an absolute right to inquire into the claims of any person exercising an office or franchise — Distinction between the powers of the attorney general and the master of the crown office — THE RELATOR — INFORMATIONS AT COMMON LAW — Stat. 4 & 5 Will. & M. c. 18. s. 2. — No information can be filed without leave of the court — Stat. 9 Anne, c. 20. s. 4. — Conduct of the relator will be animadverted upon by the court — Prosecution contrary to an agreement entered into by the relator — When relator legal adviser of the defendant — Reg. Gen. M. T. 3 Vict. — Affidavit must state at whose instance the application is made — Judgment of Lord Denman in Regina v. Hedges — When the court will direct to whom the management of the prosecution shall be confided — Affidavits made by three persons, two of whom are unqualified — DEGREE OF INTEREST — Where relator and defendant claim under the same title — Judgment of Lord Denman in Rex v. Parry — Judgment of Mr. Justice Patteson in Rex v. White — Relator not a burgess — Stranger to a corporation — Mere poverty in a relator — A positive act of acquiescence in the offence complained of must exist, to disqualify a relator — Subsequent acquiescence — Presumption of acquiescence may be rebutted — When the court will change the relator — AGAINST WHOM AN INFORMATION WILL BE GRANTED.*

4. CAUSES FOR WHICH AN INFORMATION, &C. WILL AND WILL NOT BE GRANTED, pp. 2439—2445.

Object of stat. 9 Anne, c. 20. — Discretionary in the court to grant an information — The court consider the validity or defect of defendant's title, and the expediency of stopping the prosecution — Second application for the same cause — Information will not be granted for trying the title to an office which is determined — Where there is no other mode in which an applicant can acquire redress — An user, as well as a claim to a particular franchise must be shown — When mandamus the proper remedy — Where the office is not full — Where adequate relief can be obtained in a private action — Secondary and incidental question — An information against a whole corporation as a body, can only be exhibited by the attorney general — INFORMATIONS BY THE ATTORNEY GENERAL — Usurping a power which was no prior franchise of the crown — Officers engaged in the administration or execution of public justice — Courts of justice — Fairs — Markets — Illegal levy of a rate — Exclusive right of ferry — Private franchise — Claiming to be a burgess — Right of voting for a burgage tenement — Guardian of the poor — Parochial officers — County treasurer — Petit constable — Trustees under a public local act — Servant of a corporation.

VALIDITY AND INVALIDITY OF ELECTIONS, pp. 2445—2460.

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The person elected must take upon himself to support the title of his electors—Under what circumstances the title of electors can be tried by an information—The court will not hold parties disqualified on affidavits which there is no opportunity to contradict—INELIGIBILITY OF THE PERSON ELECTED—Votes given unknowingly and knowingly to an unqualified candidate—Where the candidates to be put in nomination are not limited—Where an election is once entered upon, it cannot be stopped—Mode of taking the opinion of a corporate body—Judgment of Lord Denman in Regina v. Brightwell—Stat. 5 & 6 Will. 4. c. 76. s. 52.—None of town councillor not on the burgess roll—Not making the requisite declaration under stat. 9 Geo. 4. c. 17. ss. 2. & 4.—INCOMPATIBILITY OF OFFICES—Ministerial and judicial offices cannot be united in the same person—The acceptance of an incompatible office, implies a surrender of the other—Party elected bound to take care that his election has been valid—Party must be in office de facto—Judgment of Lord Denman in Regina v. Slatter—SWEARING IN—Need not be immediately consequent upon an election—Officer must be sworn before he enters on official duties—Where the election and swearing are intended to be simul et send—Before whom and under what circumstances an oath may be administered—ACTION—Want of original qualification renders the party holding an usurper.

6. AFFIDAVIT—RULE NISI—RULE ABSOLUTE—THE INFORMATION—STAY OF PROCEEDINGS—QUASHING INFORMATION—DISCLAIMER, pp. 2460—2464.

7. THE PLEADINGS, pp. 2464—2468.

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Proof of franchise is either direct or presumptive—Title under letters patent—Judgment of ouster—Oyer is not demandable of any record—Letters patent enrolled in Chancery—Acceptances of charter—Corporation books—Bye-laws—INSPECTION OF RECORDS AND DOCUMENTS—Judgment of Lord Denman in Regina v. Ledgard—USER—A legal title may be presumed from user—Proof of a large custom than that alleged—The crown can select any of the issues to shew an usurpation—Impeachment of official title—When it appears that, in addition to the custom stated in the record, an act merely ministerial is to be done—Acting as town councillor under stat. 5 & 6 Will. 4. c. 76.—COMPETENCY OF WITNESS.

9. NEW TRIAL—COSTS—JUDGMENT—EXECUTION, pp. 2475—2480.

DEFINED.

The crown considered as the fountain from whence all public franchises were derived.

1. DEFINED.

By the fiction of the feudal law, the king, as the head and visible representative of the community, was considered not only as the ultimate proprietor of all the land in the kingdom, but the fountain from whence all public franchises were derived; and if any individual or collective body of men, whether corporate or not, without legal authority, exercised any such franchise, it was considered as an usurpation on the king's prerogative; if a franchise had been legally granted, but was exercised in a manner in-

consistent with the express or implied condition of the grant, the latter was considered as forfeited, and the king might resume it.

DEFINED.

Although the usurpation of franchises, or liberties which originally flowed from the king, like an intrusion into his lands, was in the eye of the law a misdemeanour (1), yet, by the common law, no man can be called upon to answer the king's suit without some record importing his charge. The object and use of a presentment or indictment are to apprise the king of an offence committed, as it is of an office to inform him of a title in civil matters.

No man can be called upon to answer the king's suit, except by record.

In these last, except where the freehold or inheritance is concerned, a suggestion or information filed of record will serve instead of an office; so in case of offences, unless where treason or misprision of treason or felony is charged, in which cases the finding of two juries, the grand and petit, is required, any matter of record, or suggestion, or surmise upon record, or information filed as of record for the king, importing the charge of an offence, may, if the king pleases, serve instead of an inquest or verdict, either by indictment or presentment, and the party thereupon shall be compelled to plead to it as a presentment. (2)

The manner by which either the original title to franchises was tried, or the forfeiture of them for subsequent misapplication was enforced, was by writ of *quo warranto* (3), which was called the king's writ of right for franchises and liberties, and in analogy to other writs of right, the judgment was final for the point adjudged, whether against the king or against the defendant. (4)

After the circuits of the justices itinerant ceased, the writ of *quo warranto* gradually fell into desuetude, and an "information in the nature of *quo warranto*," at the suit of the attorney general, was substituted in its place.

The "information" tends to the same purpose as the ancient writ, being generally made use of to ascertain the accuracy of disputed facts respecting the civil rights to any office or franchise, and is properly a criminal prosecution in order to fine the defendant for his usurpation, as well as to oust him from his office, but usually considered as a civil proceeding, for the court will grant a new trial, though the verdict may have been given for the defendant. (5)

The information, &c. tends to the same purpose as the ancient writ.

There is likewise another distinction between this proceeding and a civil action; in the latter, the plaintiff must recover by the strength of his own case, and must not rest on the weakness of the defendant's plea; for however defective the latter may be, yet if the plaintiff do not shew a cause of action, he cannot recover: but as all franchises are derived from the crown, the writ of *quo warranto* shews no title in the king to have the particular franchise exercised by the defendant, but calls upon the latter to shew by what title he claims it; and if the title he sets forth be incomplete, the king is entitled to judgment. (6)

(1) Hawk. b. ii. c. 26. s. 6.

(2) *Rex v. Barchet*, 1 Show. 106.

(3) This was an original writ issuing out of Chancery, directed to the sheriff of the county, commanding him to summon the defendant to be at such a place before the king at his next coming into the county, or before the justices itinerant at the next assize, "when they should come into those

parts," to show by what warrant, "*quo warranto*," he claimed the franchises mentioned in the writ.

(4) 2 Inst. 282. *Rex v. Stafferton*, 1 Bulst. 55, 56.

(5) *Rex v. Francis*, 2 T. R. 484. *Rex v. Bedford Level (Corporation of)*, 6 East, 367.

(6) 2 Kyd on Corporations, 399.

DEFINED.

Three species of franchises, for the usurpation of which an information will be granted.

There are three species of franchises, for the usurpation of which an information, &c. will be granted: — First, for the usurpation of franchises which the king has already granted, and are of such a nature, that if the defendant have no title, they may be repossessed and enjoyed by the king; such as the franchise of wrecks, waifs, and estrays.

Secondly, those which the king has created, and which subsist in themselves, although there be no person *in esse*, who has a good title to them. Their nature is such, that if the defendant be found to have no title, he must be ousted and forejudged from the enjoyment of them; but they are not repossessed by the king. Of this kind are corporate offices, so that if the officer or all the officers be ousted, the franchise is not affected, but others may be appointed to fill their places either by election by other persons, to whom the king has granted the power, or, if there are none capable of making such election, by a new appointment of the crown.

The third kind comprises what are called franchises, but are not really such; that is, if one or more pretend to be a corporation, or to have wreck or waifs, and estrays, or a market, when in fact no such corporation was ever erected, or grant made by the king of the franchise of wreck, waifs, and estrays, or a market, upon judgment against the defendant on this point, the pretended franchise is extinguished, and can neither exist in the crown nor be granted to others; therefore, there can be no judgment of seizure of these, but the defendant must be forejudged and fined for his usurpation to the public injury. (1)

TIME WITHIN WHICH AN INFORMATION WILL BE GRANTED.

Stat. 7 Will. 4. & 1 Vict. c. 78. s. 23.

Application against officers under the Corporation Act must be made within twelve months.

Cases not within stats. 9 Anne, c. 20. or 7 Will. 4. & 1 Vict. c. 78. s. 23. seem to be left without limitation.

When rule absolute not granted within six years after the earliest

2. TIME WITHIN WHICH AN INFORMATION WILL BE GRANTED.

By stat. 7 Will. 4. & 1 Vict. c. 78. s. 23. every application to the court, for the purpose of "calling upon any person to shew by what warrant he claims to exercise the office of mayor, alderman, councillor, or burgess in any borough, shall be made before the end of twelve calendar months after the election or the time when the person against whom such application shall be directed shall have become disqualified, and not at any subsequent time."

Cases in which informations, &c. may be applied for, and which are not cases within stats. 9 Anne, c. 20. or 7 Will. 4. & 1 Vict. c. 78. s. 23., seem still left without any limit by statute or otherwise as to the time within which they will be granted.

But length of time will weigh with the court as presumptive evidence, or as one circumstance joined to others to shew the impropriety of granting an information (2); and thus used, it may weigh not only so as to induce the court to refuse the information, but to discharge the rule with costs. (3)

Where a rule *nisi* for a *quo warranto* information for the exercise of a franchise was obtained within six years after the earliest time at which the defendant appeared to have exercised it, but the motion for a rule absolute was not made till the six years had expired, the court discharged the rule,

(1) Willcock on Corporations, 454.

(2) *Rex v. Dawes* and *Rex v. Marten*, 4 Burr. 2120.

(3) *Rex v. Wardroper*, *ibid.* 1963.

holding that it was too late, by stat. 32 Geo. 3. c. 58. s. 1., to file the information. (1)

The power of the attorney general in filing informations respecting corporate offices is restricted under stat. 7 Will. 4. & 1 Vict. c. 78. to twelve calendar months; but in all other cases, by whatever rules the court may regulate its discretion, they cannot apply to the attorney general, in respect to him, as was observed by Lord Mansfield in a case antecedent to the statute, "no length of usurpation shall affect the crown—'*nullum tempus occurrit regi*.' The king will not be bound by our discharging the rule; the crown may still bring a *quo warranto*." (2)

TIME WITHIN WHICH AN INFORMATION WILL BE GRANTED.

time at which the defendant exercised the franchise.

Authority of attorney general restricted by stat. 7 Will. 4. & 1 Vict. c. 78.

3. TO WHOM AND AGAINST WHOM INFORMATIONS, &C. WILL BE GRANTED.

The authority of the attorney general with respect to the filing of informations, &c., is only restricted by the recognised boundaries of the common or statute law, the crown having at all times an absolute right to inquire into the claims of any person exercising an office or franchise, and to remove the parties unless they can shew a complete legal title; but this principle does not apply to common relators, for if it did, the vexations and mischiefs of so unlimited a privilege would be infinite. (3)

Stats. 4 & 5 Will. & M. c. 18. and 9 Anne, c. 20. leave the power of the attorney general with respect to filing informations, whether in the nature of *quo warranto* or not, exactly as it was at common law, because stat. 4 & 5 Will. & M. c. 18. s. 6. expressly provides, that it shall not be "construed to extend to any other information, than such as are or shall be exhibited in the name of their majesties' coroner or attorney in the court of King's Bench for the time being, commonly called the master of the crown office." And stat. 9 Anne, c. 18. only introduces some provisions with respect to informations in cases within its meaning, filed in the name of the latter officer. (4)

The distinction between the power of the attorney general and the master of the crown office is, that the power of the latter is confined in practice, by the discretion of the court, to cases which concern the public government, and does not comprehend all of them; whereas, that of the former extends not only to all cases which concern public government, but to those which concern the private rights of the crown. (5)

At common law, informations might, in many cases, be exhibited *ex officio* by the master of the crown office, as the king's coroner and attorney, on the suggestion of private persons. (6)

Under stat. 4 & 5 Will. & M. c. 18. s. 2. no information, &c. can be filed without leave of the court. The clerk of the crown, after having obtained

TO WHOM AND AGAINST WHOM INFORMATIONS, &C. WILL BE GRANTED.

INFORMATIONS, &C. BY THE ATTORNEY GENERAL.

The crown has an absolute right to inquire into the claims of any person exercising an office or franchise.

Stats. 4 & 5 Will. & M. c. 18. and 9 Anne, c. 20. leave the power of the attorney general unaltered.

Distinction between the powers of the attorney general, and the master of the crown office.

THE RELATOR. INFORMATIONS AT COMMON LAW.

Stat. 4 & 5 Will. & M. c. 18. s. 2.

No information

(1) *Regina v. Harris*, 11 A. & E. 518., vide etiam *Rex v. Stokes*, 2 M. & S. 71.

(2) *Rex v. Wardroper*, 4 Burr. 1963.

(3) *Rex v. Clarke*, 1 East, 43.

(4) There are several records in the crown office of informations in the nature of *quo warranto* filed in the name of the attorney general, in the intermediate time

between the two statutes, and since the passing of the last, as well in cases within the meaning of the last as in others. *Ibid.* 2 Kyd on Corporations, 415.

(5) *Rex v. Marsden*, 3 Burr. 1814—1817. *Rex v. Carmarthen (Corporation of)*, 2 Kyd on Corporations, 416, 417.

(6) 2 Kyd on Corporations, 410.

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&c. WILL BE
GRANTED.

can be filed
without leave
of the court.

Stat. 9 Anne,
c. 20. s. 4.

Conduct of the
relator will be
animadverted
upon by the
court.

Prosecution
contrary to an
agreement en-
tered into by
the relator.

When relator
legal adviser of
the defendant.

Reg. Gen. M.
T. 3 Vict.

Affidavit must

such express leave, must, previous to the issuing of process, take a recognisance from the applicant, with the place of his abode, title, or profession, to be entered to the person against whom such information is exhibited in the penalty of 20*l.*, that the information shall be prosecuted, and the orders of the court obeyed. (1) This statute, although it only relates to informations for trespasses, batteries, and other misdemeanours, has been treated as a remedial statute to prevent vexation; and informations, &c. are within its purview. (2)

By stat. 9 Anne, c. 20. s. 4. if any person or persons shall usurp, intrude into, or unlawfully hold and execute, the offices of mayors, bailiffs, portreeves, or other offices, or the franchises of burgesses or freemen, in any city, town corporate, borough, or place within England or Wales, the proper officer of the court of Queen's Bench, with the leave of the court, can exhibit one or more information or informations in the nature of a *quo warranto*, at "the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises."

The conduct of the relator will experience animadversion from the court, and the consequences of granting the information will likewise be weighed, Lord Mansfield having thus expressed himself in discharging rules for filing two informations:—

"Our grounds are three, taken together—First, the light in which the three relators, now informing the court of this defect of title, appear, from their behaviour and conduct relative to the subject-matter of their information, previous to their making this motion.

"Secondly, the light in which the application itself manifestly shews their motives, and the purpose which it is calculated to serve.

"Thirdly, the consequences of granting the information." (3)

Where a prosecution was contrary to an agreement entered into by the prosecutor, the rule was discharged with costs, on the exclusive ground of the breach of faith. (4) So, likewise, a rule *nisi* was discharged, where the relator had been the legal adviser of the defendant, and had advised him, that his election to the disputed office was good. (5)

By Reg. Gen. M. T. 3 Vict. (6) "it is ordered, that no rule be hereafter granted for filing any information in the nature of a *quo warranto*, unless, at the time of moving, an affidavit be produced by which some person or persons shall depose upon oath, that such motion is made at his or their instance as relator or relators; and that such person or persons shall be deemed to be the relator or relators in case such rule shall be made absolute, and shall be named as such relator or relators in such information in case the same shall be filed, unless this court shall otherwise order."

Under Reg. Gen. Michaelmas Term, 3 Vict., the affidavit in support of a

(1) *Vide* stat. 4 & 5 Will. & M. c. 18., post, 2475. *Res v. Howell*, C. T. H. 247.

(2) Tancered on Quo Warranto, 7. *Res v. Hertford* (*Mayor of*), 1 *Ld. Raym.* 426. 1 *Salk.* 374. 12 *Mod.* 225. Willcock on Corporations, 455.

(3) *Res v. Dawes* and *Res v. Martin*, 4 *Burr.* 2190.

(4) *Res v. Mortlock*, 3 T. R. 300.

(5) *Res v. Payne*, 2 *Chitt.* 369.

(6) 11 A. & E. 3.

motion for a *quo warranto* information must state at whose instance the application is made. It is not enough for a party to depose that, if the court grant the information, it is his intention to become really and *bond fide* the relator. Thus, in *Regina v. Hedges* (1) Lord Denman observed, "The objection must prevail. Every party who makes an affidavit in support of the *quo warranto* might be said to be liable to costs; but we intended, by the rule, to get rid of the questions which arose in these cases; and we therefore required an affidavit to shew, not merely who the relator is, but at whose instance the application is made. We ought not to have granted this rule without such an affidavit."

The court will sometimes direct to whom the management of the prosecution shall be confided. Thus, in *Regina v. Alderson* (2) a rule *nisi* for *quo warranto* informations was obtained against several parties for exercising the office of alderman, on the ground that they had been unduly elected. Pending such rules, a burgess in whose room one of the parties had been elected moved the court, that, if the rules were made absolute, the management of the prosecutions might be transferred to himself, alleging, that he had been improperly displaced, and had contemplated moving for *quo warranto* informations against the parties elected; that the informations now in question had been moved for collusively by persons of a political party in the borough, adverse to his own, and the same with that of the persons elected; that the relator was in low circumstances, and in the employment of the attorney prosecuting the rules; and that the attorney had employed the same agents in London to instruct counsel for and against the rules. In answer it was stated, that the motions were made *bond fide*, and without collusion, for the purpose of trying a point of law; that the course complained of had been taken for the purpose of having the question discussed adversely, but at the least possible expense; and that the relator was interested in the affairs of the borough, and had obtained the rules for the sole purpose of having the question tried, and not on the request of the attorney, and was liable to him for the costs.

The court, on making the rules absolute for *quo warranto* informations, directed, that the management of the prosecutions should be transferred as prayed; although they were of opinion, that the facts did not shew collusion, or a design on the part of the original prosecutors to obtain any undue advantage.

If the motion be made on the affidavits of three persons, two of whom are not qualified to be relators, the information may nevertheless be granted, if the third party be unobjectionable as a relator, though his affidavit alone may not shew sufficient ground for the information. (3)

If, in an application for liberty to file an information in the nature of a *quo warranto*, the relator come before the court as a freeman, and whose freedom was conferred by the same select body who have elected the defendant to an office, the title to which, the relator seeks to impeach by the information — he cannot be heard, inasmuch as his own title stands upon the same foundation as the defendant's title. (4)

In *Rex v. Parry* (5) Lord Denman stated, "A relator's case will con-

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state at whose instance the application is made.

Judgment of Lord Denman in *Regina v. Hedges*.

When the court will direct to whom the management of the prosecution shall be confided.

Affidavits made by three persons, two of whom are unqualified.

DEGREE OF INTEREST.

Where relator and defendant claim under the same title.

Judgment of

(1) 11 A. & E. 163. 9 Dowl. P.C. 493.

(2) 11 A. & E. 3.

(3) *Rex v. Parry*, 6 *ibid.* 810.

(4) *Rex v. Bracken, Alcock & Napier* (Irish), 113.

(5) 6 A. & E. 819.

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GRANTED.

Lord Denman
in *Rex v.*
Parry.

stantly depend in part on the testimony of those who, from want of interest, or their previous conduct, could not be themselves relators. In such cases the court will ascertain who is the real relator, and that he is sufficient; it will then distinguish between him and those who are merely his witnesses, and will not affect him by their previous acts or declarations, unless he be identified with them in such a way as to disqualify him from being received as a relator."

Judgment of
Mr. Justice
Patteson in
Rex v. White.

In *Rex v. White* (1) the court granted a *quo warranto* information, at the instance of a private relator, against a member of a corporation, on grounds affecting his individual title, although it was suggested, that the same objections applied to the title of every member, and therefore that the application was, in effect, against the whole corporate body; Mr. Justice Patteson observing, "In *Rex v. Ogden* (2) the information would have called upon the parties to shew, why they acted as a corporation at all; and, besides, they did not claim to exercise any powers of government or municipal authority over the other inhabitants of the town. That case therefore entirely differs from this. Then, is it any answer here, that every member of the corporation may be in the same predicament with the party moved against? I think there is no instance in which the court has so held, where the objection applied to the party individually."

Relator not a
burgess.

On motion for a *quo warranto* information against a town councillor, founded on a defect in the burgess roll, it is not a valid objection to the relator, that he is not a burgess; his interest is sufficient, if he be subject to the government of the councillors as an inhabitant. (3)

Stranger to a
corporation.

Where a person is a perfect stranger to a corporation, though his situation may not absolutely disqualify him from a right to examine into the title of a corporator, yet "he ought to come to the court with a very fair case in his hands." (4)

Mere poverty
in a relator.

Mere poverty in a relator is not a sufficient ground to induce the rejection of his information (5); but if he be in collusion with a stranger, the information will be refused, unless the application be to enforce a general act of parliament. (6)

A positive act
of acquiescence
in the offence
complained of,
must exist to
disqualify a
relator.

The principle that will not permit those who have acquiesced in an election to impeach it, does not apply, unless a positive act of concurrence be established. (7)

It is a valid objection to a relator applying for an information, &c. for usurping the office of burgess, that he was formerly present at, and concurred in, the election of another burgess, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected. (8)

But where the relator was apprised, at the time of an election, of all the objections stated in the affidavit when moving for the rule, and did not apply

(1) 5 A. & E. 613.

(2) 10 B. & C. 230.

(3) *Rex v. Parry*, 6 A. & E. 810. *Regina v. Quayle*, 11 *ibid.* 508. *Rex v. Hodge*, 2 B. & A. 344. n. *Rex v. Kemp*, 1 East, 47. n. *Rex v. Stacey*, 1 T. R. 1. *Rex v. Dawes*, 4 Burr. 2123.

(4) *Rex v. Kemp*, 1 East, 47. n. *Rex v.*

Stacey, 1 T. R. 1. *Rex v. Dawes*, 4 Burr. 2123.

(5) Tancred on *Quo Warranto*, 277. *Rex v. Wynne* (Sir W.), 2 M. & S. 346. *Rex v. Trevenen*, 2 B. & A. 339.

(6) *Rex v. Brown*, 3 T. R. 574. n.

(7) *Rex v. Symmons*, 4 *ibid.* 223. Tancred on *Quo Warranto*, 38, 39.

(8) *Rex v. Parkyn*, 1 B. & Ad. 690.

to the court till after a lapse of seven years (1), yet, being from the nature of his office of town clerk a witness rather than a prosecutor, and present at the election in a character merely ministerial, this was not thought such a concurrence, nor his conduct to be of such a description, as to induce the court to reject his application. (2)

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If the objection to the eligibility of the person be latent at the time of his election (3), and that the defect be the omission of an act which the legislature have positively required to be done before any person shall be elected into any corporate office, the concurrence in the election will be no ground for refusing the information, nor that the party applying has no connection with the corporation. (4)

Although a relator may not have concurred in the election of the person against whom he makes an application for an information, such a subsequent acquiescence in his election may be shewn, that the court will consider the relator precluded from questioning its regularity. Thus, if the objection upon which the application is founded has been known and acquiesced in by a corporation for a great number of years, it is a reason for not suffering any member of that body to impeach a title, which they themselves have so long and knowingly admitted.

Subsequent acquiescence.

The acquiescence of a corporation will give no right to a party, if his title be essentially defective; but it is a reason why those who have suppressed that defect a great length of time, should not afterwards be admitted as common relators. (5)

It was held to be no objection to relators applying for an information against a person for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy (to which the other was a necessary qualification); or that they afterwards attended at, and concurred in, corporate meetings whereat he presided, or where he attended in his official character, such application being made within the time then limited by law, viz. in four years after the defendant's election as an alderman. (6)

S. the successful candidate at an election for the treasurer of the county of the city of Dublin, having been declared unduly elected (on account of the non summons of some of the electors) the court of Queen's Bench in giving judgment upon a motion at the suit of D. the unsuccessful candidate, upon the discussion of which motion S. insisted that the election was valid, and that he himself was duly elected; and an information in the nature of a *quo warranto* (in which K. one of the sureties for S. at the election was the nominal, but S. the real relator) to try the validity of that election, having been moved for, it was held, upon the latter motion, 1st, that there was no objection to the granting the *quo warranto* on the ground of K. being the relator; 2dly, that the relator was not estopped from insisting, that the election was void; 3dly, that S. was not disentitled to the interference of the court in his favour, by the circumstance of his having procured himself to be elected pending the return of a *mandamus* at the suit of D.; nor 4thly, by the fact

(1) *Sed vide stat.* 7 Will. 4. & 1 Vict. c. 78.

(2) *Res v. Binsted*, Cowp. 75.

(3) *Res v. Smith*, 3 T. R. 573.

(4) *Ibid.* *Res v. Brown*, *ibid.* 574. n.

(5) *Res v. Clarke*, 1 East, 38. *Res v. Dawes*, 4 Burr. 2120. Tancred on *Quo Warranto*, 41. Willcock on *Corporations*, 479.

(6) *Res v. Clarke*, 1 East, 38.

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INFORMATIONS,
&c. WILL BE
GRANTED.

Presumption of
acquiescence
may be re-
butted.

When the court
will change the
relator.

AGAINST WHOM
AN INFORMAT-
ION WILL BE
GRANTED.

At common
law an infor-
mation may be
brought against
the same per-
son, for the ex-
ercise of any
number of
franchises.

Stat. 9 Anne,
c. 20. s. 4.

Where several
rights of divers
persons can be
determined in
one informa-
tion.

The court to

of the corporation funds having been misapplied in defraying the expenses of S., incurred by supporting his case against D. (1)

Relators have not been precluded from impeaching the title of the defendant to the office of mayor, though they had actually attended and voted at the time of his election; but the affidavits did not state for whom they voted, and it was understood, that they voted for other candidates. In *Rex v. Morris* (2) the objection to the defendant's election was, that from a reduction below a moiety in the original definite number of one of the integral parts in the corporation, no valid election could take place. Their ignorance as far as appeared of this fact, was held to rebut the presumption of such an acquiescence on their part, as would warrant the court in rejecting their application.

But a corporator will be presumed to be cognisant of that which has recently taken place in the corporation of which he is a member, unless the contrary be shewn; and, therefore, where he has concurred in an election through ignorance of some fact which renders it invalid, and afterwards applies for an information, he must in his affidavit point out the objection, and satisfy the court, that it has come to his knowledge since the election, and that it is a matter which ought to be inquired into. (3)

After a rule for a *quo warranto* information has been made absolute, the court will change the relator on motion on his behalf, if, by reason of his necessary absence from England in the conduct of his own private affairs, he is unable to enter into the recognisance required by stat. 4 & 5 Will. & M. c. 18. s. 2. (4)

By the common law, one information may be brought against the same person for the exercise of any number of different franchises. (5)

So likewise it may be brought against different persons for exercising in conjunction the same franchise; as, for example, against different persons by name for claiming to be a corporation (6); and it may be brought against different individuals for exercising conjointly different franchises in the same corporation.

By stat. 9 Anne, c. 20. s. 4. "if it shall appear to the said respective courts, that the several rights of divers persons to the said offices or franchises may properly be determined in one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices for franchises."

In *Rex v. Foster* (7) four rules had been made absolute for four informations against four defendants respectively, "to show by what authority they claimed to be chamberlains of Alnwick in the county of Northumberland;" it was moved on behalf of the defendants, that there should be only one information against all the four defendants instead of four distinct informations; and the court, under stat. 9 Anne, c. 20. s. 4., directed that this should be done.

By the words of the section, whether one or more informations shall be

(1) *Regina v. Darley*, 2 Jebb & Symes (Irish), 239.

(2) 3 East, 213.

(3) *Rex v. Slythe*, 6 B. & C. 240. *Rex v. Cudlipp*, 6 T. R. 508. *Rex v. Trevesen*, 2 B. & A. 339.

(4) *Regina v. Quayle*, 9 Dowl. P. C. 549.

(5) Co. Entr. 527. (b.), 540. (b.) *Symers v. Regem*, Cowp. 499,

(6) Co. Entr. 527. (b.)

(7) 1 Burr. 573.

brought against the defendants usurping corporate offices *ejusdem generis*, is to be determined by the court, according to what shall appear most proper and convenient. (1)

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determine whether it be expedient to consolidate information.

In *Symmers v. Regem* (2), under stat. 19 Geo. 2. c. 2. s. 4. (I.), the persons were several, and each was charged with the usurpation of three offices, but all with the same usurpations; the common law authorised the junction of different claims, and the statute the junction of different persons. To such a joinder the observation of Lord Mansfield may be applicable, that "nothing could be more proper than to join the several defendants and the respective franchises they claim, which are three. The right of election is exactly the same, and the evidence the same."

In *Regina v. Portsmouth (Mayor of)* (3), a joinder of several persons for the exercise respectively not only of several, but of offices not *ejusdem generis* in the same corporation, is reported to have been allowed.

Against whom informations by the attorney general should be exhibited.

When informations are exhibited by the attorney general, they should be, it has been said, against the individuals usurping that franchise by their names as individuals; the distinction being, that if an information be brought against a corporation for usurping any other franchise, it must be against them in their corporate name; but if for usurping to be a corporation, it ought to be preferred against the particular persons (4), because the judgment must have two things in it—first, "to damn the corporation, (*quod penitus extinguatur et excludatur*)", from being a corporation for the future; for being wrongfully usurped, it cannot be continued; a judgment to continue wrong and usurpation can never be a right judgment: secondly, a fine to the king for the usurping for time past. This judgment may and ought to be given, where the information is against particular persons, for usurping upon themselves to be a corporation, and they shall be fined and imprisoned; but this cannot be where the information is against the body politic, for by the judgment the body politic is extinguished and dissolved, and no fine can be imposed upon that which is not; so that hereby the king must lose his fine, which the particular persons usurping ought to pay, and the law is agreeable always to itself, and the means answerable to the end. I suppose no man will affirm, that where a suit or judgment is against a corporation, that the fine or execution shall be against all or any particular member." (5)

4. CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

The object of stat. 9 Anne, c. 20. was to render more comprehensive, speedy, and effectual, such informations as were to be filed by the proper officer in each of the courts mentioned, with the leave of the said courts respectively; but this description did not apply to the informations of the attorney general.

Object of stat. 9 Anne, c. 20.

(1) Tancered on Quo Warranto, 258. *Res v. Warlow*, 2 M. & S. 75. *Symmers v. Regem*, 489.

(2) Cowp. 489.

(3) 10 Mod. 65.

(4) 8 Howell's St. Tr. 1039. 1358. *Res v. Cusacke*, 2 Rol. 115. 125. Palm. 1.

(5) Vide Pollexfen's Arg. 8 Howell's St. Tr. 1214—1219. Tancered on Quo Warranto, 269. *Res v. Amery*, 2 T. R. 515.

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

There are many cases not mentioned in stat. 9 Anne, c. 20. in which informations, &c. will lie, for the court's power of granting such informations is not founded upon that act; but that act was made for regulating the proceedings in them in certain cases relating to corporations (1), and did not confer upon the coroner any original power in a new class of cases: but the statute placed such informations as are founded upon it on a new footing; it considers them criminal proceedings only in form, and brought to decide disputes of a civil nature, rather than punish offences against the crown.

Discretionary in the court to grant an information.

It is discretionary in the court to grant or withhold a *quo warranto* information, even if a good objection to the title be shewn. And, therefore, in a case where the assessors were objected to, as having been assessors of the borough and not for the mayor's ward, and no satisfactory answer was given, the court refused a rule for an information on the grounds—that no fraud was imputed; that no mischief appeared to have been done; that the prosecution, if successful, would probably dissolve the corporation; and that the prosecutors appeared to have that intention. (2)

The court consider the validity or defect of defendant's title, and the expediency of stopping the prosecution.

It was formerly the practice of the court to grant informations, &c. almost as of course; and, in shewing cause against the rule, the grounds on which the defendant rested his defence were rarely disclosed: but the opposite practice now prevails; and the court, in the exercise of its absolute discretion, do not merely consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances. (3) Thus, the information will not be granted for the exercise of a franchise, unless reasonable doubts respecting its illegality shall appear from the affidavits. (4)

Second application for the same cause.

A rule for a *quo warranto* information against a mayor, on the ground that he did not reside as the charter required, was discharged on affidavits shewing residence. Afterwards a second rule was obtained on the same ground, on affidavits impeaching the former opposing affidavits, and tending to shew, that the residence was colourable. The rule was discharged, on the ground, that a second application ought not to have been made after the former decision; but without costs, as the court had granted the rule *nisi*. (5)

Information will not be granted for trying the title to an office which is determined.

A party who had been appointed to, and was discharging the office of town clerk of a borough, when the Municipal Corporation Act (5 & 6 Will. 4. c. 76.) passed, was afterwards removed by the town council, and claimed compensation under sect. 66. A motion was then made, at the instance of the corporation, for a *quo warranto* information against him for exercising the office, on the alleged grounds that he was not a burgess at the time, was not sworn in, and did not make the declaration required by stat. 9 Geo. 4. c. 17:—It was held, that, under the above circumstances, an information ought not to be granted for the purpose of trying the title to an office, which was determined. (6)

Where there is

If there be no other mode in which an applicant can acquire redress but

(1) Bull. N. P. 210. (b.)

(2) *Rex v. Parry*, 6 A. & E. 810.

(3) *Rex v. Clarke*, 1 East, 43. *Rex v.*

Stacey, 1 T. R. 1. *Rex v. Dawes*, 4 Burr. 2022. *Rex v. Trevenen*, 2 B. & A. 479.

(4) *Regina v. Archdall*, 8 A. & E. 281.

(5) *Rex v. Orde*, *ibid.* 420. n.

(6) *In re Harris*, 6 *ibid.* 475.

by an information, &c., the court rarely refuse acquiescence to its being issued. (1)

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

no other mode in which an applicant can acquire redress.

An user, as well as a claim to a particular franchise, must be shewn.

Where the right, or the fact on which the right depends, is disputed (2); or if a right depend upon a matter of doubtful law, as whether an infant be capable of being elected a burgess (3); or where the necessity of residence in a corporation is disputed (4); or whether a residency has been fair and real, or only colourable (5); the court will interpose, in order that the question shall be finally settled. (6)

In all cases to subject a party to an information, &c., an user as well as a claim to a particular franchise must be shewn (7); consequently, satisfactory evidence of the user, or usurpation of the franchise, must appear upon the affidavits. But that which constitutes a sufficient user, depends upon the nature of the office or franchise claimed: thus, where it appeared in the case of a freeman or free burgess of a corporation, that he had been sworn in, though no act or claim be stated to have been done or made by the defendant, the information was granted (8): and though a mere claim to be sworn in is no usurpation, yet a swearing in, though defective in law, may be; and where a defendant had taken the oath in such a way as he thought to be sufficient at the time to make him a free burgess, it was considered to be an user. (9)

If a remedy can be acquired by *mandamus*, an information, &c. will be refused: thus, on an election of councillors for a ward in a borough, the presiding alderman and two assessors, before two in the afternoon of the next day but one after the election, published under stat. 5 & 6 Will. 4. c. 76. s. 35. a declaration containing a list of the councillors elected, which declaration included the name of P. After two o'clock the alderman and assessors, on the discovery of a supposed error in counting the legal votes, signed and published a second list, omitting the name of P. and substituting that of R. P. afterwards made the declarations required by stats. 9 Geo. 4. c. 17. s. 2. and 5 & 6 Will. 4. c. 76. s. 50., and R. subsequently did the same. Afterwards upon P. claiming to act, the mayor and town council refused to permit him to do so, and allowed R. to act. On an application by P. for a *mandamus* to receive and count his votes, it was held, that the office was not full of R., and that the proper remedy was by *mandamus*, the second publication and subsequent acting by and on behalf of R, being merely void, and P. being in *de facto*. (10)

When *mandamus* the proper remedy.

Where the office is not full.

But if a party (11) have been ousted of an office by the election of another party to that office (the election not being merely colourable), his remedy is not by *mandamus*, but by an information in the nature of a *quo warranto*.

If adequate relief can be obtained in a private action, license to exhibit an information, &c. will not be granted: thus, where two sets of church-

Where adequate relief can be obtained in

(1) *Rez v. Bingham*, 2 East, 312.

(2) *Rez v. Latham*, 3 Burr. 1485.

(3) *Rez v. Carter (Sir John)*, Cowp. 58.

(4) *Rez v. Latham*, 3 Burr. 1486.

(5) *Rez v. Richmond (Duke of)*, 6 T. R. 560. *Rez v. Sargent*, 5 ibid. 466.

(6) 2 Kyd on Corporations, 432.

(7) *Rez v. Whitwell*, 5 T. R. 85. *Rez v. Ponsonby*, Sayer, 245. *Rez v. Mursden*, 3

Burr. 1812. *Rez v. Owen*, ibid. 1820. in *marg.*

(8) *Rez v. Tate*, 4 East, 337.

(9) Ibid. Tancered on Quo Warranto, 35.

(10) *Regina v. Leeds (Mayor of)*, 11 A. & E. 512.

(11) *Rez v. Oxford (Mayor of)*, 1 N. & P. 474.

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

a private action.

Secondary and incidental question.

An information against a whole corporation as a body, can only be exhibited by the attorney general.

When the dissolution of the corporation will not be regarded.

INFORMATIONS BY THE ATTORNEY GENERAL.

wardens had been sworn in for a parish, "the court" assigned as a reason for non interposition, that "they left them to settle the right in an action." (1)

Where the substantial ground of an application for an information, &c. fails, the court will not grant it for the trial of a secondary and incidental question, especially when by so granting it, they will enable a party to try upon the same record along with it a question which they think ought not to be tried, and the further discussion of which, would only tend to enhance and continue public inconvenience. (2)

Under stat. 9 Anne, c. 20. an information, &c. cannot be exhibited against a whole corporation as a body by name, to shew by what authority they claim to be a corporation, except by the attorney general on behalf of the crown (3), as the statute of Anne extends only to the cases of individuals usurping offices or franchises in corporations, where the right of the body to act as a corporation is acknowledged.

In *Rex v. Carmarthen (Corporation of)* (4) an information was moved for against all the corporation by name, to shew why they acted as a body corporate; upon which Lord Mansfield put this question, "Whether an informer has a right to come into the court to demand a trial, whether or no any corporation in the kingdom is dissolved?" It was admitted, that he had no such right; that such an information must be by and in the name of the attorney general on behalf of the crown; whereupon the counsel made their motions against the several individuals "to shew by what authority they respectively claimed to exercise their particular franchises," and they obtained the ordinary rules.

The principles involved in this case were acted upon in *Rex v. Parry* (5) in which it was holden, that leave to file a *quo warranto* information against an individual corporator at the instance of a private person will not be refused, merely because the proceeding may or will have the effect of dissolving the corporation (6):—but an information will not be granted against a corporate officer, if the object be to try the legality of the charter granted under the Municipal Corporation Acts. (7)

Informations, &c. in the name of the attorney general have been exhibited — against a corporate officer to shew by what authority he held a franchise which he assumed to exercise in his official capacity (8); for claiming to have waifs, estrays (9); goods and chattels of felons (10); felons of themselves (11); and deodands. (12) For holding a court leet or view of frankpledge (13); borough court (14); ginters court (15); court baron (16); court of pie poudre. (17) For claiming to have—return of writs (18), fines, issues, and amercements (19); a park (20); free warren (21); free

(1) *Rex v. Dawbeny*, Str. 1196. *Rex v. Shepherd*, 4 T. R. 381.

(2) *Rex v. Osbourne*, 4 East, 386, 387.

(3) *Rex v. Cusacke*, 2 Rol. 115. Co. Entr. 527. (b.)

(4) 1 W. Black. 187. 2 Burr. 869.

(5) 6 A. & E. 810.

(6) Vide etiam *Rex v. Bond*, 2 T. R. 767. *Rex v. Slythe*, 6 B. & C. 247. *Rex v. White*, 5 A. & E. 618.

(7) *Regina v. Taylor*, 11 A. & E. 949.

(8) *Rex v. Hertford (Mayor of)*, 1 Salk. 374. 1 Ld. Raym. 426.

(9) Co. Entr. 528. 540. (b.)

(10) Ibid. 540. (b.), 551. (b.), 561.

(11) Ibid. 540. (b.), 549. 551. (b.)

(12) Ibid. 540. (b.)

(13) Ibid. 527. (b.), 551. (b.), 561.

(14) Ibid. 537. (b.)

(15) Ibid.

(16) Ibid. 544.

(17) Ibid. 561.

(18) Ibid. 528. 537. (b.), 544. 551. (b.), 561.

(19) Ibid. 551. (b.), 561.

(20) Ibid. 561.

(21) Ibid. 544. 551. (b.), 561.

chase (1); pillory and tumbrel (2); treasure trove (3); assize of bread and beer, and scrutiny of weights and measures (4); a market, and, by reason of it, toll, stallage, and piccage (5); a district of the city called Coleherberd, exempt from the government of the mayor and all other officers of the city of London (6); a right to punish forestallers; to elect constables (7); the offices of clerk of the market (8), or coroner (9); the king's beam (10); a prison (11); the right of arrest (12); the office and bailiwick of conservator of the Thames; the office of coal and cornmeter. (13)

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

Claiming to have — in a local court a jurisdiction over pleas of all kinds, real, personal, and mixed (14); the electing of two aldermen, who while aldermen were to be justices of the peace (15); a right to grind at any mill of the lords of the ville, or elsewhere, without impediment; as many bailiffs and serjeants-at-mace and other officers as to the inhabitants might seem necessary or expedient for the proper and decent government of their town (16); four fairs in the year, and profits arising (17); soc, sac, thol, them, and infangthef (18); the year, day, and waste (19); exemption from purveyance. (20)

An information will be granted to question the authority under which a new jurisdiction or public trust is exercised, although it be of such a nature, that the king alone could not create it.

Usurping a power which was no prior franchise of the crown.

Thus, by a private statute for enlarging and regulating the port of Whitehaven, several persons were appointed trustees, and a power was given to them of electing others upon vacancies by death or otherwise. The defendants took upon them to act as trustees without such an election as the statute required; upon which it was stated by the court, "that informations have been constantly granted, where any new jurisdiction or a public trust is exercised without authority;" "for all havens belong originally to the crown. The public trade and revenue are much concerned in the regulations of ports; and there being a particular method of election required, we will always keep people up to that method; and rather than suffer them to vary from it, we have construed corporations to be absolutely dissolved." (21)

All officers invested with government are within the scope of informations, &c.: thus, where by the charter of a borough, the office of a justice of the peace was a corporate office, the court granted an information for its exercise. (22) So likewise against the bailiff of a ville (23); the portreeve of a

Officers engaged in the administration or execution of public justice.

(1) Co. Entr. 551. (b.)

(2) Ibid. 551. (b.), 561.

(3) Ibid. 540. (b.), 551. (b.)

(4) Ibid. 528. 537. (b.)

(5) Ibid. 527. 544. 561.

(6) Ibid. 527. (b.)

(7) Ibid.

(8) Ibid. 528. 537. (b.)

(9) Ibid. 528. 544.

(10) Ibid. 544.

(11) Ibid.

(12) Ibid.

(13) Ibid. 535. (b.) In this case the information was returnable in the Exchequer. Instead of a *quo warranto*, the king sometimes proceeds by writ of inquiries of usurpations and purprestures, which issues from

the Exchequer, and is returnable there.

Ibid. 530. (b.)

(14) Ibid. 537. (b.)

(15) Ibid.

(16) Ibid.

(17) Ibid.

(18) Ibid. 544.

(19) Ibid.

(20) Ibid. 559.

(21) *Rex v. Nicholson*, Str. 299., vide etiam *Rex v. Badford (Duke of)*, 1 Barnard. 242. 280.

(22) *Rex v. —*, 2 Chitt. 368. *Rex v. Hubball*, 6 B. & C. 139.

(23) *Rex v. Boyles*, 2 Ld. Raym. 1559. Str. 836. Willcock on Corporations, 458.

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

Courts of justice.

borough, who by virtue of his office was the returning officer (1); bailiff of a borough or manor, who, being a prescriptive officer and member of the court leet, had power to summon and select the jury, such discretionary authority being a material and important function in the administration of justice (2); exercising the office of steward of a court leet (3); or the office of constable. (4)

An information will lie for holding a court of record (5), a court leet (6), or against commissioners under a local act invested with power of distress and imprisonment (7); but it will not be granted for a court baron, because a private right is only concerned therein. (8)

Fairs.

An information in the nature of *quo warranto* was granted for holding a fair, although no toll was demanded or taken, nor did any particular person claim the right of holding a market, the court being unanimous in making the rule absolute for the information, and Chief Justice Lee cited *Rex v. Browning* for erecting a skin market at Smithfield Bars as a strong case in point; from which it seems, that the question, whether an information for such a franchise would be granted by the King's Bench, had been the subject of debate. (9)

Markets.

In *Rex v. Marsden* it was doubted, whether the court could, on the application of a private person, grant an information for holding a market. (10)

Illegal levy of a rate.

An information was granted against bailiffs and others for levying a rate within a town (11), and also for claiming an exclusive ferry over the Thames. (12)

Exclusive right of ferry.

Private franchise.

If the franchise usurped be not connected with the public government, but be of a mere private nature, the court will not allow its officer to interfere; and the information must be prosecuted by the attorney general if he think fit: thus, an information was moved for in nature of a *quo warranto* for making a warren for rabbits, but Lord Hardwicke said, "We do indeed grant these informations for public usurpations on the crown, but never for private usurpations of franchises; but the way is, to apply to the attorney general in such cases." (13)

Claiming to be a burgess.

A *quo warranto* information will not be granted for merely claiming to be a burgess of a borough, named in schedule (A.) of stat. 5 & 6 Will. 4. c. 76.; and it makes no material difference, that a person has voted for a member of parliament as a burgess, his name having subsequently been expunged from the list of voters by the revising barrister. (14)

Right of voting for a burghage tenement.

But in the case of the borough of Horsham (15) the court held, that an information, &c. would lie against a person claiming to have a right of

(1) *Rex v. Mein*, 3 T. R. 596. *Rex v. M'Kay*, 4 B. & C. 351.

(2) *Rex v. Bingham (Clark)*, 2 East, 308. *Rex v. Highmore*, 5 B. & A. 771.

(3) *Rex v. Hulston*, Str. 621.

(4) *Rex v. Goudge*, Str. 1213. *Rex v. Franchard*, ibid. 1149.

(5) *Rex v. Williams*, 1 Burr. 402.

(6) *Rex v. Bridge*, 1 W. Black. 46.

(7) *Rex v. Beedle*, 3 A. & E. 467.

(8) *Rex v. Hulston*, Str. 621.

(9) *Rex v. Wilkinson*, 3 Burr. 1818.

(10) *Rex v. Marsden*, ibid. 1820. The reporter in a note gives the proceedings in *Rex v. Owen*, which was an information

moved in 12 Geo. 2. in the King's Bench for holding a market; and adds in the conclusion that the rule in *Rex v. Peck* (H. T. 10 Geo. 1.), and the rule in *Rex v. Browning* (T. T. 10 Geo. 1.) were there produced; both of which were made absolute. They were for setting up skin markets in Smithfield.

(11) 2 Kyd on Corporations, 419.

(12) *Rex v. Reynell (Sir T.)*, Str. 1161.

Rex v. Marsden, 3 Burr. 1822.

(13) *Ibbotson's case*, C. T. H. 261. *Sir William Louthers's case*, 2 Ld. Raym. 1408.

(14) *Regina v. Pepper*, 7 A. & E. 745.

(15) H. T. 30 Geo. 3. cit. 3 T. R. 598.

voting by virtue of a burgage tenement; and they said, the point had been so often ruled, that it was too late to raise the question; and there the rule was made absolute against one who claimed such right. (1)

CAUSES FOR WHICH AN INFORMATION, &c. WILL AND WILL NOT BE GRANTED.

An information in the nature of a *quo warranto* does not lie for exercising the office of guardian of the poor for an union under stat. 4 & 5 Will. 4. c. 76. (2); nor for the office of churchwarden (3); nor against a county treasurer to shew by what authority he holds his office (4); nor for the office of petit constable, although a matter of right be in dispute:—the court observing, “no doubt of it, the king has a right to call any one to account by his writ of *quo warranto* for exercising any public office, be it ever so small; yet we do not use to grant informations for such inferior offices.” (5)

Guardian of the poor.
Parochial officers.
County treasurer.
Petit constable.

An information, &c. will not be granted for the office of trustees under a public local act (6):—or against a mere servant of a corporation; or against one who exercises no franchise or authority of any kind under the crown. (7)

Trustees under a public local act.
Servant of a corporation.

5. VALIDITY AND INVALIDITY OF ELECTIONS.

VALIDITY AND INVALIDITY OF ELECTIONS.

Upon an application for leave to file an information, &c., or upon demurrer to the pleadings, or upon a special verdict after the trial of the information, subjects affecting the powers and being of corporations are brought under discussion; the construction of their charters, the validity of their elections in all their steps, whether conducted in pursuance of prescriptive usage, or under a statute, charter, or bye-law, are submitted to the decision of the court.

The Municipal Corporation Act has effected a considerable change in the law of *quo warranto*, as applicable to those corporations (8) which are included in its schedules; but all other corporations are unaffected by its provisions.

Where reasonable doubts exist as to the mode in which an election has taken place in a corporation, as whether the presence of the mayor or other presiding officer was or was not essential to the holding of a court for that purpose; or whether a person legally elected has become subsequently disqualified—will be considered sufficient grounds for granting an information. (9)

Doubts respecting the legality of an election.

Under stat. 11 Geo. 1. c. 4., if it happen, that no election shall be made on the day appointed by charter or usage, nor on the day after by authority of stat. 11 Geo. 1. c. 4. s. 1., or such election having been made, shall afterwards become void, then power is given by the second section of such statute

Elections under stats. 11 Geo. 1. c. 4. and 7 Will. 4. & 1 Vict. c. 78.

(1) Sed vide *Rex v. Harvey*, Str. 547. *Rex v. Mein*, 3 T. R. 599.

(2) In re *Aston Union*, 6 A. & E. 784., vide etiam *Rex v. Ramsden*, 3 ibid. 456. *Rex v. Hanley*, ibid. 463. But an information in nature of a *quo warranto* has been granted against a party claiming to act as guardian of the poor in Exeter under stat. 18 Geo. 3. c. 76. H. T. 1816, ex rel. *Dealry*, cit. 3 A. & E. 476.

(3) *Rex v. Shepherd*, 4 T. R. 381.

(4) *Rex v. Herefordshire (Justices of)*, 1 Chitt. 700.

(5) *Anon.* 1 Barnard. 279.

(6) *Rex v. Hanley*, 3 A. & E. 463. n.

(7) *Rex v. Bedford Level (Corporation of)*, 6 East, 356.

(8) Vide 1 Stephens's Corporation Acts, 2d ed. 435—538.

(9) *Rex v. Latham*, 3 Burr. 1486. 1 W. Black. 468. Tancred on Quo Warranto, 35. Willcock on Corporations, 473.

VALIDITY AND
INVALIDITY OF
ELECTIONS.

to the court of Queen's Bench to award a *mandamus*, requiring the members having a right to vote to proceed to an election on a day prefixed in the writ; and "such officer or other person respectively shall preside in such assembly as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election, in case the same had been made or done upon the day hereinbefore prescribed for that purpose."

Presiding officer under stat.
11 Geo. 1. c. 4.

Whether the election be on the day after the charter day by virtue of the first, or in obedience to a *mandamus* under the second section of the statute, it seems, that the person who must preside is, 1. the person who ought to have presided, if the election had taken place on the charter day, or day appointed by usage; or 2. in his absence, the person who is the nearest then present in place to the person so absenting himself.

If it appear clearly, that the person presiding was not the person nearest then present in rank and office to the person absenting himself, the court will grant a *mandamus* to proceed to a new election; but if the point be doubtful, the court will not grant the writ, but the legality of the election must be tried on a *quo warranto*. (1)

Object of stat.
11 Geo. 1.
c. 4. was to
have a new
election.

The object of stat. 11 Geo. 1. c. 4. "was to enable corporations to go to an entire new election on a subsequent day, where no election had been begun before;" and the words "comprehend the continuing of elections begun on the charter day, but not completed within that time" (2), because "the wrong acts of officers were part of what was intended to be provided against by this act."

Mention of
hours in the
statute is di-
rectory.

"The mention of hours in the statute is certainly directory and not restrictive, and intended to prevent surprise by beginning at inconvenient times." (3)

When the proper officer to preside has been appointed, if by the charter or constitution of the borough or corporation he forms an integral part of the elective assembly, it is necessary, that he should be present up to the time when the election is completed; and though his absenting himself may be for an improper purpose, and be criminal, that will not render what is done in his absence valid, and an election proceeded in after his departure will be void. (4)

If elections be
not made within
the time ap-
pointed by stats.
5 & 6 Will. 4.
c. 76. and 7
Will. 4. & 1
Vict. c. 78.
s. 25., they may
be holden on
the following
day.

By stat. 7 Will. 4. & 1 Vict. c. 78. s. 25., "in case no election shall be made of any mayor, or any of the aldermen, councillors, or other corporate officers, in any borough named in the said schedules, upon the day or within the time appointed by stat. 5 & 6 Will. 4. c. 76., or by this act, for any such election; or such election being made, shall afterwards become void, whether such omission or avoidance shall happen though the default of the officer or officers who ought to preside at such election, or by any accident or other means whatsoever, the corporation shall not thereby be deemed or taken to be dissolved or disabled from electing such mayor, alderman, or councillor, or other corporate officer, for the future; but in any case where no such election shall be made as aforesaid, the election for any such mayor, alderman, coun-

(1) *Rez v. Newsham*, Sayer, 211. *Case of the Borough of Bossing*, Str. 1003. *Rez v. Holmes*, 3 Burr. 1454. *Rez v. Oxford (Corporation of)*, C. T. H. 178. *Aberystwith case*, Str. 1157. *Rez v. Cambridge (Mayor of)*, 4 Burr. 2008.

(2) *Per Hardwicke C. J. in Rez v. Pash*, C. T. H. 27. 2 Barnard. 93. 447.

(3) *Per Hardwicke C. J. ibid.*

(4) *Rez v. Buller*, 8 East, 389. *Rez v. Williams*, 2 M. & S. 141. *Tancred on Quo Warranto*, 87.

clerk, or other corporate officer may be had, held, and proceeded with upon the day next after the day on which such election ought to have been made, unless such day shall happen to be on a Sunday, and then upon the Monday following, and every act necessary to be done in order to and for the completing such election shall and may be then done; and the same shall be as effectual and valid for all purposes, as if the election had been made on the proper day appointed for that purpose."

And by the 26th section of the foregoing statute, the powers given to the court of Queen's Bench under stat. 11 Geo. 1. c. 4. are extended to elections under stat. 5 & 6 Will. 4. c. 76. and stat. 7 Will. 4. & 1 Vict. c. 78.

By stat. 7 Will. 4. & 1 Vict. c. 78. s. 1. "no election of any person into any corporate office, which shall take place after the passing of this act (1), shall be liable to be questioned by reason of any defect in the title or want of title of the person before whom such election may have been had, provided that the person before whom such election shall be had, shall be then in the actual possession of, or acting in the office, giving the right to preside at such election."

VALIDITY AND
INVALIDITY OF
ELECTIONS.

Stat. 7 Will. 4.
& 1 Vict.
c. 78. s. 1.

A corporate assembly may be incompetent to do corporate acts, when its component parts have not been properly convened, or when they are insufficiently constituted: and an election will be invalid, and the person chosen by it to fill a corporate office liable to ouster, if the elective body be not properly convened.

CORPORATE
ASSEMBLY IM-
PROPERLY CON-
VENED.

If the election of officers in a corporation be fixed, either by statute, charter, or custom, to take place on any specific day, then it is the duty of every person entitled to vote to take notice, that there will be an election on that day. (2)

When day of
election fixed
by charter or
statute.

When corporate acts are not positively to be done on any particular day, a notice, general or special, is always necessary (3); in fact, whenever notice is given for one particular business only, the body cannot go on to other business, unless the whole body be assembled, and it be done by unanimous consent. (4) In case of an election, if all who are entitled to vote are present at the meeting (though by accident, or in consequence of a notice to meet for other purposes), and agree unanimously in their choice, the election, where no statute, charter, or usage requires previous notice, will be good. (5)

When it has been said, that corporate acts done on a day not appointed by statute, charter, or custom, require a previous summons, it is not to be inferred, that all corporate acts are valid without summons, though transacted upon a charter day. (6)

Corporate acts
without pre-
vious notice
are not valid,
though trans-
acted on a
charter day.

If a day be appointed by statute or charter, or set apart by order of a corporation, or by usage, for the transaction of particular business, the members interested, may reasonably be expected to have cognisance of the provisions of the charter or statute, and to take notice of the order or

(1) 17th July, 1837.

(2) *Rex v. Hill*, 4 B. & C. 441.

(3) *Rex v. Shrewsbury (Mayor of)*, C. H. 151. *Rex v. Doncaster (Mayor of)*, Burr. 738.

(4) *Rex v. Wake*, 1 Barnard. 80. *Ma-
bell v. Nevins*, 11 East, 84. n. *Rex v.
Theodorick*, 8 *ibid.* 543.

(5) *Musgrave (Sir Christopher) v. Nevins-
son*, 2 Ld. Raym. 1358. Str. 584. *Rex v.
Theodorick*, 8 East, 543. *Rex v. Chetwynd
(Bart.)*, 7 B. & C. 695.

(6) Tancred on Quo Warranto, 63. Will-
cock on Corporations, 43.

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usage; and particular notice to meet on such particular business may be dispensed with (1); but for all other corporate business, a notice is as requisite when it is transacted on a charter day, as on any other; and if particular business be by statute or charter required to be transacted on any particular day, such business must be transacted before proceeding to any other business.

SUMMONS OF
THE MEMBERS.

When a summons is necessary, it must be given to every member, except such as are absolutely removed from and have deserted the town. (2)

Where an objection was made by the prosecutor's counsel to the election of the defendant into the office of a capital burgess, for want of due notice of such election to the electors, the court held the objection to be sufficiently answered by its being found, "that no one of them was then resident within the borough," for if they were "not within summons, it was not necessary to summon them." (3)

Where want of
notice will be
fatal.

In *Rex v. Langhorn* (4) it appeared at the trial, that the meeting was not held on a day appropriated to the purpose of electing burgesses; and the jury found that the custom was to elect burgesses by the burgesses for the time being, who were indefinite in number; and that every resident burgess was to be served with a personal notice of the meeting; and, if he required it, of its object: but that this custom must be taken with the qualification, that an accidental omission to serve a resident burgess was not a violation of it. It also appeared that R., a resident burgess, had told the officer, whose duty it was to serve the notices, that he need not serve him, as he was frequently absent, and could hear tell of what was going on. The officer did not serve B., who was in fact in the borough at the time of the meeting. The jury found expressly that the omission to serve R. was accidental; but it was held, that the qualification of the custom, as to accidental omissions, was bad in law; and that the omission to serve R. was not accidental.

Extraordinary
elections.

In the case of a meeting to be held for the purposes of extraordinary elections, it is requisite under the Municipal Corporation Act, that the notice should be special to meet and do the particular act.

CONSTITUTION
OF AN ELEC-
TORAL ASSEM-
BLY.

PRESIDING OF-
FICER.

In electoral assemblies it is indispensably requisite, that the assembly be properly constituted by the presidency of the proper officer; the attendance of the members of the different integral parts; and that where the constitution of the electoral assembly is under a bye-law, such bye-law should be valid. If, *constat de personâ*, that a particular officer, *ex. gr.* a mayor ought to preside, then it is to be considered, whether the person put forward as such, be a mayor *de jure*, or *de facto*, or merely an usurper.

Officer *de jure*.

If there be a mayor *de jure*, he ought to preside:—because there cannot be an officer *de facto* and an officer *de jure* at the same time. (5) In order to constitute a mayor *de facto*, it is necessary, that there be some form or colour of an election; because, merely taking the title and *regalia* of office, and acting and being sworn in as mayor, are insufficient. (6)

(1) *Rex v. Hill*, 4 B. & C. 426. 6 D. & R. 593.

(2) *Rex v. Shrewsbury (Mayor of)*, C. T. H. 151. *Exeter (City of) v. Glide*, 4 Mod. 93. 1 Show. 234. *Rex v. Little*, 5 Burr. 2681. *Rex v. Hill*, 4 B. & C. 426.

(3) *Rex v. Grimes*, 5 Burr. 2601.

(4) 4 A. & E. 538.

(5) *Rex v. Lisle*, Andr. 173.

(6) *Rex v. Bedford Level (Corporation of)*, 6 East, 368.

To constitute an officer *de facto*, two requisites are necessary :—1. that there be a complete vacancy ; 2. that there be, in all elective offices, a colour of an election ;—consequently, if there be an officer *de jure* in possession, or if without any election, a person intrude into an office, he is an usurper, and all his acts are absolutely void. (1)

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Officer *de facto*.

The acts which an officer *de facto* can legally perform are, 1. such as concern the public good ; 2. such as concern third persons.

What acts an
officer *de facto*
may do.

If the public utility require it, or where third persons have a previous right to have something done, or have paid a consideration for it, there an officer *de facto* is compellable to perform the acts belonging to his office ; and when done his acts are valid : but voluntary acts done by him are void, notwithstanding a consideration may have been paid. (2)

By stat. 32 Geo. 3. c. 58. s. 3. “ if any person or persons, against whom any such information shall be exhibited, shall derive title under an election, nomination, swearing into office, or admission, by any person or persons, the title of such person or persons against whom such information shall be exhibited, shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, swearing into office, or admitting, in case such person or persons, under whom title shall be derived as aforesaid, was or were in exercise *de facto* of the franchise or office (in virtue of which he or they so elected, nominated, sworn in, or admitted) at a period six years at least previous to the time of filing such information, and his or their title shall not have been questioned by any legal proceeding carried on with effect.”

Stat. 32 Geo. 3.
c. 58. s. 3.

Where title derived under an election not to be affected on account of defect in the title of the person electing.

This enactment neither abridges nor extends the power of objecting to the titles of corporators within the period limited ; but beyond that, seems to have taken it away.

If an aggregate corporation have at its head not one, but two co-ordinate officers, and if the presence or concurrence of the head be required to give validity to corporate acts, the two must attend, for they compose but one officer.

When aggregate bodies have two co-ordinate officers.

In a corporation consisting of bailiffs and burgesses, one of the bailiffs made a lease in his politic to the other in his natural capacity, and the question was, whether this lease was void or not ?

The inconvenience of allowing them to be severed in any corporate act was urged, viz. that one might act directly against another ; and the court were of opinion, that they made but one officer, and that the one could not act without the other (3) : and, that if the corporation had chosen but one bailiff, there would have been no head officer.

In cases of old corporate elections, where “ bailiffs were the head officer,” whose presence was necessary as the presiding member of the electoral assembly, the two bailiffs were bound to preside. (4) Thus, in the shrievalty in

(1) *Abbot of Fountain's case*, 9 Hen. 6. 12. pl. 3. *Knowles v. Luce*, Sir F. Moore, 12. *Knight v. Wells (Corporation of)*, 1 Lutw. 508. *Rex v. Lisle*, Andr. 163. Str. 090. *Anon.* 2 Barnard. 193. *Rex v. Pursehouse*, *ibid.* 264. Tancred on Quo Warranto, 2.

(2) *Chudleigh's case*, 1 Co. 140. (b.) *Anon.* 4 *ibid.* 24. (a.)

(3) *Saller v. Grosvenor*, 8 Mod. 303. Tancred on Quo Warranto, 75.

(4) *Rex v. Smart*, 4 Burr. 2241., vide *Regina v. Ipswich (Bailiffs of)*, 2 Ld. Raym. 1237.

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the city of London, when one sheriff dies the other cannot act: he is no sheriff; he must wait till another be made. (1)

But it depends upon the language of the charter and nature of the office, whether two officers of the same name compose together one officer, or are distinct members of the corporation. In the latter case as well as in the former, they may be required to coalesce and preside at a corporate meeting. (2)

Act of a mere
usurper illegal.

The acts of a mere usurper, *i. e.* a person who assumes office without the forms of an election, are illegal.

**ASSEMBLY NOT
CONSTITUTED
FROM A DE-
FECT OF ITS
COMPONENT
PARTS.**

The second essential requisite for the due formation of an elective assembly is, that the members composing the integral parts into which a corporation is usually divided, should be present in such numbers, as that their concurrence shall bind the whole body, and make a valid election of an officer for the whole corporation.

If any number of individuals form a political society, such as a corporation, unity of action is indispensable — and as unity of will cannot be expected, it is necessary, that some rule should be adopted for determining what is to be acted upon, as the will of the whole body.

The most simple rule, and that which reason suggests, is, that the will of the majority should be reputed the will of the whole. This is the rule adopted by the law of England, as the primary principle in all decisions to be taken by a corporate body, and is intended to be laid down in the maxim, "*ubi major pars, ibi tota.*" (3)

"But if the ancient usage hath been, that acts have been done from time to time by the major number of those that are present, although they are but three or four, it shall be then intended, that that was part of their constitution at the beginning, and so what is done by them shall be binding to the rest." (4)

Where no
usage is dis-
closed upon
the affidavits.

Where no usage is disclosed upon the affidavits, the number of integral parts in a corporation can be decided only by the words of the charter; and how many of these integral parts must concur in an election, by appearing at the assembly with a majority of their original definite number, must depend on the particular language by which the right of election is granted.

In all the cases where the presence of every integral part of a corporation has been held to be necessary, the different component parts of the corporation have been specifically mentioned (5); and for some corporate purposes a particular body may exist, and be required to co-operate with others as a distinct and integral body, while for purposes of election it may be included and be required to attend as a part of a larger body. (6)

(1) *Jones v. Beau*, 4 Mod. 16. Tancred on Quo Warranto, 75.

(2) In *Regina v. Hooker*, 9 A. & E. 680., which was a *quo warranto* information for exercising a borough office, it appeared, that the ground of prosecution was, that the officers presiding at the election were not qualified. The defendant pleaded, that he was duly elected, but pending the information, stat. 7 Will. 4. & 1 Vict. c. 78. passed; and the prosecutor thereupon moved for a stay of proceedings, and payment of costs (down to the passing of the act) by defendant, under sect. 20. A rule absolute was granted, although the defendant suggested, that he had

a defence independent of the statute (not, however, specifying its nature), and offered to pay all costs of the trial if he failed in establishing such defence.

(3) *Regina v. Sutton*, 10 Mod. 74. Tancred on Quo Warranto, 91. The mode of proceeding in elections *quoad* municipal corporations, is defined by stats. 6 & 7 Will. 4. c. 76. and 7 Will. 4. & 1 Vict. c. 78., vide 1 Stephens's Corporation Acts, 2d ed. 137—144.

(4) Per cur. in *Husard v. Somers*, Freeman, 505.

(5) *Rex v. Headley*, 7 B. & C. 508.

(6) Tancred on Quo Warranto, 103. *Rex v. Headley*, 7 B. & C. 496.

If the concurrence in an election of the major part of one or several definite bodies, parts of the whole corporate body, be required by charter, a majority of each integral part as originally created must in fact exist; and, if by accident or negligence the original number of persons composing a select definite body be so reduced, that a majority of the whole no longer remains, that integral part is incapable of acting and is extinct, and cannot be revived by the ordinary powers of the corporation; and the corporation itself is so far dissolved, that the crown can grant a new charter. (1)

VALIDITY AND INVALIDITY OF ELECTIONS.

DEFINITE BODY.

Majority of original number must exist.

Where a corporate election is to take place, to the validity of which the concurrence of a definite body is required, the majority of such body, when full and as originally created, must not only exist in fact, but must attend the assembly at which an election is to be made. (2)

Majority of definite body must attend at elections.

If an election be made by a definite body alone, or by a definite together with an indefinite body, a majority of the definite body must be present, although in the latter case it is not absolutely requisite, that the person elected should have the voices of the majority of the definite body, but still they must form a part of the mass. (3)

Where an election is to be made by an indefinite body, such as the former burgesses of a borough, then those assembled (the assembly being duly convened) have a right to elect; and the words, "or the greater part of them," refer to the body so assembled, and not to the whole body; and this distinction between an election by a definite and one by an indefinite body has always prevailed, and is uniformly recognised. (4)

Distinction between an election by a definite and an indefinite body.

By stat. 5 & 6 Will. 4. c. 76. s. 69. all corporate acts required to be done by the council of any borough shall be done and decided by a majority of the councillors present, the whole number present not being less than one-third part of the number of the whole council.

CONCURRENCE OF ELECTORAL ASSEMBLIES.

Stat. 5 & 6 Will. 4. c. 76. s. 69.

A charter is best expounded by itself, and hence the propriety of construing its language in particular parts by the words in the context, and by the sense which they seem to bear in other parts of the same instrument.

In all cases, either of a definite or indefinite body, when a corporate assembly is once duly formed, the concurrence of the majority of those assembled is sufficient, if not otherwise regulated by statute, whatever proportion that majority may bear to the whole corporate body.

When a corporate assembly is formed, the majority bind the minority.

If no mention be made of the major part, either in the case of a definite or indefinite body, any number duly assembled, however small, is sufficient to form a corporate assembly.

Where mention is and is not made of the major part.

Where mention is made of the "major part," as in the Municipal Corporation Act, in the case of a definite body, no corporate assembly can be composed of less than the majority of that definite number when complete; and consequently, if the number be reduced below that majority, the power of acting is at an end.

In the case of an indefinite number, the words "major part" have no operation.

When "major part" has no operation.

(1) *Rex v. Pasmore*, 3 T. R. 199.

etiam *Rex v. Bower*, 1 B. & C. 492. *Rex v. Miller*, 6 T. R. 268.

(2) *Rex v. Bellringer*, 4 ibid. 810. *Rex v. Miller*, 6 ibid. 279. *Rex v. Monday, Cowp.*

(4) *Rex v. Devonshire*, 1 B. & C. 614. *Rex v. Varlo, Cowp.* 248. *Regina v. Locke*,

537. *Rex v. Newsham, Sayer*, 211.

6 Vin. Abr. Corporation, 269. [G. 3.].

(3) *Rex v. Grimes*, 5 Burr. 2598., vide

**VALIDITY AND
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ELECTIONS.**

"For the time
being."

"Surviving
and remain-
ing."

Casting vote.

**ELECTIONS
UNDER A BYE-
LAW.**

Stat. 5 & 6
Will. 4. c. 76.
s. 90.

Every corpora-
tion has an in-
cidental power
of making bye-
laws.

Bye-laws when
invalid.

The words "for the time being" have no operation in the case either of a definite or indefinite body (1), such language meaning no more than *hodi-urne diurne*. Thus, a corporation is a fluctuating body, changing its members from day to day. Certain persons are first named in the charter, on whom the powers are in the first instance conferred by nomination; as they die, the same powers are to be continued to others who succeed them. To such the words "for the time being" refer in succession. The king grants to A., B., &c., who are named as mayor and aldermen in the charter certain powers; and then he continues the same powers to all other persons, who for the time being shall be mayor and aldermen. This is the plain meaning of the words, which obviates all kind of difficulty in the misconstruction of them as applied only to the existing majority at the time, and not to the existing state of the corporation. (2)

Of the same import with the words "for the time being" have been considered the words "surviving and remaining." (3)

A presiding officer has no casting vote by common right, but must support a claim thereto either by charter or usage. (4)

By stat. 5 & 6 Will. 4. c. 76. s. 90. the council of any of the boroughs mentioned in the schedules of that act are empowered to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for the suppression of all such nuisances as are not already punishable in a summary manner under any local act, by such fines as they shall (under certain limitations) deem necessary for the prevention of such offences. (5)

If an election of a public officer were to occur under an illegal bye-law, an information, &c. would be granted.

The power of making bye-laws is a power incident to every corporation, which, though usually given by special clause in a charter, need not be so conferred, for it is included by law in the very act of incorporation; with the power of suing, purchasing, and the like; for, as reason is given to the natural body for the governing of it, so the body corporate must have laws as a politic reason to govern it. (6) This inherent power is incidental to the whole, and not to a part of the body corporate, though it may be delegated by the whole to a select body, and when so delegated is carefully to be distinguished from the power of making bye-laws vested in a select body by charter.

Where the power of making bye-laws is by charter given to a select body, they do not represent the whole community, and therefore cannot assume to themselves what belongs to the body at large; but if the power of making bye-laws be in the body at large, they may delegate their rights to a select body, who thus become the representatives of the whole community. (7)

Bye-laws will be invalid, if made contrary to the common or statute law, or in opposition to the charter of incorporation; in fact, a bye-law can

(1) *Rex v. Belringer*, 4 T. R. 810. *Rex v. Varlo*, Cowp. 250. *Rex v. Monday*, ibid. 587. *Rex v. Grimes*, 5 Burr. 2598. 1 Kyd on Corporations, 424.

(2) *Rex v. Belringer*, 4 T. R. 810.

(3) *Rex v. Devonshire*, 1 B. & C. 609.

(4) *Anon. Lofft*, 315.

(5) *Vide* 1 Stephens's Corporations Acts, 2d ed. 418—428.

(6) *Norris v. Staps*, Hob. 210. *Le case de Sutton's Hospital*, 10 Co. 31., *vide* 1 Stephens's Corporation Acts, 2d ed. 418—428.

(7) *Rex v. Spencer*, 3 Burr. 1837. *Michel v. Nevinsan*, 2 Ld. Raym. 1355.

regulate a right, but cannot confer an original right, or absolutely take away a right. (1)

The number of electors may be restrained by a bye-law, but a bye-law cannot narrow the number of the persons out of whom the election is to be made. (2)

In *Rex v. Spencer* (3) a bye-law excluding all the commonalty, except such as had served the office of churchwarden and overseer for one year, was holden void, inasmuch as it superadded a qualification not required by the charter, and which had no relation to, or connection with, their corporate character or capacity.

By stat. 5 & 6 Will. 4. c. 76. s. 13., "after the passing of this act, [9th September, 1835,] no person shall be enrolled a burgess of any borough for the purpose of enjoying the rights conferred for the first time by this act in respect of any title other than by occupancy and payment of rates within such borough, according to the meaning and provisions of this act." (4)

Where the number of electors is indefinite, and some persons who are unqualified vote in the election, on the want of qualification being discovered during the progress of the election, it seems that the bad votes ought to be rejected, and that the election should be decided according to the majority of good votes. (5)

In general, the person elected must, except where the election is by ballot (6), support the right and title of his electors; "but for the sake of justice and convenience" it has been said, "a distinction has been made in cases where the right of election depends upon corporate franchises;" and where there is no method of prosecution by which the titles of electors may be questioned in the first instance, their validity may, from the necessity of the case, be inquired into upon an information against a person elected by them.

The circumstances and mode in which the title of electors may be canvassed in an information brought against the elected, has been frequently discussed. (7) In *Rex v. Hughes* (8), in which, to obviate surprise, the names of the electors, who at the election of the defendant had been improperly rejected or admitted; were put upon the record. Upon demurrer it was held, that the prosecutor could not rest his case upon the mere liability to ouster of certain of the defendant's voters; that the distinction had been long settled between the titles of electors who did not and who did fill corporate offices; and that it was established in *Rex v. Mein* (9) to be allowable in the former case to question the titles of the electors in an information against the elected, because there was no other mode in which they could be examined, but that the titles of corporators must be questioned in another mode. (10)

VALIDITY AND INVALIDITY OF ELECTIONS.

A bye-law cannot restrict the number of the eligible.

WANT OF QUALIFICATION IN THE ELECTORS.

Stat. 5 & 6 Will. 4. c. 76. s. 13.

When "bad votes" preponderate over "good votes."

The person elected must take upon himself to support the title of his electors.

Under what circumstances the title of electors can be tried by an information.

(1) Respecting the authority to make bye-laws under the Municipal Corporation Act, vide 1 Stephens's Corporation Acts, 2d ed. 418—428.

(2) 2 Kyd on Corporations, 28.

(3) 3 Burr. 1827.

(4) Vide 1 Stephens's Corporation Acts, 2d ed. 67—93.

(5) 2 Kyd on Corporations, 8. *Rex v. Bedford (Mayor of)*, 8 Mod. 34., vide 1 Stephens on Elections, 353—363.

(6) *Rex v. Jefferson*, 5 B & Ad. 855.

(7) *Rex v. Mein*, 3 T. R. 596. *Rex v. Latham*, 3 Burr. 1485. *Rex v. Belbringer*, 4 T. R. 810. *Rex v. Miller*, 6 ibid. 268. *Rex v. Smith*, 5 M. & S. 280. *Rex v. Lisle*, Andr. 163. *Rex v. Stacey*, 1 T. R. 1. *Rex v. Pike*, 8 Mod. 286. Tancred on Quo Warranto, 187—200. Willcock on Corporations, 495. 1 Stephens on Elections, 353—363.

(8) 4 B. & C. 368.

(9) 3 T. R. 596.

(10) In *Rex v. Penryn (Corporation of)*, 8 Mod. 216., upon the ground, that at the

VALIDITY AND INVALIDITY OF ELECTIONS.

The court will not hold parties disqualified, on affidavits which there is no opportunity to contradict.

INELIGIBILITY OF THE PER- SONS ELECTED.

Votes given knowingly and unknowingly to an unqualified candidate.

Where the candidates to be put in nomination are not limited.

Where an election is once entered upon, it cannot be stopped.

In *Regina v. Quayle* (1), which was a motion for an information, &c., it appeared, that the election of a councillor was impeached by objections to his voters on the grounds of personation, and that some had no title to be on the burgess roll, it was held to be no answer in shewing cause, that, upon the defendant's affidavit, enough of the opposite party's voters were so bad as to reduce his poll below that of the defendant, though the objections in the latter case be founded on a comparison of the voting papers with the burgess roll, both verified by affidavit, and the alleged objections appearing on the face of the voting papers; for the court will not hold parties disqualified on affidavits, which there is no opportunity to contradict.

The general rule upon this subject is, that where a person proposed as a candidate is unqualified, votes given to him after the discovery and notice of his want of qualification are thrown away, and that the candidate who, next to the person disqualified, has the greatest number of good votes, is to be considered as duly elected. (2)

But if the incapacity of a candidate be announced after the proceedings at an election have commenced, and votes have been taken, the votes given in favour of an unqualified candidate before notice are not thrown away, and consequently the returning officer will not be authorised to return as duly elected another candidate, whose votes upon the whole poll do not exceed in number the votes given for the disqualified candidate before notice of his incapacity. (3)

Where by the constitution of a corporation the candidates to be put in nomination are not limited to a particular number, if some be qualified and some unqualified, and some of both kinds be chosen, the election is good as to those who are qualified, and void only as to the others.

If the number of electors be limited, and in that limited number there be some who vote without being qualified, it would seem, from the reason of the thing, that the election is void for the whole, unless there be so many good votes for the candidate chosen, as would constitute a majority of the whole limited number. And if the number of candidates be limited, there seems still stronger reason why the election should be void for the whole, where there are unqualified candidates, even if none of the latter be chosen; for perhaps, had there been no unqualified candidates, others might have been chosen in preference even to those of the candidates who were duly qualified. (4)

Where an election is once entered upon, there is no way to stop it and prevent the election of a person eligible, but by voting in favour of another candidate; no protest, though by a majority of the electors, will defeat the election of a candidate chosen by a minority; for whenever electors are

trial of the elected the right of the electors filling corporate offices shall not be inquired into or given in evidence, unless judgment of ouster against them has been obtained. It was considered, that the last of two informations which had been brought, the first against a mayor *de facto*, and the second against a capital burgess who voted for him, should be first tried.

(1) 11 A. & E. 508.

(2) *Regina v. Boscawen*, cit. 2 Burr. 1021.

Rex v. Monday, Cowp. 537. *Rex v. Wickers*, cit. 2 Burr. 1020., sed vide *Rex v. Hawkins*, 10 East, 217. *Rex v. Parry*, 14 ibid. 361. *Oldknow v. Wainwright*, 2 Burr. 1017. 1 Stephens on Elections, 353—363.

(3) Tancred on Quo Warranto, 176. *Rex v. Bridge*, 1 M. & S. 76. 1 Stephens on Elections, 353—363.

(4) 2 Kyd on Corporations, 8. *Rex v. Bedford (Mayor of)*, 8 Mod. 34. 1 Stephens on Elections, 353—363.

present, and do not vote, they virtually acquiesce in the election made by those who do. (1)

VALIDITY AND
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ELECTIONS.

A collective vote cannot be taken upon a list of names, if there be an indefinite number to be elected, because the mode of putting up collectively a list of names "is calculated to produce not a real, but an apparent unanimity only, for each individual will compromise his own opinion, in order to induce others to do the same." (2)

Mode of taking
the opinion of
a corporate
body.

But where a certain number of aldermen were to be elected on a given day, under stat. 5 & 6 Will. 4. c. 76. s. 25., which prescribed no particular mode of electing (3), it was holden in *Regina v. Brightwell* (4), that the proper mode was to put to the vote a list containing as many names as there were vacancies to be filled up, any elector being at liberty to propose and have put to the vote a list of his own; Lord Denman observing, "The contrary rule was properly applied where an indefinite number of honorary freemen was to be elected. The reason is obvious. In that case the claim of each is essentially distinct, and his individual fitness or unfitness is alone to be determined. This cannot be done when electors are required to vote for or against many candidates at once. They may think it so desirable, that A. should be a member of the corporation, from respect and confidence in him, that his election would be cheaply purchased by receiving B. and C., both of whom they may deem wholly unfit for the office; or, on the other hand, may think him so highly objectionable, that it is better to exclude a long list of well qualified persons than permit him to come among them. Every thing would, therefore, unavoidably run into bargain and compromise, where they would be obviously unnecessary and improper, and even inconsistent with the direct purpose of such an election, which need not take place at all, and which calls on the electors to exercise no other judgment than on the competency of each individual proposed.

Judgment of
Lord Denman
in *Regina v.
Brightwell*.

"But it seems to us, that when a certain number of persons is to be elected as an official body, that very principle is the only one that can reasonably be acted on. I may consider A. perfectly fit for one of the places to be filled, provided only, that B. and C. should occupy another of them. The point on which the voter must exercise his judgment is, not whether A. would be a good alderman, but whether A. and others would form a good board of aldermen. The proposer of the list lays it before the assembly as the board which he recommends. Each elector had the opportunity of proposing his own board, or each of those persons who ought in his opinion to be elected at all events, whatever others may find a seat there."

By stat. 5 & 6 Will. 4. c. 76. s. 52. if any person holding the office of mayor, alderman, or councillor, shall be declared bankrupt, or shall apply to take the benefit of any Insolvent Act, or shall compound by deed with his creditors, or being mayor shall be absent for more than two calendar months, or being an alderman or councillor more than six months, at one and the same time, unless in the case of illness, from the borough to which he shall belong, such person shall thereupon immediately become disqualified and

Stat. 5 & 6
Will. 4. c. 76.
s. 52.

Corporate offi-
cers absenting
themselves
from their
boroughs.

(1) *Oldknow v. Wainwright*, 2 Burr. 1017. (3) *Vide* stat. 7 Will. 4. & 1 Vict. c. 78.
Rex v. Monday, Cowp. 530. Tancred on s. 14.
Quo Warranto, 178.

(4) 10 A. & E. 171

(2) *Rex v. Player*, 2 B. & A. 707. *Rex v. Monday*, Cowp. 530.

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shall cease to hold the office; and in case of such absence, shall be liable to the same fine as if he had refused to accept the office, and the council thereupon shall declare the office to be void.

A bankrupt uncertificated at the time of election is not disqualified from being elected a councillor under this act. The disqualification exists only where the bankruptcy occurs during the holding of the office. (1)

Name of a
town council-
lor not on the
burgess roll.

Where a town councillor elected under stat. 5 & 6 Will. 4. c. 76. had, during his term of office, been put out of the burgess roll by the overseers for alleged non payment of rates, but continued to exercise the office, the court will not, on affidavit of those facts, and of the alleged default, issue a *mandamus* to the mayor, or alderman of the ward, to proceed to a new election; but the vacancy must be first ascertained by judgment on a *quo warranto* information: thus, in *Regina v. Phippen* (2) Lord Denman observed, "I take the regular practice to be, that where an office is full, there cannot be a new election without a *quo warranto* information to determine the title."

Not making
the requisite
declaration
under stat. 9
Geo. 4. c. 17.
ss. 2. & 4.

By stat. 9 Geo. 4. c. 17. ss. 2. & 4. every person who shall be placed, elected, or chosen in or to the office of alderman, &c. shall, within one calendar month next before or *upon his admission* into such office, make and subscribe a certain declaration before certain parties; and if he shall omit or neglect to make and subscribe such declaration, such placing, election, or choice shall be void.

"Upon his ad-
mission."

In *Regina v. Humphery* (3) it was held by the court of Queen's Bench, that the election was not void by refusal to make the declaration, or state whether the party will do so, unless he had first been admitted to the office by swearing in. But such judgment was reversed on error, by the court of Exchequer Chamber, it being decided by that court, that the statute does not give the party elected a month, at all events, for deciding whether he will make the declaration or not, but only excuses him from making it at the time of admission, if he has made it within a month before; that the words "upon his admission" mean at the time, and not within a reasonable time after; and that the authorities who admit, may prescribe the order in which the ceremonies, forming parts of the admission, shall take place; and that, if the party offer himself to the proper court to be admitted, not having made the declaration within a month before, and being asked whether he will make it or not, declines to say, but requires the court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election.

Stat. 10 Geo. 4.
c. 7. s. 14.
Roman Ca-
tholics may be
members of lay
corporations.

By stat. 10 Geo. 4. c. 7. s. 14. any subject professing the Roman Catholic religion may be a member of any lay corporation, and hold any civil office, or place of trust or profit therein, and do any corporate act, or vote in any corporate election, upon taking and subscribing the oath appointed by that act, instead of the oaths of allegiance, supremacy, and abjuration.

INCOMPATI-
BILITY OF OF-
FICES.
Ministerial and

If a corporator in possession of one office accept and act in another, the court of Queen's Bench will grant an information in nature of *quo warranto*, if in their discretion they shall consider the two offices incompatible.

(1) *Rex v. Chitty*, 1 N. & P. 78. 5 A. & E. 609.

(2) 7 A. & E. 966.

(3) 10 *ibid.* 335.

A long consistent usage will influence the decision of the court; but ministerial and judicial offices cannot be united and exercised at the same time by the same person. (1)

The distinction between a superior and an inferior office is not now considered material in deciding which of two incompatible offices is to be vacated; nor does the possession of one office render a person ineligible to another incompatible with it; but, without reference to any considerations as to which is superior and which inferior, the acceptance of the office to which a person has been last appointed or elected, implies a surrender of and vacates the former. (2)

Where a defendant held, previously to the Municipal Corporation Act, the incompatible offices of burgess and town clerk in a corporation, though he had accepted the latter office more than six years prior to the application, yet, as the incompatibility continued to the time when the rule was prayed by his acting as town clerk, the rule was made absolute. (3)

The party elected is bound at his peril to take care that it has been a valid election under which he accepts an office, because, if a person accept an office which is incompatible with an office he previously filled, the latter office is vacated; and a subsequent removal from the newly accepted office does not restore the person back again to the office which he previously vacated, but which is still well filled by the person introduced into it in his stead. (4)

Under stat. 5 & 6 Will. 4. c. 76. the court will not grant a *quo warranto* information unless it be shewn, that the party is in office *de facto*; and, for this purpose, it is not enough if the affidavit state simply, that he has "accepted the office," without specifying the mode of acceptance, although it be sworn, that the presiding alderman has declared the party duly elected: thus, in *Regina v. Slatter* (5) Lord Denman observed, "Perhaps every word cannot be interpreted by the same rules: thus, take the two words 'acting' and 'admitting'; 'acting' may be used merely to show how the deponent understands the effect of what has been done; 'admitting' is altogether a technical expression. The 'acceptance' of a charter might perhaps have only a technical meaning; but whether particular acts constituted or not an 'acceptance' of office, may be mere matter of opinion, so far as the deponent is concerned. The rule must therefore be discharged."

In *Regina v. Thomas* (6) it appeared, that the borough of T. until May 1. 1836, had its own quarter sessions, and W. held the offices of town clerk and clerk of the peace; he resigned; and thereupon, by a resolution of town council on July 20. 1836, S. was elected town clerk, but no step was taken towards investing him with the office. At an adjourned meeting of the council, July 25. 1836, a resolution was passed, rescinding that of July 20.; and by another resolution T. was elected town clerk. In August, 1836, the borough obtained a grant of quarter sessions; and on

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judicial offices cannot be united in the same person.

The acceptance of one incompatible office, implies a surrender of the other.

Party elected bound to take care that his election has been valid.

Party must be in office *de facto*.
Stat. 5 & 6 Will. 4. c. 76.

Judgment of Lord Denman in *Regina v. Slatter*.

(1) *Rez v. Trelawney* (Sir W.), 3 Burr. 1615. *Rez v. Blissel*, cit. Doug. 397. Tancered on Quo Warranto, 224, 225.

(2) Tancered on Quo Warranto, 226. *Milward v. Thatcher*, 2 T. R. 81. *Rez v. Pateman*, ibid. 777.

(3) Tancered on Quo Warranto, 232.

(4) *Rez v. Hughes*, 5 B. & C. 886. *Rez v. Hubball*, 6 ibid. 139. Tancered on Quo Warranto, 232. 1 Stephens's Corporation Acts, 2d ed. 173.

(5) 11 A. & E. 505.

(6) 8 ibid. 183.

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August 15. T. was by resolution of the council elected clerk of the peace:— It was held on motion for a *quo warranto* information against T., at the instance of S., for claiming to exercise the two offices, that T. was legally appointed town clerk on July 25., and clerk of the peace on August 15.; that the offices were not full at the times of such respective elections; that T. could not be presumed to claim the office of clerk of the peace, as incidental to the office of town clerk, by the appointment of July 25., no specific act appearing to have been done by him in the capacity of clerk of the peace between that time and August 15., though it was alleged generally on affidavit, that he had acted as clerk of the peace from July 25.; that the prosecutor could not allege that notice had not been given to him or to the councillors (according to stat. 5 & 6 Will. 4. c. 76. s. 69.) of the business to be done at the meeting of July 25., inasmuch as the prosecutor was bound to prove that fact by his affidavits, and had not done so; that by analogy to the general rule, Hilary Term, 7 Geo. 4. c. 8., the objection could not be urged on motion unless specified in the rule *nisi*, which had not been done here; and that the resolutions rescinding that of July 20., and appointing T. town clerk, were under the circumstances a sufficient removal of S. from that office.

SWEARING IN.

Need not be immediately consequent upon an election.

Officer must be sworn before he enters on official duties.

Where the election and swearing are intended to be *simul et semel*.

A person may be well elected, though his swearing in should not be immediately consequent upon his election; for the effect of requiring that the election and swearing in should take place "*simul et semel*," would be to exclude all absent and otherwise capable persons as objects of election to corporate offices, for which in practice and reason there seems no foundation. (1) But it is requisite, that an officer be sworn in before he enters on the execution of his office. (2)

If in a charter "the election and swearing" are clearly intended to be *simul et semel*, such language does not, *ex necessitate*, require that the election and swearing should be contemporaneous, but only that no valid election shall be made of a person under an incapacity at the time of election, as in the case of an infant, and subsequently completing his title by taking the oath of office: in fact, it is a general rule, that "a person capable of being sworn, if present, may be elected, if absent (and where, on that account, a swearing in could not immediately take place), if he were in other respects eligible." (3)

Before whom and under what circumstances an oath may be administered.

Although it is a legal principle, that where an aggregate body assemble for a specific object, they cannot do any other act unconnected with that purpose without the concurrence of the whole body, yet it only applies to business of a deliberative or judicial nature; consequently, the mere ministerial business of swearing in an officer antecedently well elected, can be proceeded upon by the requisite number of persons whatsoever and howsoever assembled, if such persons do not at the very time expressly dissent from performing such ministerial act, because the assent of the party before whom a person elected is sworn, must go along with the act of swearing. (4)

If a person be sworn in before the competent tribunal, and no dissent be

(1) Tancred on Quo Warranto, 200.
Rex v. Carter, Cowp. 220.

(2) Tancred on Quo Warranto, 215.

(3) *Per* Lord Ellenborough in *Rex v. Courtenay*, 9 East, 246.

(4) *Rex v. Ellis*, Str. 994. *Rex v. Courtenay*, 9 East, 246.

expressed, such silence will operate as a virtual acquiescence (1); and there is no distinction between swearing by and before any constituted officer. (2)

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A neglect to be sworn in for a great length of time, as above twenty years after an election, amounts to a waiver or refusal to accept the election by the elected; but it does not vitiate the election itself, for otherwise the question of waiver could not arise. (3)

Whether, in compliance with stat. 11 Geo. 1. c. 4. s. 4., a presiding officer, if elected, can be sworn in before himself, seems undecided; it has been held, that he could not be sworn before corporators nearest to himself in place, but not presiding at the assembly. (4)

Presiding officer elected under stat. 11 Geo. 1. c. 4. s. 4.

It is necessary to the good order and government of corporations, that they should possess the power of amotion; and which was incident to every corporation (5) previously to the Municipal Corporation Act; but it seems very questionable whether, under that statute, "the council" possess the power of amotion — except where it has been expressly granted to them.

AMOTION.
Stat. 5 & 6
Will. 4. c. 76.

Any want of original qualification by which a corporate office is avoided, renders the corporator *de facto* holding under such defective title, guilty of usurpation; and an information, &c. is the remedy appointed for the removal of him, whom the law regards as an intruder. Where the party has never *de jure* been enfranchised nor invested with an office, the corporate powers of amotion and disfranchisement which presume the contrary, and recognise him as an existing corporator, cannot be exerted. (6)

Want of original qualification renders the party holding an usurper.

But although a person has a corporate office by a complete title, he may by delinquencies of various sorts and degrees become unfit or incapable to hold it. The causes of forfeiture have been distributed into three classes (7), 1st, such as relate merely to the officer's corporate or official character, and amount to breaches of the condition tacitly or expressly annexed to his franchise or office; 2dly, offences which have no immediate relation to his corporate or official character, but are in themselves of so infamous a nature as to render the offender unfit to enjoy any public franchise, such as perjury, forgery, &c.; 3dly, offences of a mixed nature, being not only against his corporate or official duty, but also indictable at common law. (8)

Offences for which a corporator or corporate officer may be disfranchised.

This distribution into three different classes of the offences for which a corporator or corporate officer may be disfranchised or removed, respects principally the power of trial. (9) For those of the first class, the power of trial as well as of amotion belongs exclusively to the corporation; for offences of the second class, the corporation cannot disfranchise or remove without a previous conviction in a court of common law; with respect to offences of the third class it is said, that there has been great diversity of opinion, "whether, for such offences, the offender can be removed without a previous conviction at common law." (10)

In all these cases in which the corporation proceed to amotion, after a

(1) *Oldknow v. Wainwright*, 2 Burr. 1021.

(6) *Tancred on Quo Warranto*, 217.

(2) *Rez v. Ellis*, Str. 994. *Rez v. Bedford (Duke of)*, 1 Barnard. 242.

(7) *Bagg's case*, 11 Co. 99. *Rez v. Richardson*, 1 Burr. 538. *Rez v. Derby (Mayor of)*, C. T. H. 153.

(3) *Rez v. Jordan*, C. T. H. 255.
(4) *Rez v. Malden*, 4 Burr. 2130. *Tancred on Quo Warranto*, 215.

(8) *Tancred on Quo Warranto*, 218.

(9) *Rez v. Richardson*, 1 Burr. 538.

(5) *Rez v. Tiddley*, 1 Sid. 14. *Rez v. Richardson*, 1 Burr. 517.

(10) *Rez v. Derby (Mayor of)*, C. T. H. 153.

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trial before themselves or a court of competent jurisdiction, the offence of the corporator renders his office voidable and not void; and to make a vacancy in the office, an actual motion by the corporation must have taken place before the court can grant an information, &c. (1)

**6. AFFIDAVIT — RULE NISI — RULE ABSOLUTE — THE INFORMATION —
STAY OF PROCEEDINGS — QUASHING INFORMATION — DISCLAIMER.**

**AFFIDAVIT —
RULE NISI —
RULE ABSO-
LUTE — THE
INFORMATION
— STAY OF
PROCEEDINGS
— QUASHING
INFORMATION
— DISCLAIMER.**

It has been previously stated, that by stat. 4 & 5 Will. & M. c. 18. no information can be filed without leave of the court. The method of obtaining leave is, by laying a proper case before the court, verified by affidavit, upon which the court will grant a rule upon the party to show cause why an information should not be filed against him; and unless the cause shewed by him be such as puts the matter beyond dispute, the court will make the rule absolute for the information, in order that the question concerning the right may be determined. (2)

**Affidavit must
contain a pre-
cise statement
of facts.**

The affidavit should embody a precise statement of facts, and will be insufficient if too loose and general, and such, that no perjury could be assigned upon its allegations. (3)

How intituled.

The affidavits are merely entitled "In the Queen's Bench," and it is not requisite to give notice to the opposite party previously to an application being made to the court. (4)

**The affidavit of
the defendant
may be called
in aid to sup-
ply a fact.**

Where the affidavit in support of the rule omits to state a material fact, the prosecutor may call in aid the affidavit of the defendant, if by so doing the deficiency can be supplied. (5)

**Claim of cus-
tom.**

In claiming under a custom, it is requisite on the face of the affidavits to state, that "such custom immemorially existed;" and it is not enough to state facts from whence the conclusion might be drawn, because it might be consistent with a given state of facts, that the parties knew when the custom originated. (6)

**Deponent's be-
lief insufficient.**

It is not sufficient for a deponent in an affidavit to state a fact which, if true, must have been notorious. (7)

**Deponent
"understands
and believes."**

An affidavit purporting that the deponent "understands and believes," or "has heard and believes," or "has been informed and believes," will, under the particular circumstances of a case, be considered sufficient (8); the court observing in *Rex v. Slythe* (9) "that it made a great difference whether the matter of hearsay and belief went to the validity of the title, or merely to the fact of the party having exercised the office."

**When the de-
fendant has
been elected
contrary to the
provisions of a
charter.**

Where the application is founded upon the fact, that the defendants have been elected contrary to the provisions of a charter, care must be taken to allege distinctly in the affidavits, that the charter was accepted, or facts affording pregnant evidence of acting under it, so as to authorise the court to infer its acceptance, otherwise the court cannot proceed; and where a

(1) *Tancred on Quo Warranto*, 218, 219.
Lord Bruce's case, Str. 819.

(2) *Bull. N. P.* 210. (a.) (b.)

(3) *Rex v. Sargent*, 5 T. R. 466.

(4) *Rex v. Jones*, Str. 704.

(5) *Rex v. Mein*, 3 T. R. 596. *Rex v. Symmons*, 4 *ibid.* 223.

(6) *Rex v. Lane*, 5 B. & A. 488.

(7) *Rex v. Newling*, 3 T. R. 310.

(8) *Rex v. Harwood (Clerk)*, 2 East, 177.

(9) 6 B. & C. 240.

rule *nisi* had been obtained, it was not only discharged for a defect in the affidavit in these particulars, but the court refused leave to amend it, saying that it would be a dangerous precedent, and that the parties must make a new application. (1)

An affidavit will be received in support of facts already alleged; but where an additional affidavit containing new matter was tendered, the court refused to receive it. (2)

The motion for a rule to inspect and take copies of books, &c. when an action is depending, is founded on an affidavit stating the circumstances under which the inspection is claimed, and that an application has been made in the proper quarter for permission to make the inspection, which has been refused. (3) When a motion for an information in nature of *quo warranto* is depending, the court will grant a rule absolute in the first instance (4); but when no action is depending, the proper mode of proceeding is by moving for a rule to shew cause why a *mandamus* should not issue, commanding the officer who has the custody of the books to permit the party applying to inspect and take copies of the necessary entries. (5)

The affidavit, upon which this motion is founded ought to state clearly the right under which the inspection is claimed, and that the inspection has been refused. (6) And when the motion is for a writ of *mandamus* to inspect, grounded upon affidavits, the rule is only a rule *nisi*.

If a rule be made to shew cause why an information should not be filed in nature of *quo warranto*, the court will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to shew cause is granted (7); but if a rule be made to shew cause why a *mandamus* should not be awarded, the court will not make a rule for the prosecutor to inspect and take copies of books and records, until the rule be made absolute, and a return made to the *mandamus*. (8)

If a person has no direct interest to inspect public records, a rule *nisi* will only be granted in the first instance (9); but it is otherwise when some cause or proceeding has been instituted, in which the applicant's right may be involved. (10)

Vexation and expense having been occasioned to defendants in informations in the nature of *quo warranto*, by the practice of raising issues upon various matters, distinct from the ground on which the information was granted by the court, it was ordered by a general rule of court, "that from thenceforth the objections intended to be made to the title of the defendant shall be specified in the rule to shew cause, and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the court, or of some judge thereof." (11)

If the name given to a corporation in the rule be mistaken, the rule will be discharged. (12)

A conditional order having been granted for an information, calling on

**AFFIDAVIT —
RULE NISI, &c.**

Affidavit containing new matter.

Motion to inspect founded upon affidavit.

When a motion for an information, &c. is depending.

Substance of affidavit.

Rule to inspect in cases of information, &c. and of *mandamus*.

RULE NISI.
The objections intended to be made to the title of the defendant, must be specified in the rule to shew cause.

Misnomer.

- | | |
|--|---|
| (1) <i>Rex v. Barzey</i> , 4 M. & S. 253. | (8) <i>Rex v. Surry (Justices of)</i> , Sayer, 145. |
| (2) <i>Rex v. Newling</i> , 3 T. R. 314. | (9) <i>Rex v. Allgood</i> , 7 T. R. 746. |
| (3) <i>Roe v. Aylmar</i> , Barnes, 236. | (10) <i>Rex v. Nottingham (Town of)</i> , 1 W. Black. 59., <i>vide ante</i> , 1685—1695. tit. EVIDENCE. |
| (4) <i>Rex v. Trevannion</i> , 2 Chitt. 366. <i>Rex v. Lucas</i> , 10 East, 235. | (11) Reg. Gen. H. T. 7 & 8 Geo. 4. 6 B. & C. 267. |
| (5) <i>Ibid.</i> | (12) <i>Rex v. Bedford (Duke of)</i> , 1 Barnard. 242. |
| (6) <i>Brewers' Comp. v. Benson</i> , Barnes, 236. | |
| (7) <i>Rex v. Hollister</i> , C. T. H. 245. <i>Rex v. Surry (Justices of)</i> , Sayer, 145. <i>Rex v. Shelley</i> , 3 T. R. 141. | |

**AFFIDAVIT —
RULE NISI, &c.**

the defendant to shew *quo warranto* he exercised the franchise of a freeman, by the right of marriage, of the corporation of Dublin:—It was held, 1. that upon an order so framed it could not be decided whether such an admission into the corporation were or were not honorary, within the meaning of stat. 2 & 3 Will. 4. c. 88. s. 9., because the order in its form questions the existence of the franchise, rather than any privilege conferred by it; 2. that to such an order it is a full answer, that the party has been admitted to his freedom by the corporation, and by virtue of that admission exercises the franchise in question. (1)

Application may be made on the last day of term.

Service of rule, &c.

RULE ABSOLUTE.

There does not appear to be any objection to moving on the last day of term for the rule, to shew cause why an information should not be exhibited. (2) When granted, it is drawn up and served (but personal service is not necessary), an affidavit of the service must be made, and the proceedings are conducted as in cases of criminal informations. (3)

The court will make a rule absolute for an information, although the party before (4) or after the rule *nisi* granted has resigned his office; and in the latter case, although the resignation has been accepted, because a resignation is not an answer, although it might regulate the court in the imposition of the fine.

THE INFORMATION.

Form of information.

Name of relator.

The information is in the same form (5), whether it be brought for an usurpation without any original title, or for a subsequent forfeiture, where the original title is not disputed. (6)

In an information under stat. 9 Anne, c. 20. it is not requisite to state, that the information was filed with the leave of the court. (7) But the name of the relator must be mentioned as such in the information. (8)

No necessity to set out the whole constitution of the place.

There is no necessity to set out particularly in the information the whole constitution of the place, or to shew, whether the office is by charter or prescription; but if it be alleged to be an office, which appears, upon the face of the information, to concern the public, it is sufficient against the person that usurps it. (9)

An information may be good in part and bad in part.

Where informations had charged the defendants with the usurpation of other liberties, as well as with the liberty of being a corporation, they were sustained for the usurpation of the liberties, because an information might be good in part, and bad in part; and as the informations were good for the other liberties, it was not worth while to question, whether they were good as to that part which questioned the corporate existence. (10)

(1) *Regina v. Cowen*, 1 Jebb & Symes (Irish), 223.

(2) *Tancred on Quo Warranto*, 255.

(3) 1 Gude's Cro. Prac. 158.

(4) *Rex v. Powell*, Sayer, 239.

(5) The form of the information is thus: "A. B., attorney general of the lady the queen, who sues for the lady the queen in this behalf, comes here into court of our said lady the queen, before the queen herself, at Westminster, on — in this same term, and for the said lady the queen gives the court here to understand and be informed, that — for the space of — now last past and more, have used and still do use, without any warrant or royal grant, the following liberties and franchises, to wit, —, of all which liberties, privileges, and franchises aforesaid, the said —, during all the time aforesaid,

have usurped and still do usurp upon the said lady the queen, to the great damage and prejudice of her royal prerogative, whereupon the said attorney of the said lady the queen, for the said lady the queen, prays the advice of the court in the premises and due process of law against the said —, in this behalf to be made, to answer to the said lady the queen, by what warrant he claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid." 2 Kyd on Corporations, 403, 404.

(6) Co. Entr. 527—564. 2 Kyd on Corporations, 404.

(7) *Symmers v. Regem*, Cowp. 501.

(8) 9 Anne, c. 20. s. 4.

(9) *Rex v. Boyles*, 2 Ld. Raym. 1538. Str. 836.

(10) *Tancred on Quo Warranto*, 270, 271.

The information must set forth with certainty the particular franchises exercised by the defendant; and an information was held bad for uncertainty, which called upon a person to shew by what authority he claimed to be portreeve of Honiton, and to have all the liberties, privileges, and franchises, belonging to the said office without shewing what they were. (1)

The information concludes by the attorney general, or the coroner, praying that due process of law may be awarded against the defendants.

Upon the information being filed, a writ of *subpoena* is issued to compel an appearance, and an attachment in default thereof.

Upon an appearance being entered for the defendant, the prosecutor may directly enter his rules to plead, as in cases of information for misdemeanour:—in fact, the defendant was never entitled to an imparlance.

If the defendant do not take out a summons for time to plead, the prosecutor can, at the expiration of the eighteen days' rule to plead, sign judgment. (2)

When a proper case has been laid before the court for an information, they never exercise any control over it afterwards, as to the manner in which it is to be conducted. (3)

Several *quo warranto* informations having been filed on the same grounds for exercising the office of alderman of the same corporation, one was tried, a verdict found for the crown, and a rule *nisi* granted for a new trial, or to enter a verdict for the defendant. A rule *nisi* was then obtained for a stay of proceedings in the other informations pending the above application; but the court discharged the rule, the prosecutor undertaking to proceed with only one other information until further order; but they refused to direct, that either party should be bound by the result of such one proceeding. (4)

It is improper to move to quash by consent an information which has once been granted; but if both sides consent, the court will allow the recognisance which has been entered into to be discharged. (5)

An information can be brought for the purpose of enabling a person to disclaim; and it is no objection to the proceeding, that it is a friendly proceeding, because it might be the only mode of a party who was in office to disclaim (6); and where it appeared, that the defendant was a very young man, and that he neither had acted, nor intended to act, the court allowed him to enter a disclaimer without costs. (7)

According to the nature of the case, the defendant may either disclaim as to all, or plead as to all the franchises mentioned in the information; or he may plead as to part, and disclaim as to part. (8)

There must be separate informations in order to enable each defendant to disclaim, because it is necessary that there should be a disclaimer upon record; otherwise, no punishment could be inflicted upon the person

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The particular franchises supposed to be usurped must be stated.

Conclusion of information.

Process.

Appearance.

When judgment can be signed.

The court never interfere with an information after it is granted.

STAY OF PROCEEDINGS.

Improper to move to quash by consent.

DISCLAIMER.

No objection that an information is a friendly proceeding.

Pleading as to part, and disclaiming as to part.

There must be separate informations, in order to permit each defendant to disclaim.

(1) *Rex v. Blagden*, Gilb. Rep. 145.

(2) *Gude's Cro. Prac.* 160. Tancred on *quo warranto*, 278.

(3) *Rex v. Brown*, 4 T. R. 276. *Rex v.atham*, 3 Burr. 1485., *sed vide ante*, 2435 2438.

(4) *Rex v. Cousins*, 7 A. & E. 285. It is ordered (Ibid.) that the rule *nisi* for staying proceedings as above mentioned should be now discharged, "the prosecutor

hereby undertaking to file an information in one of these prosecutions only, and to proceed to trial on such one information only, until the further order of this court."

(5) *Rex v. Brickell*, 4 Burr. 2297. *Rex v. Edgar*, *ibid*.

(6) *Rex v. Marshall*, 2 Chitt. 370.

(7) *Rex v. Holt*, *ibid*. 366.

(8) Co. Entr. 529. (b.) Com. Dig. Quo Warranto (C.), 4.

AFFIDAVIT —
RULE NISI, &c.

In cases of disclaimer, a judgment of ouster is awarded.

who had usurped the franchise ; for the court could not set a fine for the usurpation unless there was such a disclaimer (1) ; but one information can alone be tried, and the rest suspended upon an undertaking of the other parties to disclaim, according to the event of the trial (2) ; and a judgment of ouster is always awarded in cases of disclaimer, the entry of which is as follows :—“ Upon which the said plea of the said &c. in form aforesaid pleaded, and all and singular the premises being seen, and by the court here understood, it is considered that the said &c. aforesaid, with and in the liberties, privileges, and franchises aforesaid, and with and in any of them, in the said information specified, do in no way intermeddle, but from the same, and from each of them, be altogether excluded.”

THE PLEADINGS.

Stat. 9 Anne, c. 20. s. 4.

7. THE PLEADINGS.

By stat. 9 Anne, c. 20. s. 4. “ those against whom an information by virtue of that act shall be sued and prosecuted, shall appear and plead as of the same term or sessions in which the said information shall be filed, unless the court where such information shall be filed, shall give further time to such person or persons, against whom such information shall be exhibited to plead.” (3)

Stat. 32 Geo. 3. c. 58. s. 1.

By stat. 32. Geo. 3. c. 58. s. 1. “ the defendant to any information in the nature of a *quo warranto* for the exercise of any office or franchise in any city, borough, or town corporate, can plead that he had first actually taken upon himself, or held, or executed the office or franchise which is the subject of such information, six years or more before the exhibiting of such information, &c. ; ” “ which plea shall and may be pleaded, either singly, or together with and besides such plea, as he might have lawfully pleaded before the passing of this act, or such several pleas as the court on motion shall allow.”

By section 2. the prosecutor can reply a forfeiture, surrender, or avoidance by the defendant, of the office or franchise happening within six years before the exhibiting the information.

Pleading double.

Under this statute the defendant can plead double : thus, in *Rex v. Autridge* (4), the defendant to an information calling on him to shew by what authority he exercised the office of a free burgess of Launceston, having under the common rule to plead several matters pleaded two prescriptive titles in two separate pleas. An application was made to strike out one of the pleas, because stat. 32 Geo. 3. c. 58., which for the first time enabled a defendant in certain cases to plead several pleas to an information in nature of *quo warranto*, only extended to cases where defendant pleaded that he had holden the office for six years ; when, and when only, he may plead other pleas : — upon which Lord Kenyon said, “ that the statute ought not to receive so narrow a construction ; for that the legislature

(1) *Rex v. Powell, Sayer*, 239. *Rex v. Warlow*, 2 M. & S. 75.

(2) *Ibid.*

(3) The time to plead is thus regulated : after defendant has appeared, two four-day rules to plead must be given ; after the ex-

piration of the last, a peremptory rule to plead must be moved for in term, otherwise the defendant has until the next term to plead. *Rex v. Gincer*, 6 T. R. 594.

(4) 8 T. R. 467.

intended to give a defendant in such a proceeding the liberty of pleading several pleas, whether with or without the plea of the Statute of Limitations, the concluding words in the act being, 'or such several pleas as the court on motion shall allow.'"

It is only to informations within stat. 9 Anne, c. 20. that stat. 32 Geo. 3. c. 58. applies; and consequently, it is only in the cases of corporate offices that the defendant can plead double, for to such offices the provisions of stat. 9 Anne, c. 20. are confined. (1)

To enable a man to defend himself against a *quo warranto*, he must, as far as regards the quality of his estate, have a frank tenement; for being a writ of right in its nature, it must be answered in chief, which a copyholder, by reason of the baseness and exility of his estate, is unable to do; and if a *quo warranto* be brought against a tenant for years in a manor, to shew by what authority he held a court baron, he must pray aid of his lessor, otherwise, if he plead in defence, he will be ousted of his liberty by judgment. (2)

Where the information is general, the claim may be so likewise (3):—but a plea stating, that the defendant was put into possession by a *mandamus* without setting out any title by election, is bad. (4)

To an information, a defendant is not allowed to plead a general issue, such as not guilty, or *non usurpavit*.

A *quo warranto* is in the nature of a writ of right; it contains two things in itself, a claim and an usurpation, and the defendant must justify or disclaim. If there have been an user of a franchise, the authority for such user must be shewn; an usurpation is not a matter of fact but of law, because it consists not simply in the use of a liberty, but in the use of it without right or title. (5)

If the defendant disclaim, and deny having used the franchise, issue may be taken on the user; because, if he have used the franchise, that user must have been an usurpation, and by establishing the user the whole charge will be proved.

But where the defendant states his title, the usurpation is only a matter of consequence; it depends upon the nature of the claim; user is confessed because it is justified; if the justification be proved, it is no usurpation; if it fail, then is the usurpation established, because there will appear an user without a lawful warrant. (6)

If the defendant's plea be insufficient, it amounts to a confession of the usurpation. (7)

If the defendant plead in bar, he must shew his title to the particular office or franchise which he is charged with usurping; and it is a general rule, that, in *quo warranto*, a defendant ought to shew a full and perfect title in himself. (8)

The defendant may plead in abatement of the information; but the plea

It is only to informations within stat. 9 Anne, c. 20., that stat. 32 Geo. 3. c. 58. applies.

Defendant must, as far as regards the quality of his estate, have a frank tenement.

Where the information is general, the claim may be so likewise. Insufficient statement of a title by *mandamus*. General issue cannot be pleaded.

When defendant disclaims and denies having used the franchise.

Effect of insufficient plea.

Plea in bar.

Plea in abatement.

(1) *Rez v. Richardson*, 9 East, 469. *Rez v. Highmore*, 5 B. & A. 771.

(2) *Rez v. Staperton*, Yelv. 190. Bro. Abr. *Quo Warranto* (pl. 1.).

(3) *Rez v. Maidenhead (Corporation of)*, Palm. 81, 82.

(4) *Regina v. Darley*, 2 Jebb & Symes (Irish), 611.

(5) *Sir Gervase Clifton's case*, 3 Leon. 184. 4 *ibid.* 199. *Regina v. Blagden*, 10 Mod. 298.

(6) *Tancred on Quo Warranto*, 308, 309.

(7) *Rez v. Philips*, Str. 394.

(8) *Le case del Abbot of Strata Mercella*, 9 Co. 24. *Rez v. Leigh*, 4 Burr. 2146. *Rez v. Birch*, 4 T. R. 608.

THE PLEADINGS.

Change of name in corporation.

will be set aside, if the affidavit which must be annexed to the plea be not properly entitled. (1)

If a corporation having franchises or privileges by grant or prescription, be afterwards incorporated by another name, as if they were "bailiffs and burgesses," and then become "mayor and commonalty;" or "prior and convent," and afterwards be translated into a "dean and chapter;" and the quality and name of the corporation be thus altered and changed, yet the new body will enjoy all the franchises, &c. which the old corporation had, either by grant or prescription. (2) They cannot claim franchises lying in prescription by a name received within time of memory, but must do so by their ancient name, until such a time (when it was changed), and then by their new name; and should also shew how the name was changed. (3)

The same patent should not be pleaded in the same plea as a grant and confirmation.

The same patent cannot be pleaded in the same plea as a grant and confirmation, because it would be bad on demurrer for duplicity. (4)

Where a charter directed, that elections should take place in such manner as was used before a former charter, a plea alleging, that, before this last charter, the mayor, &c. used to elect, except at those times when there was any bye-law to regulate the mode of elections, was held bad for uncertainty. The defendant should have shewn distinctly in his plea, what was the usage in fact, that the other party might know on what precise ground to go down to trial. (5)

The nature of the franchise claimed must be attended to, some franchises lying in prescription and others in charter. Any thing which may be claimed without matter of record may be claimed by prescription; as the privilege of being a county palatine (6), or a corporation *tenere placito*, or of having treasure trove, waifs, and estrays, wreck of the sea, a court leet, and other courts, &c.

Chartered franchises and liberties.

"But franchises and liberties which cannot be seized before the cause of forfeiture appears upon record, cannot be claimed by prescription," but are to be allowed by force and effect of a charter: of such a nature are the franchises to have *bona et catalla proditorum felonum, felonum de se, fugitivorum, &c.*; to have consuance of pleas, deodands, and various others. (7)

Prescriptive franchises.

All franchises have been granted either before or after the time of memory; if before the time of memory, they must be claimed by prescription, and the party claiming them must prescribe; and for such as lie in grant, they must be claimed by charter of confirmation under the great seal, granted within memory, or allowance in eyre (8), or allowance in the King's Bench; and in some cases before the justices in the Common Pleas and in the Exchequer; and by such proofs, the claim may be supported without shewing the charter granted before time of memory. (9)

Prescriptive

"If a man has franchises by prescription, and the king grants the same

(1) *Rex v. Jones*, Str. 1161.

(2) *Luttrell's case*, 4 Co. 87. (b.) *Haddock's case*, Sir T. Raym. 435.

(3) *Mellor v. Spateman*, 1 Saund. 339. Bro. Abr. Prescription (pl. 70.).

(4) *Rex v. Trinity House*, 1 Sid. 86.

(5) *Rex v. Birch*, 4 T. R. 608.

(6) Com. Dig. Franchise (D.), 4. 7. Co. Litt. 114. (b.)

(7) Co. Litt. 114. 2 Inst. 281. *Foxley's*

case, 5 Co. 109. (b.) *Le case del Abbot de Strata Mercella*, 9 ibid. 24. Com. Dig. Franchise (A. 1, 2.).

(8) *Rex v. Briggs*, 2 Bulst. 297.

(9) Tancred on Quo Warranto, 288. Bro. Abr. Prescription (M.), 4, 5, 6. *Foster v. Mitton*, 1 Salk. 183. *James v. Trollop*, Skin. 51. 239. *Le case del Abbot de Strata Mercella*, 9 Co. 28. (a.)

liberties to him by charter, he cannot afterwards claim them by prescription." (1)

In one plea the defendant may rely upon an election under a custom; and in another, upon an election under a bye-law: in one and the same plea he may aver, that the corporation is by prescription and also by charter, under various names of incorporation; and that his election took place under a bye-law made, not by virtue of the charter, but by the whole body by their prescriptive name and title. (2)

As a charter has its binding efficacy from its acceptance by the body to which it is addressed, the fact of the due acceptance is always expressly averred (3); but under the Municipal Corporation Act such averment need not be made, because it is compulsory.

If an election have taken place, not on the day appointed by charter or usage, but on the day following, pursuant to the directions of stat. 11 Geo. 1. c. 4., or 7 Will. 4. & 1 Vict. c. 78., the fact, that no election did take place must be alleged; that the proper persons assembled by virtue of the statute; that the mayor, bailiff, or other proper officer attended and presided; or that, being absent, the person having a right to vote being the nearest then present in place or office, held the court, presided at the meeting, and proceeded to make the election.

If the election be conducted by the authority of a *mandamus*, issued by virtue of stat. 11 Geo. 1. c. 4., or by stat. 7 Will. 4. & 1 Vict. c. 78., the plea (4) must negative the fact of any election on the day appointed by statute, charter, or usage; or on the day following, under the first section of the statute: it must be likewise averred, that the *mandamus* issued, the mandatory part of which must be set out, and that the writ was delivered to the proper officer of the corporation.

The plea then alleges, that notice in writing of the day and time of election was, by the person appointed by the court, affixed at the proper place by the space of six days (this being the length of time during which public notice is required by the act to be given, when a corporation proceeds to an election under a *mandamus*); and that afterwards the election came on. The day and the time of taking the election must then be specified, and the circumstances of the election and swearing in, that the court may judge whether the provisions of the statute have been complied with; and the plea should conclude with an averment, that the defendant was thereupon "then and there duly admitted to the execution of the office, according to the said statute."

The plea in bar after title made concludes with a general traverse, "without this, that he did or doth usurp upon our said lord the king, the said office, liberties, privileges, and franchises, in manner and form as by the said information is above supposed."

If the defendant have pleaded and shewn a title, the crown cannot take issue on the general traverse, but the title must be answered. (5)

A prosecutor in a *quo warranto* information is allowed to reply specially, and to put as many matters in issue as he pleases; "but the new matter

THE PLEADING.

title will be destroyed by the grant of a charter.

Defendant may rely upon an election under custom, and upon an election under a bye-law.

Acceptance of charter should be averred.

Election under stats. 11 Geo. 1. c. 4. and 7 Will. 4. & 1 Vict. c. 78.

Conclusion of plea.

When statement of title must be answered.

Prosecutor al-

(1) Com. Dig. Prescription (G.).

(2) *Rex v. Westwood*, 4 B. & C. 781.

(3) *Ibid.* 791. *Rex v. Barzey*, 4 M. & S.

(4) *Rex v. Saltash (Mayor of)*, 2 Gude's

Cro. Prac. 296.

(5) Tancered on Quo Warranto, 308.

**THE PLEAD-
INGS.**

lowed to reply specially, and to put as many matters in issue as he pleases, if consistent with the plea.

introduced in the replication, ought to be consistent with the matter contained in the plea. If, for instance, a defendant set up a bad title under an old charter, when, in fact, a new charter has been granted, altering the old mode of election, the crown may introduce the new charter in the replication, because it is consistent with the matter contained in the plea, but there is something to be superadded to that matter." (1)

And where the defendant demurred to the prosecutor's replication, and it appeared that the plea was defective, it was holden, that the replication being unanswered, it was an answer to the plea. (2)

Where demurrer will be wrong in being applied to the general as well as to the special replications.

An information was brought against a defendant for usurping the office of bailiff of a borough; to the plea of the defendant, shewing the nature of the office and the manner of his appointment, there were sixteen general replications by the crown traversing the several facts stated as inducement in the defendant's plea, and thirty special replications setting up various customs as to the election and appointment of the bailiff, and there was a general demurrer to the whole. The court, though inclined to think the special replications bad, because they neither confessed and avoided, nor denied the mode of appointment stated in the pleas, yet were clearly of opinion, that the demurrer was wrong in being applied to the general as well as to the special replications, and that therefore there must be judgment for the crown. (3)

A material fact must be denied.

It is a fundamental principle of pleading, applicable to replications as well as to pleas, that some material fact in the adversary's pleading should be selected, and that it should be expressly confessed and avoided or denied. (4)

Amendment of plea.

After a demurrer by the king to a plea to an information, the party, before he has joined in demurrer, may by leave of the court amend his plea, because all is in paper; and though it has been doubted, whether he can so amend, after having joined in demurrer (5), yet it seems, that the court upon the production of proper affidavits, will allow amendments to be made on the pleadings, although a demurrer may have been joined, and even after argument. (6)

After trial the judgment must follow the title set up.

But after trial, if the title upon which the defendant relied be found against him, the judgment must follow the title set up; and judgment cannot be arrested, and a replader awarded, although it should appear upon the whole record, that the defendant has a good title to his office.

There is a distinction between a civil action and an information: in the former, if the plaintiff have no cause of action, he cannot have judgment; in the latter, the king has no need to traverse any thing but the title set up; and if the defendant fail in it, or in any link of it, judgment must be given against him. (7)

(1) *Per Buller J. in Rex v. Knight*, 4 T. R. 424.

(2) *Rex v. Smith*, 2 M. & S. 583.

(3) *Rex v. M^r Kay*, 4 B. & C. 351.

(4) *Tancred on Quo Warranto*, 315. *Rex v. Hughes*, 4 B. & C. 368.

(5) *Rex v. Trinity House*, 1 Keb. 137. 1 Sid. 54.

(6) *Rex v. Ellames*, 2 Barnard. 445. Str. 976. C. T. H. 42. 7 Mod. 223. *Rex v. Armstrong*, Andr. 109. *Rex v. Philips*, 1 Burr. 292. *Rex v. Greet*, 8 B. & C. 370.

Rex v. Blatchford, 4 Burr. 2147. *Rex v. Birch*, 4 T. R. 610.

(7) *Rex v. Leigh*, 4 Burr. 2143. *Tancred on Quo Warranto*, 320.

8. EVIDENCE.

EVIDENCE.

Evidence to prove the existence of a particular franchise is either direct or presumptive. *Direct* evidence consists in the production of the letters patent or charter, by which it is created, from the proper place of deposit.

Proof of franchise is either direct or presumptive.

The fact also admits of proof, and is constantly proved, in the absence of direct evidence, by evidence of prescription, or of constant usage, from which a title by prescription or grant may be presumed; because the proof of an ancient grant, without date, does not necessarily destroy a right claimed by prescription, for the grant may have been before the time of legal memory, or in confirmation of a prior grant. (1)

To facilitate the proof of the title of those who hold under letters patent, it is enacted by stat. 3 & 4 Edw. 6. c. 4. and by stat. 13 Eliz. c. 6. that all patentees, or those claiming under the title of patentees any estate in or to lands, tenements, and hereditaments, or in or to any other thing whatsoever, by letters patent granted since February 4. 27 Hen. 8., or at any time thereafter to be granted, should convey to themselves such claim or title, as well against the king as against every other person, by shewing forth an exemplification or *constat* under the great seal of England of the enrolment of the letters patent, as if the same letters patent were pleaded and set forth. (2)

Title under letters patent. Stat. 3 & 4 Edw. 6. c. 4. and stat. 13 Eliz. c. 6.

A judgment of ouster is not only admissible but also conclusive evidence against a third person, unless it can be impeached for fraud. (3)

Judgment of ouster.

Where the defendant made title to the office of bailiff, from an election under the bailiffship of Batty and Armstrong, and an issue was joined, whether they were bailiffs or not—the record of the judgment of ouster against them was held to be evidence. (4)

It has been said, that “where there has been a judgment of ouster, he [the ousted] is no longer in possession of the office,” and that this was the reason why such judgment was admissible in evidence in an information against the elected; but that, “when a person is in possession of the office, his title cannot be thus questioned.” (5)

In a subsequent case (6), an issue being raised upon the record, that the presiding officer at the defendant's election was not then mayor, the title of that officer, whether mayor *de jure* as well as *de facto*, was held to be put in issue; evidence to impeach it was considered admissible, though no judgment of ouster had been actually obtained; and it having been shewn, that the presiding officer was himself not duly elected, there was judgment against the defendant at whose election such defective officer had presided as mayor.

Oyer is not in strictness demandable of any record (7); and it has been

Oyer is not de-

(1) *Addington v. Clode*, 2 W. Black. 989.
3 Stark. Ev. 946. 3d ed.

(6) *Rex v. Smith*, 5 M. & S. 271.

(2) Vide Co. Litt. 225. (b.) *Hall's case*, 5 Co. 53.

(7) The reason seems to be, because the party pleading has not the custody of it. Bro. Abr. Oyer de Records, 8. *Jevens v. Harridge*, 1 Saund. 8. (b.) *Wymark's case*, 5 Co. 74. (a.) *Dr. Leyfield's case*, 10 ibid.

(3) *Rex v. York (Mayor of)*, 5 T. R. 72.

(4) *Rex v. Hebden*, Str. 1109.

(5) *Per Holroyd J. in Rex v. Hughes*, 4 B. & C. 379.

92. (a.) *Rex v. Philips*, Str. 394.

- EVIDENCE.** expressly decided, that where a defendant deduces his title under a charter, he is not bound to make *profert* of it; and if he do so, the prosecutor is not entitled to oyer. (1)
- mandable of any record. If there be no letters patent enrolled in Chancery, that "might be a ground to come to the court of King's Bench to apply for a copy of them; but that must be made by affidavit." (2)
- Letters patent enrolled in Chancery.
- Acceptance of a charter. In general, the acceptance of a charter is proved by evidence of acting under it; and that is evidence in the case of a new as well as of an old charter; or it may be shewn by proving a vote to that effect passed at a public meeting, by a public declaration, or any other unequivocal act. (3)
- Charter cannot be accepted partially. And where a new charter is granted to an old corporation, the corporation may accept it as a grant, or as a compensation; and if they make their elections according to the method prescribed by the new charter, it is evidence of their consent to accept it as a grant. (4)
- Corporation books. Evidence of a partial acceptance of a charter is not admissible. (5)
- So the acceptance by each individual of his particular franchise must be shewn; for the crown cannot oblige a man to be a corporator against his consent; but in laying the foundation for the information by applying for the rule *nisi*, an user of the franchise must be alleged, and proof of the user at the trial will be proof of the acceptance. (6)
- The corporation books are the proper records of the transactions of the body, for the purpose of proving the election, swearing in, admission, disfranchisement, and restoration of particular members of the body. (7)
- Corporation books are generally allowed to be given in evidence, when they have been publicly kept as such, and the entries made by the proper officers. (8)
- Corporation books being of a public nature, examined copies of the entries therein may also be given in evidence, and consequently the court will not enforce the production of the original books (9), unless it appear necessary, that they should be inspected on account of a rasure, new entry, or the like, which must be verified by affidavit.
- An entry in the public books of a corporation is not evidence for them (10), unless it be an entry of a public nature.
- The deed of a corporation cannot be given in evidence, without some evidence, that the seal affixed to it, is the seal of the corporation.
- Bye-laws. If a bye-law be pleaded and issue taken thereon, proof that from the time of the supposed bye-law the usage of elections has been according to such supposed law, affords presumptive evidence, that there was such a law, although it cannot be produced. (11)
- Usage, evidence of a bye-law. Usage is evidence of a bye-law not extant, whether it did really once exist, or is only supposed to have existed, to account for and give a legal origin to

(1) *Rex v. Amery*, 1 T. R. 149.(2) *Per Buller J. ibid.* 150.(3) *Rex v. Hughes*, 7 B. & C. 708.(4) *Rex v. Larwood*, 1 Salk. 167.(5) *Rex v. Westwood*, 4 B. & C. 781. 7 Bing. 1.(6) *Rex v. Ashew*, 4 Burr. 2200.(7) *Symmers v. Regem*, Cowp. 489.(8) *Rex v. Mothersell*, Str. 93.(9) *Brocas v. London (Mayor of)*, *ibid.* 307.(10) *Marriage v. Lawrence*, 3 B. & A. 142.(11) *Le case de Corporations*, 4 Co. 78. *Hull (Mayor of) v. Horner*, Cowp. 110. *Rex v. Tomlyn*, C. T. H. 316.

the usage (1); and sixty years' user has been considered ample evidence of a bye-law. (2)

EVIDENCE.

As a general principle, an inspection of documents for the purposes of evidence is never granted in criminal cases, because no one can be called upon to produce evidence against himself (3); but "informations, &c." not being considered of a criminal character, are exempted from the application of this rule.

INSPECTION OF
RECORDS AND
DOCUMENTS.

In order to obtain an inspection of public records, or of court rolls, or of corporation records, or of books or papers in the custody of other persons an application can be made to the court for a "*mandamus*" (4); or where there is a cause in court, for a rule. (5)

But to give charters or corporation books a public character, it must appear, as previously observed, if they be questioned, that they have been publicly kept, and that the entries have been made by proper officers; not but that entries made by other persons may be good, if the town clerk be sick, or refuse to attend, which however must be proved. (6)

Stat. 5 & 6 Will. 4. c. 76. s. 35. directs, that when councillors are elected, "the mayor shall cause the voting papers to be kept in the office of the town clerk during six calendar months at the least after every such election; and the town clerk shall permit any burgess to inspect the voting papers of any year on payment of 1s. for every search;" and by the foregoing statute it seems, that the town clerk cannot be compelled to allow two burgesses at once to inspect the voting papers deposited with him after an election of town councillors, or to give more than one of the papers to one person at the same time; but that the town clerk is bound to allow any burgess, who brings a list of his own, to compare it with the papers which are produced as the voting papers, and to make extracts therefrom. (7)

Stat. 5 & 6
Will. 4. c. 76.
s. 35.

In *Regina v. Ledgard* (8), where papers, purporting to be voting papers given in at the election, were produced from the town clerk's office, who had been elected town clerk some days after the election, but had not received the voting papers in the first instance, although they had been delivered to him shortly after his own appointment:—It was held, that, under stat. 5 & 6 Will. 4. c. 76. s. 35., the papers were not sufficiently identified to be evidence of the votes given; Lord Denman observing, "Stat. 5 & 6 Will. 4. c. 76. s. 35. makes the custody of the town clerk the proper custody; and this, it is said, makes the fact of the custody evidence as to the identity of the voting papers. I think that is not so; and that we

Judgment of
Lord Denman
in *Regina v.*
Ledgard.

(1) *Le case de Corporations*, 4 Co. 77. (b.) *Merewether and Stephens's Hist. of Boroughs*, 2238—2250. Bull. N. P. 211. (a.) *Rez v. Head*, 4 Burr. 2518. *Rez v. Ashwell*, 12 East, 22. *Rez v. Bird*, 19 *ibid.* 367. *Rez v. Westwood*, 4 B. & C. 781. 7 Bing. 1.

(2) *Perkin v. Cutlers' Comp. (Master of)*, 21 Serjeant Hill's MS. Lincoln's Inn Library, 65., *vide* stat. 3 & 4 Will. 4. c. 42. ss. 26, 27., by which an objection to a witness, solely on the ground of the verdict or judgment being pronounced for or against him, is removed; *anté*, 1750—1758. tit. EVIDENCE.

(3) *Rez v. Purnell*, 1 W. Black. 37. 1

Wils. 239. *Crew, q. t. v. Saunders*, Str. 1005. 1223. *Whitaker v. Isod*, 2 Taunt. 115. 12

Vin. Abr. Evidence, 146. [F. b.].

(4) *Rez v. Lucas*, 10 East, 235.

(5) Tidd, 594—596. *Rez v. Newcastle (Hostmen of)*, Str. 1223. *Rez v. Babb*, 3 T. R. 579.

(6) *Rez v. Mothersell*, Str. 93. *Brocas v. London (Mayor of)*, *ibid.* 307., *vide etiam Rez v. Christchurch (Mayor of)*, *ibid.* 401. Tancered on Quo Warranto, 334., *vide anté*, 1688. tit. EVIDENCE.

(7) *Rez v. Arnold*, 4 A. & E. 657.

(8) 8 *ibid.* 535.

EVIDENCE.

cannot engraft so much upon the words of the section, as to hold, that this is any evidence at all, without some further proof. We will not suppose any fraud. Had the town clerk done any thing, as, for instance, if he had made up the whole poll, perhaps some ground might have been laid for the argument; but it is too much to say, that when the papers are produced to shew the whole poll, they are sufficiently identified by the custody. I doubt whether the mere custody makes them evidence at all; for the consigning them to the town clerk's custody, which is what the act does, is very different from making them public documents. I think, therefore, that the evidence was improperly admitted, and that there must be a new trial."

Leave to inspect will be granted before issue joined.

As a general principle, the court will not grant "leave to inspect" before issue joined, for till then it does not appear, whether an inspection is necessary (1); but this rule does not apply to "informations, &c."

In *Rex v. Hollister* (2), where a rule had been granted to shew cause why an information should not go against the defendant, and the common rule to inspect the charter and corporation books had been moved for, Lord Hardwicke said, "I think we have done it of late upon a rule to shew cause. Take it."

In *Rex v. Surry (Justices of)* (3) the court drew a distinction between a *mandamus* and an information by stating, that, in the case of the former, "the court will not make a rule for the prosecutor to inspect and take copies of books and records until the rule is made absolute, and a return is made to the *mandamus*;" but, "that if a rule be made to shew cause, why an information should not be filed, the court will make a rule for the prosecutor to inspect and take copies of books and records, as soon as the rule to shew cause is made."

So in *Rex v. Shelley* (4) inspection was allowed before the rule for the information was made absolute; and in *Rex v. Babb* (5) the rule for inspection was obtained after the rule *nisi* for the information, Mr. Justice Ashhurst observing, "There does not appear to be any reason why we should grant a rule for inspection, till the rule for the *quo warranto* information is made absolute;" implying, that whatever might be the reason or the want of it, the practice had been otherwise, and the rule was discharged upon the merits.

A legal title may be presumed from user.

A legal title to a franchise may be presumed from user, although it be clear, that the title is not prescriptive; for notwithstanding the maxim, *nul-lum tempus occurrit regi*, a grant from the crown may be presumed from long continued enjoyment (6), even against the crown, as to a claim of right; still less would such an objection operate against the presumption of the grant of a franchise from the crown, where the grant was not inconsistent with the rights of the crown, but rather shewed a beneficial exercise of the royal authority for the benefit of the subject.

Usage for twenty years is evidence of an immemorial custom.

A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding an immemorial custom. (7)

Usage to explain the words of a charter is admissible, whether it appear

Usage explana-

(1) *Hodges v. Athis*, 3 Wils. 398. *Groenvelt v. Burrell*, 1 Ld. Raym. 253. Carth. 421.

(2) C. T. H. 245.

(3) *Sayer*, 145.

(4) 3 T. R. 141.

(5) *Ibid.* 579.

(6) *Rex v. Carpenter*, 2 Show. 48. *Bidulph v. Ather*, 2 Wils. 23.

(7) *Rex v. Joliffe*, 2 B. & C. 54.

in the shape of evidence, or upon the face of the affidavits or the pleadings. (1) Its office is to explain merely, and it cannot be received to contradict the words of a charter, this being the restriction under which parol evidence is in any case admitted to expound a written instrument. Whether, in a particular case, it be of this character or not, is a question for the court. (2)

EVIDENCE.
tory of the words of a charter.

Usage is the proper evidence upon which a prescription is to be established; but where a title to an office was founded upon a charter within memory, and usage was stated in the plea and denied in the replication, and on the trial the issue was found for the king, it was held to be an immaterial issue which had been joined, and was rejected as such by the court. (3)

Proof of a larger custom than that alleged, will not be fatal as a variance. (4)

Proof of a larger custom than that alleged.

In *Rex v. Rowland* (5) the plea alleged, that a court leet was holden immemorially, part in the morning and part in the evening, and that the custom had been to elect the mayor at the morning court, and that he had been accustomed to be sworn in at the evening court by the steward or his deputy, issue having been taken on the mode of election, and also on the mayor being duly sworn, it appeared at the trial it had been also the custom for the leet jury to present in writing the candidates who had most votes at the morning court, but that they had no control over the poll:—It was held, that this was merely a ministerial act on their part, and that it needed not to be alleged as part of the custom.

For usurping an office upon the crown, the crown can take what issues it thinks proper to shew such usurpation; and there is no instance of precluding the crown from insisting upon any objection it should be advised to take issue upon, in order to show that the defendant had usurped the franchise. (6)

The crown can select any of the issues to shew an usurpation.

Where issue is taken upon the fact, whether A. B. was mayor at the time of the defendant's election, the question, whether he was mayor *de jure*, is put in issue; and evidence is admissible to show, that he was not mayor *de jure*, notwithstanding he was mayor *de facto*. (7)

Impeachment of official title.

Although it be held in general, that the person elected must take upon himself to support the right and title of his electors (8), yet for convenience, a distinction has been made in cases, where the right of election depends upon corporate franchises.

It has been said to be a general rule founded on principles of justice and convenience, that upon a *quo warranto* against particular members, the prosecutor cannot go into evidence to impeach the titles of other corporators *de facto*, being electors.

If in proving a custom it appear from the evidence, that, in addition to the custom stated upon the record, an act merely ministerial is to be done, his will not be considered as a material variance between the allegation and

When it appears that in addition to the custom stated

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| (1) <i>Rex v. Philips</i> , Str. 394. | <i>Trevesbury (Bailiff of) v. Bricknell</i> , 1 Taunt. 142. |
| (2) <i>Rex v. Osbourne</i> , 4 East, 327. <i>Rex v. Fleet</i> , 8 B. & C. 363. <i>Rex v. Heath</i> , 1 Barnard. 416. <i>Rex v. Miller</i> , 6 T. R. 268. | (5) 3 B. & A. 130. |
| (3) <i>Rex v. Philips</i> , Str. 394. | (6) <i>Rex v. Latham</i> , 3 Burr. 1485. |
| (4) <i>Moore's case</i> , 17 Howell's St. Tr. 914. | (7) <i>Rex v. Smith</i> , 5 M. & S. 271., vide etiam <i>Rex v. Lisle</i> , Str. 1090. Andr. 163. |
| | (8) <i>Symmers v. Regem</i> , Cowp. 489. |

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on the record, an act merely ministerial is to be done.

Acting as a town councillor under stat. 5 & 6 Will. 4. c. 76. s. 50.

proof; nor will it be held necessary, that this ministerial fact should appear upon the face of the plea. (1)

An information in the nature of a *quo warranto* will be granted against a party for claiming to be a councillor of a borough, on an affidavit, that he has taken upon himself the office, and acted in that capacity, and has been seen present at meetings of the council, acting as a councillor, though the nature of the acceptance or acting be not further specified, and though it be not stated, that he has made the declaration under stat. 5 & 6 Will. 4. c. 76. s. 50. (2)

On trial of a *quo warranto* information for exercising the office of councillor for a ward having nine, the issue being, whether defendant was duly elected, the prosecutor's case was, that nine other candidates at the election had a majority over the defendant:—It was held, that the prosecutor was not bound to prove in the first instance, that the nine were qualified to be councillors, but might make a case, by shewing simply, that they had the actual majority. (3)

Competency of witness.

Under stat. 5 & 6 Will. 4. c. 76. no person for any offence under that statute will be rendered incompetent in consequence of contribution to the borough fund, or being a member of the body corporate.

Persons who have executed offices in corporations, have been considered competent to prove what they did, when they were in office, and what has been usually done in their time, although in such cases these officers were liable to be punished by information, in consequence of the custom not warranting their acts. (4)

Such testimony is admissible on the ground of necessity; for although when unlawful acts are done in a corporate assembly, the whole assembly are liable to be punished by information, yet there would be no evidence as to such acts, if the persons who were present at such assemblies were not allowed as good witnesses.

When two qualifications concur to render a man eligible, a person who has but one is a competent witness.

Where two qualifications must concur to render a man eligible to an office in a corporation, he who has but one, is a good witness respecting the right. As where to be a common councilman of Appleby, it was necessary, that a man should have had a burgage tenure, and have been an inhabitant, yet, he who was an inhabitant but held no burgage tenure, was of necessity a good witness, for in effect he was a witness against himself. But he who had both those qualifications could not be called, because he would prove a right in himself, and in those who had his qualifications, exclusive of all others. (5)

Where separate informations of *quo warranto* are brought against several members of a corporation on the trial of one of the informations, the other parties are competent witnesses on behalf of the defendant. (6)

Neither was it held a valid objection at *Nisi Prius* to the competency of

(1) *Rex v. Rowland*, 3 B. & A. 130.

(2) *Regina v. Quayle*, 11 A. & E. 508.

(3) *Regina v. Ledgard*, 8 ibid. 535.

(4) *Rex v. Bray*, C. T. H. 358.

(5) *Stevenson v. Appleby (Mayor of)*, 2 Ld. Raym. 1353. Str. 583. *Hockley v. Lamb*, 1 Ld. Raym. 731. *Rex v. Robins*, Str. 1069., vide etiam *Shrewsbury (Carpenter of) v. Hayward*, Doug. 374. *Rex v. Phipps*, Bull. N. P. 289. (b.) *Rex v. London (Mayor of)*, 2 Lev. 231. *Rex v. Carpenter*, 2 Show. 47. *Tancred on Quo Warranto*, 363. *Enfield v. Hills*, 3 Lev. 236.

(6) *Rex v. Gray*, Selw. N. P. 1166. S. C. nom. *Rex v. Bray*, C. T. H. 358.

a witness who was town clerk, that he voted for the defendant by whom he was called. (1)

EVIDENCE.

Voting as an elector.

9. NEW TRIAL — COSTS — JUDGMENT — EXECUTION.

NEW TRIAL — COSTS — JUDGMENT — EXECUTION. NEW TRIAL

After a verdict for the prosecutor in an information, &c., a new trial can be obtained (2); and if the verdict be for the defendant, a new trial may be granted, because a *quo warranto* information is merely in the nature of a civil proceeding. (3)

In some cases where the merits have never been tried, from the defective state of the record, the court, after verdict, instead of granting a new trial, have awarded a repleader. (4)

The giving or withholding costs is, in most cases, regulated by stat. 4 & 5 Will. & M. c. 18. s. 2., by which "no information shall be filed till the prosecutor shall have entered into a recognisance in the penalty of 20*l.* that he will effectually prosecute such information, and abide by and observe such orders as the court shall direct;" "and in case the defendant shall appear and plead to issue, and the prosecutor shall not, within one whole year after issue joined, procure the same to be tried, or if upon such trial a verdict pass for the defendant, or the informer procure a *noli prosequi* to be entered, then in any of the said cases the court of King's Bench is authorised to award to the defendant his costs, unless the judge before whom such information shall be tried shall, at the trial of such information in open court, certify upon record 'that there was reasonable cause for exhibiting such information;' and in case the said informer shall not, within three months next after the said costs taxed, and demand made thereof, pay to the defendant the said costs, then the said defendant shall have the benefit of the said recognisance to compel him thereunto."

COSTS. Stat. 4 & 5 Will. & M. c. 18. s. 2.

To whatever sum the costs of the defendant may amount, he cannot on this statute have more than the amount of the recognisance; nor, on the application for an information, will the court compel the prosecutor to give security for the costs over and above the 20*l.* (5)

By stat. 9 Anne, c. 20. s. 5., "in case any person or persons against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively, as well to give judgment of ouster against such person or persons of and from any of the said offices or franchises, as to fine such person or persons respectively for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively, to give judgment, that the relator or relators in

Stat. 9 Anne, c. 20. s. 5.

(1) *Richard Elles's case*, 17 Howells's St. Tr. 827.

(2) *Rex v. Malden*, 4 Burr. 2135.

(3) *Rex v. Francis*, 2 T. R. 484. *Rex v. Poole*, C. T. H. 23. *Rex v. Malden*, 4 Burr. 2135. *Tancred on Quo Warranto*, 396.

(4) *Rex v. Carmarthen (Mayor of)*, 1 Burr. 292.

(5) *Rex v. Howell*, C. T. H. 247. *Rex v. Powell*, Str. 33. *Rex v. Morgan*, *ibid.* 1042. 2 Kyd on Corporations, 412. *Rex v. Filwood*, 2 T. R. 145.

**NEW TRIAL —
Costs — JUDG-
MENT — EXE-
CUTION.**

The power of awarding costs under stat. 9 Anne, c. 20. s. 5. only arises when the defendant has been adjudged guilty.

"In any of the said cases."

"Places" only apply to those previously enumerated.

"Other offices" mean offices *ejusdem generis*.

Limitation of costs under stat. 32 Geo. 3. c. 58. s. 1.

such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators, such costs to be levied in manner aforesaid."

The power of awarding costs under this statute arises only when the defendant has been adjudged guilty, or, when a judgment has passed in his favour, according to either of which results he is to pay or receive costs. (1)

Secondly, the statute does not extend to all cases of informations in nature of *quo warranto*, but only to such as have been exhibited in any of the "said cases" in any of the "said courts."

The grievance complained of in the preamble is stated to be, that "divers persons had of late illegally intruded themselves into, and had taken upon themselves to execute, the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs, and places within that part of Great Britain called England and Wales, &c."

It seems to have been the course of the crown office, from the period of the statute till 32 Geo. 3., to tax full costs in cases of informations for offices in boroughs sending members to parliament, but not incorporated, and in places neither incorporated, nor sending members to parliament. (2)

"The act is meant to extend to all officers of corporations as such, and, as far as relates to all the corporate rights of the burgesses and freemen, it is very legally, clearly, and correctly drawn; but it is not within the reason or meaning of the act, that it should extend generally to all offices or franchises exercised without authority from the crown, within a corporation. It was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party." (3)

"The word 'places' in the act extends only to offices in places of the same kind with those before enumerated, otherwise the legislature would have used only one compendious word, which would have included places of every denomination." (4)

"The terms 'other offices' must mean offices *ejusdem generis* with those before mentioned (in stat. 9 Anne, c. 20.), which are all corporate offices" (5); and consequently, where judgment had been given for the defendant on an information for using the office of registrar and clerk of the court of requests of Bristol, it was held, that he was not entitled to costs, because the office in question was not a corporate office. (6)

A similar limitation has been given to the provision for costs contained in stat. 32 Geo. 3. c. 58. s. 1., by which statute a defendant is enabled to plead, that he first actually held or executed the office or franchise which is the subject of such information six years or more before the exhibiting of

(1) Tancred on Quo Warranto, 388, 389.

(2) *Rex v. Wallis*, 5 T. R. 376. n. (a.) 2 Kyd on Corporations, 423. Tancred on Quo Warranto, 389.

(3) *Per* Lord Mansfield in *Rex v. Williams*, 1 Burr. 402. 1 W. Black. 93. *Rex v. Marsden*, 3 Burr. 1812.

(4) *Per* Lord Kenyon in *Rex v. Wallis*, 5 T. R. 375.

(5) *Per* Abbott C. J. in *Rex v. Hall*, 1 R. & C. 237., vide etiam *Rex v. Wallis*, 5 T. R. 375.

(6) *Ibid*.

such information; and if, upon the trial of such information, the issue be joined upon such plea, and found for the defendant, he will be entitled to judgment, and to such and the like costs as he would have been entitled to, if a verdict and judgment had been given for him upon the merits of his title. (1)

NEW TRIAL —
Costs — JUDG-
MENT — EXE-
CUTION.

If the grounds on which the information be prayed by the prosecutor appear frivolous and vexatious, the court will discharge the rule with costs. (2)

Vexatious pro-
ceedings.

And if the applicant have kept from the court evidence of usage with which he might have been furnished from the books of the corporation, the rule will be discharged with costs. (3)

Suppression of
evidence.

With respect to costs after verdict, where one material issue is found for the crown, on which judgment of ouster is given, the prosecutor is entitled to costs on all the issues, whatever number of them may have been found for the defendant. (4)

If when one ma-
terial issue be
found, the pro-
secutor enti-
tled to the
costs of those
upon which he
has failed.

The stat. 9 Anne, c. 20. s. 5. is imperative, and the court of Queen's Bench in giving judgment for the relator or defendant in an information under this statute is bound to give judgment, that they shall recover the costs of the prosecution or defence (5); and upon a writ of error, if the judgment of the court below be reversed, the court of error must give the same judgment as the court below was bound to have given. (6)

Stat. 9 Anne,
c. 20. s. 5. re-
specting costs
on inspection.

In one case it is stated to have been adjudged, that no costs can be recovered by reason of a writ of error brought upon a judgment of the Queen's Bench in an information. (7)

The court will not stay proceedings until the prosecutor gives security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. (8)

The judgment of ouster is final and absolute (9); but the judgment in a *quo warranto* may be good in part and bad in part. Thus, the judgment of ouster may be good as a common law judgment; but if it proceed and give costs in a case not within stat. 9 Anne, c. 20., it will be bad as to that part. (10)

JUDGMENT.

Judgment of
ouster is abso-
lute.

Judgment may
be good in
part, and bad
in part.

Judgment upon an information, &c. is either interlocutory and founded upon the non appearance or default of the defendant (11), or it is final when pronounced after his appearance and pleading, and when given upon the merits.

Judgment is
either inter-
locutory by
default, or final.

(1) *Rex v. Richardson*, 9 East, 469., *ante*, 2464. tit. PLEADINGS.

(2) *Rex v. Lewis*, 2 Burr. 780. *Rex v. Wardroper*, 4 *ibid.* 1963. *Rex v. Kemp*, 1 East, 46. *n.* *Rex v. Carpenter*, Str. 1039. *Rex v. Mortlock*, 3 T. R. 300. Tancred on Quo Warranto, 384.

(3) *Rex v. Hoyts*, 6 T. R. 430. *Rex v. Hughes*, 7 B. & C. 719. Tancred on Quo Warranto, 385.

(4) *Rex v. Downes*, 1 T. R. 453.

(5) *Rex v. Amery*, 1 Anst. 183. So in cases within stat. 4 & 5 Will. 3. c. 18., the court is bound to award costs to defendant; "for where a court is authorised by statute to do a matter of justice to the party, upon certain circumstances, it has no discretionary power of considering whether it ought to do it or

not, when a case appears to be within those circumstances." Hawk. P. C. b. ii. c. 26. s. 13. Tancred on Quo Warranto, 394.

(6) *Rex v. Amery*, 1 Anst. 183.

(7) *Rex v. Pender*, 2 Bro. P. C. 294. 22 Lords' Journ. 626. Tancred on Quo Warranto 400.

(8) *Rex v. Wynne (Bart.)*, 2 M. & S. 346.

(9) Tancred on Quo Warranto, 375.

(10) *Rex v. Williams*, 1 Burr. 409., *sed vide etiam Rex v. Ponsonby*, Sayer, 245.

(11) Upon judgment by *nil dicit* to an information, a *capiatur pro fine* issues, which is only interlocutory to bring the party in to receive the judgment of the court, and final judgment of ouster may afterwards be passed. *Regina v. Tyrrell*, 11 Mod. 235.

NEW TRIAL —
COSTS — JUDG-
MENT — EXE-
CUTION.

Seizure *quousque*.
Seizure.

Form of judgment depends more upon the nature of the franchise, than the title of the person usurping it.

Judgment under stat. 9 Anne, c. 20.

When the judgments must be several.

Forfeiture of the principal charter is the forfeiture of

The judgment of seizure *quousque* is an interlocutory judgment, and is required to be given by the Statute of Gloucester, 6 Edw. 1.

Where the defendant justifies, and fails in proving a title to the franchise, the judgment of the crown may be 1. of seizure; 2. of ouster; 3. of seizure and ouster.

The form of the judgment for the crown, when the title to a franchise has been tried upon an information, seems now to depend more upon the quality or nature of the franchise, than upon the defendant's having shewn a colour of title, or the want of it, to excuse his usurpation.

In *Rex v. London (Mayor of)* (1) Chief Justice Holt observed, "There are three sorts of liberties, — a liberty granted from the crown, which doth subsist in the crown; a liberty created *de novo*, and doth exist notwithstanding it be forfeited; and another that cannot exist but in the persons to whom it is granted.

"In the first, judgment to seize or oust is proper, for then it belongs to the crown; if the other be forfeited, judgment is for a seizure, and no more; for, notwithstanding the forfeiture, it exists in the crown: for the latter, judgment is proper to be given only for ouster, and that is the proper judgment."

The form of the judgment depends more upon the nature of the franchise, than upon the title of the person usurping it. (2)

Where the information is brought against individuals (or against a body by its corporate name) for claiming to be a corporation, a franchise which cannot subsist in the hands of the crown, the judgment ought to be that of ouster. (3)

In cases within stat. 9 Anne, c. 20., where a person against whom an information has been exhibited shall be found guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices, it shall be lawful for the said courts as well to give judgment of ouster as to fine such person for his usurpation.

When it is found by a jury that an usurpation has taken place, which continues to the time of the information, the proper judgment is that of seizure or ouster, notwithstanding other material issues have been found for the defendant. (4)

Where a *quo warranto*, or an information in the nature of it, is brought for several franchises, it is as several writs or several informations, to which there may be several pleas and several judgments; because the defendant may claim one franchise by one title, and another by another. (5)

Where several franchises are granted by the same charter, and one is subordinate and incident to another, the forfeiture of the principal is the forfeiture of the subordinate and incident; but when the franchises are

(1) *Rex v. London (Mayor of)*, 1 Show. 256. 4 Mod. 53. Skin. 293. 310.

(2) *Rex v. Staverton*, Yelv. 190. *Rex v. Stanton*, Cro. Jac. 259. *Rex v. London (Mayor of)*, 8 Howell's St. Tr. 1167.

(3) *Sir George Reynel's case*, 9 Co. 97. Co. Entr. 539. (b.) *Tancred on Quo Warranto*, 370—373.

(4) *Rex v. Penryn (Mayor of)*, Str. 582.

Rex v. Pindar, 8 Mod. 234. *Rex v. Bala*, 2 Ld. Raym. 1445. *Tancred on Quo Warranto*, 374. In *Rex v. Courtney* (9 East. 246.) the court said, "after diligent search we can find no precedent of a judgment of ouster *quousque* upon the files of this court."

(5) *Case of the Dublin Corporation*, Palm. 7, 8. 2 Kyd on Corporations, 410.

independent, and the one may stand without the other, the forfeiture of the one is not the forfeiture of the other. (1)

The judgment in a *quo warranto* was final, for it was in the nature of a writ of right. (2) And therefore, if judgment be against the king, the king will be for ever bound as to the thing adjudged. (3) So, if judgment be against the king upon a confession by the attorney general, it can never afterwards be examined for a matter in fact; for as to the fact it is conclusive, though not as to the law. (4)

But the judgment in an information is said not to be final (5), nor to an information can there be a judgment of *misericordia*; and where such a judgment had been entered instead of the *capiatur pro fine*, it was reversed. (6)

Upon a judgment of seizure, a writ to execute the judgment has in many cases issued. (7)

In *Rex v. London (Mayor of)* (8), in answer to Treby's argument, that a writ ought to issue to execute the judgment, it was agreed, that sometimes there had been writs of seisin, but that was where the things taken into the king's hands were of profit to him; that the writ was "*ita quod de proficiis respondeant*," which shewed the reason of it. And in the same case Chief Justice Holt observed, "There needs no writ of execution; for in a *quare impedit*, if judgment be against the incumbent, the patron presented without any more ado; and then, if the judgment did not seise the corporation into the king's hands, then what need of the act of parliament?"

Where the judgment passed in favour of the defendant, and either by confession of the attorney general, or by the verdict of the jury, he was found entitled to his liberties; the judgment was, "*quod præd. R. eat inde sine die salvo jure domini regis cum inde loqui voluerit*."

In addition and collateral to the principal judgment was that of "*capias pro fine*" to punish the usurpation, of which, the claimant had been pronounced guilty. This is not to be confounded with the fine to the king for the redemption of the franchise; the former was *in panam*, the latter was the price given for the restoration of liberties; the former also was set by the court, the latter was purely in the king's breast, and *ex gratia regis*, unless, when the proceedings were *in eyre*, and the forfeiture was incurred for some slight abuser, when the fine for redemption was affixed by the justices itinerant. (9)

The execution in an information under stat. 9 Anne, c. 20. is now regarded as an execution in a civil suit. (10)

In *Rex v. Pickerill* (11) the verdict was found for the relator on all the issues; on which judgment of ouster was entered up; "and that the defend-

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Costs — JUDG-
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CUTION.

the subordi-
nate.

Judgment how
far final.

EXECUTION.

Writ to ex-
ecute the judg-
ment.

When judg-
ment passed
for the defend-
ant.

"*Capias pro
fine*."

Execution
under stat. 9
Anne, c. 20.,
regarded as an
execution in a
civil suit.

(1) *Rex v. Maidenhead (Corporation of)*, Palm. 82. Tancered on Quo Warranto, 379.

(2) *Rex v. Trinity House*, 1 Sid. 86. 1 Keb. 331.

(3) *Rex v. Briggs*, 1 Rol. 112. 2 Bulst. 298.

(4) Ibid.

(5) *Rex v. Trinity House*, 1 Sid. 86.

(6) *New Radnor case*, cit. by Sir R. Sawyer

in *Rex v. London (City of)*, 8 Howell's St Tr. 1184.

(7) Co. Entr. 539. (b.) Riley's P. P. 277. cit. by Sir R. Sawyer in 8 Howell's St Tr. 1181.

(8) 1 Show. 275.

(9) Rastall's Entries, 494.

(10) *Rex v. Pickerill*, 4 T. R. 809.

(11) Ibid.

NEW TRIAL —
Costs — JUDGE.
MENT — EXECUTION.

ant, in order to satisfy our said lord the king for and on account of the usurpation aforesaid, be taken, &c., and that J. W. [the relator] do recover against the defendant 180*l.* for costs, &c." On which a writ issued, requiring the sheriff to take the defendant, &c. "to satisfy us concerning his redemption, by reason of his claiming to have, use, and enjoy the office of a burgess, &c.;" and this writ was indorsed thus, "allowed for costs, 180*l.*"

The fine to the king is merely nominal.

A defendant in execution under a *quo warranto*, as well for the contempt as for the relator's costs, is not entitled to his discharge on payment of the fine only. (1)

(1) *Rex v. Pickerill*, 4 T. R. 809.

REPLEVIN.

1. DEFINED, pp. 2482—2483.

2. WHERE REPLEVIN CAN OR CANNOT BE MAINTAINED, pp. 2483—2485.

Not affected by Uniformity of Process Act (Stat. 2 Will. 4. c. 39.)—When the proper form of action—Can be maintained for any thing that may be legally distrained—Goods taken illegally, though not as a distress—Distress taken damage feasant—Local rates—WHERE REPLEVIN DOES NOT LIE—Things attached to the freehold—Execution awarded from a superior court—Convictions by magistrates—Distress for poor rates, one of which was quashed—Bailees—Prohibition restraining proceedings after the expiration of five days, allowed by stat. 2 Will. & M. st. i. c. 5.

3. BY WHOM REPLEVIN CAN OR CANNOT BE MAINTAINED, pp. 2485—2486.

Plaintiff must have either the general or special property in the goods taken—If goods remain unsold, tenant can replevy after the five days—When parties have a joint interest—Parties having separate and distinct interests—Where defendant cannot claim goods as a distress for rent, and also set up the title of assignees.

4. PLAINT IN COUNTY COURT, pp. 2486—2489.

GENERALLY—THE DECLARATION—Removal of plaint into the superior courts—WRIT DE PROPRIETATE PROBANDA—PONE LOQUELAM—RECORDARI FACIAS LOQUELAM—ACCEDAS AD CURIAM—CERTIORARI—Effect of such writs upon the proceedings in the inferior courts.

5. THE DECLARATION, pp. 2489—2490.

6. PLEAS TO THE DECLARATION—AVOWRIES AND COGNISANCES, pp. 2491—2498.

Plea in abatement or bar of property—Reg. Gen.—Stat. 3 & 4 Will. 4. c. 42. s. 1.—Non cepit—"NOT GUILTY"—Distinction between avowry and cognisance—Particular estates must be shewn—Condition subsequent—Where uncertainty as to the nature of the freehold, is matter of form only—Where one portion of the land conveyed subject to a rent charge, is not well charged—What does not amount to an averment of a right of common at all times of the year—An amercement may be on the owners and occupiers of a lordship, generally, yet the levy on the individual—Avowry for tithe compositions—AVOWRY FOR RENT ARREAR—Stats. 11 Geo. 2. c. 19. s. 22. and 25 Geo. 2. c. 13. s. 4.—An avowry admits the property, of the goods in the plaintiff—Husband may avow in his own name for rent due in right of his wife—Distress made by command of a landlord, who dies before it is actually made—Joint tenants and co-parceners—Not requisite to allege positively that the plaintiff was tenant to the avowant—Misdescription of the locus in quo, but not a fatal variance—Terms of the contract under which the tenant holds, must be truly stated—Defendant cannot avail himself of the statute of general avowries, to avoid setting out his title—When not requisite to aver, that rent remains due, or to state day of payment—When plea does not shew that the rent was satisfied by a former distress—AVOWRY BY EXECUTORS—AMENDMENT OF AVOWRY.

7. PLEAS IN BAR BY PLAINTIFF, pp. 2498—2503.

Stat. 4 Anne, c. 16.—De injuriâ cannot be pleaded generally—New assignment—Non demisit—Non tenuit—Tender of arrears—Riens in arrear—PAYMENT—Demise from defendant—Eviction—Nil habuit in tenementis—

Damage feasant — Defect of fences — Abuse of distress — Right of way — Right of common.

8. THE REPLEVIN BOND, pp. 2503—2513.

Mode of taking the bond — Stats. 1 & 2 Phil. & M. c. 12. s. 3. and 11 Geo. 2. c. 19. s. 23. — Persons who have authority to grant replevins — Stat. 36 Geo. 3. c. 38. applies to the case of a sheriff replevying goods under a writ of replevin issued out of Chancery — When sheriff cannot grant replevin — The bond should follow the language of stat. 11 Geo. 2. c. 19. — Bond executed by one or three sureties — Where affidavit stamp not requisite — Distress for rent charge — ASSIGNMENT OF BOND — Liability of sheriff for refusing to assign the bond — Stat. 11 Geo. 2. c. 19. s. 23. — By whom and to whom the bond can be assigned — When defendant is and is not entitled to an assignment of the bond — What is and is not a forfeiture of the bond — RIGHTS OF ACTION BY ASSIGNEE OF THE BOND UNDER STAT. 11 GEO. 2. c. 19. — Who may sue — Not obliged to sue "in the court into which the plaint has been moved — Defendant not bound to procure a return of the writ of replevin — LIABILITIES OF THE FLEDGES — DECLARATION AT THE SUIT OF THE ASSIGNEE — PROCEEDINGS AGAINST THE SHERIFF — Extent of liability — Was sheriff irresponsible — THE DECLARATION — In an action against sheriff for a false return, unnecessary to allege that the cattle were in the defendant's bailiwick — ACTION ON THE BOND BY THE SHERIFF — PLEADINGS.

9. EVIDENCE, pp. 2513—2519.

Right to begin — Non cepit — Non tenuit — Riens in arrear — Damage feasant — Distress for rent — Tender of amends — Competency and incompetency of witnesses — Proof of defendant being bailiff — REPLEVIN BOND — Insufficiency of pledges — Where a surety in a replevin bond is interested.

10. LIMITATION OF ACTION — SET-OFF — PAYMENT OF MONEY INTO COURT — STAY OF PROCEEDINGS — NEW TRIAL — COSTS — JUDGMENT AND EXECUTION, pp. 2519—2523.

1. DEFINED.

DEFINED.

Judgment of
Lord Redesdale in *Shannon*
v. *Shannon*.

By replevin the owner of goods unjustly taken and detained from him, may regain possession thereof, through the medium of, and upon application to the sheriff, upon giving him security to prosecute an action against the person who seized. It is principally used in cases of distress; but it seems, that it may be brought in any case, where the owner has goods taken from him by another. (1) In *Shannon v. Shannon* (2) Lord Redesdale said, "The writ of replevin is founded on a taking, and the right which the party from whom the goods are taken has to have them restored to him, until the question of title to the goods is determined. The person who takes them may claim property in them, and if he does, the sheriff cannot deliver the goods until the question is tried: but that claim of property can be made only where there has been a taking, and it appeared to him that the writ of replevin was calculated in such cases to supply the place of detinue or trover, and to prevent the party from whom the goods are taken, being put to those actions, except where the other can show property."

In replevin, the plaintiff and defendant are considered as actors, the defendant in respect of his having made the distress (being a claim of right, and the avowry in the nature of a declaration) (3), and the plaintiff in

(1) 1 Chitt. Pl. 162.

(2) 1 Sch. & Lef. (Irish), 327.

(3) *Ryall v. Rolfe*, 1 Wils. 260, 261.

1 Saund. 347. (e.) *Lambert v. Stronker*, Willes, 221.

respect of his action, on which ground principally, the distinction between the pleadings in this action and in that of trespass depend. (1)

DEFINED.

2. WHERE REPLEVIN CAN OR CANNOT BE MAINTAINED.

WHERE REPLEVIN CAN OR CANNOT BE MAINTAINED.

The action of replevin is not affected by stat. 2 Will. 4. c. 39.; for, independent of this action not commencing in any of the superior courts of law at Westminster, the 19th section of the foregoing statute has enacted, that "nothing therein contained shall extend to any cause removed into either of the said courts by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise."

Not affected by Uniformity of Process Act (stat. 2 Will. 4. c. 39. s. 19.).

Replevin is the proper form of action to recover a specific chattel, for, in trover, damages are only recovered. (2) Replevin lies only where goods, &c. are unlawfully taken, not where they are simply detained by a party to whom they have been delivered upon a contract. (3) Therefore replevin will not lie for goods delivered on a contract, but unjustly detained, as goods delivered to a carrier. (4)

When the proper form of action.

It lies for removable or tenant's fixtures (5), and for any thing that may by law be distrained. (6) But whether it lies for personal property which cannot be distrained, as title deeds, money not in a bag, or a bill of exchange, &c., seems to depend upon the question, whether the remedy by replevin extends to all unlawful takings?

Can be maintained for any thing that may be legally distrained.

It seems, that if goods be taken illegally, though not as a distress, replevin may be supported. (7) It may be brought to try the legality of a distress for rent, provided there were no sum whatever in arrear (8); but if any sum however small were due, and the distress were for a greater sum, or excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by action on the case.

Goods taken illegally, though not as a distress.

Replevin likewise lies for the young of animals distrained, born since the distress (9); for an illegal distress taken damage feasant (10); for a sewers' rate (11); for a heriot, &c. (12); and for goods distrained under a warrant from commissioners authorised by act of parliament to levy rates for specific local purposes with power of distress. (13) So likewise, when a special inferior jurisdiction is given to justices, &c. and they exceed it, replevin, in some cases, lies; as where a magistrate granted a warrant of distress against a person for rates, in respect of lands which the latter did not occupy. (14)

Distress taken damage feasant. Local rates.

(1) 1 Saund. 347. (b.)

(2) *Dore v. Wilkinson*, 2 Stark. 288.

(3) *Galloway v. Bird*, 12 Moore, 547. 4 Bing. 299.

(4) *Ibid*.

(5) *Lindon v. Hooper*, Cowp. 414.

(6) 7 Bac. Abr. Replevin and Avowry (F.), 87. Com. Dig. Replevin (A.).

(7) 19 Vin. Abr. Replevin, 22. [B. a.]. *Le Mason v. Dixon*, Sir W. Jones, 173, 174. *Bishop v. Montague (Viscountess)*, Cro. Eliz. 824. Com. Dig. Replevin (A.). Co. Litt. 145. (b.)

(8) *Harrison v. Barnby*, 5 T. R. 248. n.

(c.) n. *Cobb v. Bryan*, 3 B. & P. 348.

(9) Gilbert on Replevin, 156. *Arundell v. Trevill*, 1 Sid. 82.

(10) 1 Saund. 346. (e.) n. 2.

(11) *Pritchard v. Stephens*, 6 T. R. 522. Com. Dig. Pleader (3 K.), 26. *Pearson v. Roberts*, Willes, 672. n. (b.)

(12) *Bishop v. Montague (Viscountess)*, Cro. Jac. 50.

(13) *Att. Gen. v. Brown*, 1 Swanst. 304. *Fenton v. Boyle*, 2 N. R. 399.

(14) *Pearson v. Roberts*, Willes, 673. n. (b.) *Milward v. Caffin*, 2 W. Black. 1330.

WHERE RE-
PLEVIN CAN
OR CANNOT BE
MAINTAINED.

Poor's rates.

Replevin lies to try the legality of a distress for poor's rates. Thus, in *Sibbald v. Roderick* (1), where some poor rates had not been duly published on the Sunday following the allowance, according to stat. 17 Geo. 2. c. 3., and a warrant of distress issued for a single sum, made up of these rates and of others which were regular:—It was held, that the warrant was wholly bad, and that replevin lay for a distress taken under it. (2)

WHERE RE-
PLEVIN DOES
NOT LIE.

Things at-
tached to the
freehold.

Execution
awarded from
a superior
court.

Replevin only lies for taking personal chattels, and not for things attached to the freehold, and which are in law considered fixtures (3), and cannot be delivered to the distrainer upon a writ of *retorno habendo*.

If a superior court award an execution, it seems, that no replevin lies for the goods taken by the sheriff by virtue of the execution; and if any person should pretend to take out a replevin, the court would commit him for a contempt of their jurisdiction. (4) So where goods are taken by way of levy, as for a penalty on conviction under a statute, it is generally in the nature of an execution, and unless replevin be given by the statute, such action will not lie, the conviction being conclusive, and its legality not questionable in replevin (5), as on a conviction for deer stealing. (6)

Convictions by
magistrates.

Where a magistrate has competent jurisdiction, and adjudges, and, on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not repleviable. (7)

Replevin cannot be maintained for goods distrained by virtue of a warrant from a magistrate, who has competent jurisdiction under the Statute of Labourers (20 Geo. 2. c. 19. s. 1.), to issue a warrant of distress and sale on refusal of the party to pay: nor can the question of a magistrate's jurisdiction be tried in such an action; and therefore it cannot be pleaded in bar to a recognisance made under such warrant, that the labourer did not duly make oath before the magistrate, that the sum claimed was due to him for wages, nor that such sum was not due. (8)

Distress for
poor's rates, one
of which was
quashed.

Where in replevin for taking the plaintiff's goods, the defendant avowed, as overseer of the poor under stat. 43 Eliz. c. 2., by virtue of a warrant of distress for 104*l.* 17*s.* due for several rates, one of which was quashed on the ground that the plaintiff was not an occupier within the parish where he was rated:—It was held, that as one of the rates was quashed, the warrant was void, and the precise sum due for poor rates should have been demanded from the plaintiff previous to the issuing of such warrant. (9)

Bailee.

Replevin will not lie against a bailee; but a party may retake his goods, if they have been removed for the purpose of depriving the owner of them. (10)

Prohibition
restraining
proceedings
after the ex-
piration of five
days allowed
by stat. 2 Will.
& M. st. i. c. 5.

A prohibition may be issued to the sheriff to restrain him from proceeding in a replevin suit under stat. 11 Geo. 2. c. 19., after the expiration of the

(1) 11 A. & E. 38.

(2) Vide etiam *Dewell v. Marshall*, 3 Wils. 442. *Milward v. Caffin*, 2 W. Black. 1330. *Cortis v. Kent Water Works Comp.* 7 B. & C. 338. *Arnitt v. Garnett*, 3 B. & A. 440.

(3) *Res v. Leeds (Justices of)*, 4 T. R. 584. 2 Saund. 84.

(4) Gilbert on Replevin, 161. *Winnard v. Foster*, 2 Lutw. 1191. *Cannon v. Smalwood*, 3 Lev. 204.

(5) 7 Bac. Abr. Replevin (C.), 69.

(6) *Res v. Monkhouse*, Str. 1184

(7) *Wilson v. Weller*, 1 B. & B. 57. 3 Moore, 294. *Wootton v. Harvey (Chit)*, 6

East, 75. *Res v. Housason*, 14 ibid. 605.

(8) *Wilson v. Weller*, 1 B. & B. 57. 3 Moore, 294.

(9) *Hurrell v. Wink*, 2 Moore, 417. 3

Taunt. 369.

(10) *Reeves v. Morris, Armstrong & Macartney (Irish)*, 159.

five days allowed by stat. 2 Will. & M. st. i. c. 5. for replevying a distress, and after sale of such distress. (1)

WHERE REPLEVIN CAN OR CANNOT BE MAINTAINED.

3. BY WHOM REPLEVIN CAN OR CANNOT BE MAINTAINED.

BY WHOM REPLEVIN CAN OR CANNOT BE MAINTAINED.

Plaintiff must have either the general or special property in the goods taken.

If goods remain unsold, tenant can replevy after the five days.

When parties have a joint interest.

Husband and wife

Executors.

Parties having separate and distinct interests.

Where defendant cannot claim goods as a distress for rent, and also set up the title of assignees.

The plaintiff must, at the time of the caption, have had either the general property in the goods taken, or a special property therein. (2) What is considered a general or special ownership or interest to enable a party to maintain trover, is equally applicable to replevin; but it is questionable, whether mere possession be enough to support replevin. (3) Neither the removal of a distress for rent from the demised premises after five days, nor an appraisal of the distress, takes away the tenant's right to replevy (4); and if the goods remain unsold, the tenant may replevy after five days. (5)

Parties who have a joint interest in the distress may join in the replevin (6); but if the interest in the goods taken be several (7), there ought to be several replevins. Where A. took a lease in writing in his own name of certain premises, and subsequently occupied part only, and paid rent for so much as he occupied to B., as whose agent he in fact took the lease:—It was held, that B. might distrain for the part so occupied, and that A was precluded in replevin from disputing his title. (8) Joint tenants and tenants in common can and should join. (9) If the goods of a feme sole be taken, and afterwards she marry, the husband alone may have a replevin (10); and if the goods be taken after marriage, and the husband and wife join in replevin, and after verdict a motion be made in arrest of judgment on the ground of their joining, it will be presumed, if nothing appear upon the record to the contrary, that the husband and wife were jointly possessed of the goods before marriage, and that the goods were taken before marriage—in which case they might join. (11)

The husband and wife may join in replevin of goods which the wife has as executrix (12); but the declaration must shew the wife's interest in the property. (13) Executors may have replevin of goods taken in the lifetime of their testator. (14)

If the plaintiff have not the immediate right of possession, replevin cannot be supported, but the party must proceed by action on the case. (15) If several persons have separate and distinct interests in the property distrained, they cannot join in replevin. (16)

In replevin, defendant avowed for rent in arrear from one J. M., and also claimed the goods as being the property of himself and another as assignees of J. M., against whom a commission of bankruptcy had issued. A verdict having been taken on the whole record, the court directed it to be entered

(1) *Anté*, 1352—1367. tit. DISTRESS.

Griffiths v. Stephens, 1 Chitt. 196.

(2) Co. Litt. 145. (b.)

(3) *Templeman v. Case*, 10 Mod. 25.

(4) *Jacob v. King*, 5 Taunt. 451. 1 Marsh. 135.

(5) *Anon.* 1 Chitt. 196. (a.)

(6) 9 Hen. 4. 16. (a.) 1 Inst. 145. (b.)

(7) Bro. Abr. Replevin (pl. 12.).

(8) *Clarke v. Waterton*, 2 M. & Rob. 87.

(9) Bull. N. P. 53.

(10) F. N. B. 159.

(11) *Bern v. Mattaire*, C. T. H. 119.

(12) Bro. Abr. Baron and Feme (pl. 85.).

(13) *Serres v. Dodd*, 2 N. R. 405.

(14) Bro. Abr. Replevin (pl. 59.). *Cudmore v. Betison*, 1 Sid. 62.

(15) *Gordon v. Harper*, 7 T. R. 9.

(16) Co. Litt. 145. (b.) Bro. Abr. Replevin (pl. 12.). Gilbert on Replevin,

153.

BY WHOM RE-
PLEVIN CAN
OR CANNOT BE
MAINTAINED.

for the plaintiff on the issue taken on the title of the assignees, on the ground, that the defendant could not be permitted in the same record to claim the goods as a distress for rent, and also to set up the title of the assignees. (1)

PLAINT IN
COUNTY COURT.
GENERALLY.

4. PLAINT IN COUNTY COURT.

Replevin by original writ has become obsolete at the common law.

Replevin by plaintiff is under Statute of Marlebridge (52 Hen. 3. c. 21.), which enacts, "that if the beasts of any man be taken and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties."

The first proceeding in the county court is the plaintiff, before the entry of which, there is no cause in court (2): the Statute of Marlebridge (52 Hen. 3. c. 21.) seems to require, that the plaintiff should precede the granting of the sheriff's precept to replevy; and stat. 11 Geo. 2. c. 19. is silent upon the subject.

After the goods have been replevied and delivered to the plaintiff, he must, according to the terms of the bond, levy his plaintiff at the next county court, and prosecute his suit with effect and without delay. If he do not levy his plea at the next county court, or if he make default in any subsequent part of the proceedings, or do not prosecute the suit with success, either in the county court or in this court, after the removal of the cause (3), the defendant may take an assignment of the replevin bond, and may proceed thereon against the plaintiff and his pledges, in the same manner as a plaintiff proceeds upon a bail bond. (4)

Entering the
plaint is the act
of the party,
the sheriff be-
ing merely
ministerial.

The entering of the plaintiff is the act of the party; and if no plaintiff be entered, the bond is forfeited. (5) The act of the sheriff or his deputy in entering the plaintiff in replevin is merely ministerial; it has, therefore, been held, that although a sheriff or his deputy may neglect to enter a plaintiff in replevin, the court of Queen's Bench will not compel him to do so on motion; yet, perhaps, they would grant a *mandamus* to enter the plaintiff. (6)

Appearance.

Regularly the plaintiff should be entered before the precept to replevy, or replevin is issued, upon which the defendant should be summoned, and at the return both he and the plaintiff should appear; and it seems, no judgment can be entered on the return against the plaintiff for not declaring, unless the defendant appear. (7)

THE DECLARA-
TION.

The declaration founded on the plaintiff is similar to that in the courts of Queen's Bench and Common Pleas, and commences in general with a statement analogous to the recital of an original summons, or writ of replevin. (8) The cause of action must be stated to have arisen within the jurisdiction of the inferior court.

Statement of
cause of action.

Pleadings.

Stat. 4 Anne,
c. 16.

The pleadings in county courts are analogous to those in the courts above; but stat. 4 Anne, c. 16. only applying to courts of record, the parties

(1) *Emery v. Mucklow*, 4 M. & Sc. 263. (5) *Exp. Boyle*, 2 D. & R. 13.
(2) *Tesseyman v. Gildart*, 1 N. R. 292. (6) *Ibid.* *Wilkinson on Replevin*, 20.
(3) *Turnor v. Turner (Clerk)*, 2 B. & B. 21.
112. 4 Moore, 616. (7) *Seal v. Phillips*, 3 Price, 17.
(4) *Vide Form of Plaintiff, Chitt. Forms*, (8) *Lord v. Houstoun*, 11 East, 62.
401.

cannot plead, avow, or plead in bar several matters, though a practice to the contrary prevails in many counties. It is a rule, that wherever the freehold is brought in question, the county court, not being a court of record, has no power to try, and therefore cannot proceed: by such means the lord was left without remedy to recover the beasts as his pledges, for the county court could not determine the point on which the return was to be made. This was remedied by stat. Westm. 2. (13 Edw. 1. c. 2.) which gave the lord a *pone* and *recordari* to remove the cause into the king's courts, where that plea might be tried and the lord be established in possession of his services, and still have the pledges, *de retorno habendo*, retained for him. (1)

As the statute 4 Anne, c. 16., relating to double pleading, applies only to courts of record, so the statute requiring that demurrers should be special, is also confined to courts of record; and, therefore, in the county courts the demurrer may always be general, though it may be desirable to demur specially, that the matter may be pointedly brought for the consideration of the court. Although the judge of an inferior court may set aside a verdict or judgment on the ground of irregularity (2), yet he cannot grant a new trial. (3)

The plaint may be removed either by plaintiff or defendant: by the plaintiff at pleasure, by the defendant upon reasonable cause. (4) This assignment of cause by the defendant, however, is at present but matter of form; it is assigned in the writ of *recordari &c.*, and cannot be denied or traversed by the sheriff or plaintiff. (5) But where the action of replevin is commenced in a court baron, cause must be assigned for removing it, whether removed by the plaintiff or defendant. (6) The plaint may be removed by writ of *pone*, *recordari facias loquelam*; or if the plaint be levied in a court baron, it is removed by writ of *accedas ad curiam*.

Whether the replevin be by plaint or by writ, if the defendant claim property, the sheriff's power to replevy the beasts is arrested (7); or if ancient demesne be pleaded (8), or if the queen be a party, or the taking be in right of the crown (9), the sheriff cannot proceed in the cause; because questions of property cannot be determined in the county court without the queen's writ, so that it is usual in practice to remove the plaint into one of the courts at Westminster in the first instance. (10)

Property must be claimed by the defendant in person (11); it cannot be claimed by his bailiff or servant. A bailiff cannot claim property below, because, being only servant to another, in whose right he has taken the goods, he cannot say that they are his own; but the bailiff above may plead property in a stranger, for this is a sufficient reason to excuse him from damages, since he has not taken the plaintiff's goods from him. (12)

PLAINT IN
COUNTY COURT.

When the freehold is brought in question, the county court have no power to try.

REMOVAL OF
PLAINT INTO
THE SUPERIOR
COURTS.

Plaint by whom removable.

Writs by which proceedings in replevin may be removed from the inferior courts.

WRIT DE PROPRIETATE PROBANDA.

Rights to property cannot be questioned in the county courts.

Property must be claimed by defendant in person.

(1) Gilbert on Replevin, 94. Greenwood, Co. Court, 33.

(2) *Jewell v. Hill*, Str. 499.

(3) *Bayley v. Boorne*, ibid. 392. *Rex v. Ely (Bishop of)*, Andr. 183, 184. Fortesc. 198. *Blacquiére v. Hawkins*, Doug. 379. *Wilkinson on Replevin*, 23, 24.

(4) F. N. B. 157, 158.

(5) *Talbot v. Binns*, 8 Bing. 71. 1 M. & Sc. 148. *Parkes v. Renton*, 3 B. & Ad. 105., vide Chitt. Forms, 403.

(6) F. N. B. 158, 159. 27 Hen. 6. 3. (b.), 4. (a.)

(7) Gilbert on Replevin, 130. Co. Litt. 145. *Wilkinson on Replevin*, 16.

(8) 2 Finch. L. 317. 4 Hen. 6. 30. 2 Hen. 7. 6. Co. Litt. 145.

(9) Bro. Abr. Replevin, 3.

(10) Archb. by Chitt. 829.

(11) 1 Inst. 145. (b.)

(12) Selw. N. P. 1182.

PLAINT IN
COUNTY COURT.Writ of *replevin* *de proprietate probanda*.

On the purchasing the writ *de proprietate probanda*, an inquest of office is holden: and if on such inquest the property be found for the plaintiff, the sheriff is to make deliverance; but if it be found for the defendant, the replevin by plaintiff is determined, and the sheriff cannot proceed any farther; yet the plaintiff may bring a new replevin by writ, for what is done on the plaintiff will not operate as a bar, because it is not connected with the proceeding by writ. (1)

PONE LOQUE-
LAM.Writ of *pone* at
common law.

Replevin by original writ is by the common law, but is obsolete in England (though frequently brought in Ireland); the last instance of such a writ in the English Chancery was 1741 (2); consequently the writ of *pone* at common law has likewise fallen into disuse.

Writ of *pone*
under stat.
Westm. 2.

At the common law, where the lord avowed taking the distress for services or customs, if the plaintiff disavowed the tenure, and disclaimed holding of the avowant, the inferior court had not any further cognisance of the suit, and the proceeding there was stayed. This inconvenience was remedied by stat. Westm. 2. (3), which gave the avowant in this case the writ of *pone* to remove the proceedings into the king's courts. It appears from the preamble, that the avowant is entitled to this writ of *pone*, as well where the proceedings are instituted in the inferior court by plaintiff, as where they are commenced by writ out of Chancery. (4)

Writ of *pone*
when return-
able.

The writ of *pone* is an original writ obtained from the cursitor, bearing *teste* after the entry of the plaintiff in the county court, and returnable on a general return day in term, wheresoever &c.; but if it happen to bear *teste* before the entry of the plaintiff, it is not material. (5) The writ of *pone* is also the proper writ to remove all suits which are before the sheriff by writ of *justicies*; in other respects it does not differ from the writ of *recordari facias loquelam*. (6)

If a writ of *pone per vadios* be by mistake made returnable in vacation, it will be bad. (7)

RECORDARI
FACIAS LOQUE-
LAM.

If the goods have been replevied upon mere application to the sheriff without writ, the plaintiff is removed by the original writ of *recordari facias loquelam*. (8)

By this writ the sheriff is commanded to record the plaintiff, and when recorded, to return it into the King's Bench or Common Pleas at a fixed day, on which the parties are to attend in court. This being done, the superior courts have authority to proceed. When the record is removed (9), and the party declares *in banco*, the plaintiff is determined; therefore advantage cannot be taken of a variance between the plaintiff and the declaration in the superior court. (10)

Writs of *recordari facias loquelam* are conditional (11), and a plaintiff may remove a plaintiff without cause; but a defendant cannot do it without cause. (12)

Writs of *re-*
cordari facias
loquelam are
conditional.

The defendants, by virtue of a magistrate's warrant under the Statute of Labourers (13), distrained the plaintiff's goods, which he afterwards reple-

(1) 7 Bac. Abr. Replevin (E.), 84. Wil-
kinson on Replevin, 17.

(2) Anon. 2 Atk. 237.

(3) 13 Edw. 1. c. 2.

(4) Selw. N. P. 1183.

(5) F. N. B. 162—164.

(6) Archb. by Chitt. 830.

(7) *Wright v. Lewis*, 9 Dowl. P. C. 183.
4 Jur. 1112.

(8) Stat. 13 Edw. 1. c. 2. (Westm. 2.).

(9) *Hargreave v. Arden*, Cro. Eliz. 543.

(10) F. N. B. 70.

(11) Anon. Lofft, 520.

(12) Ibid.

(13) Stat. 20 Geo. 2. c. 19.

vied, and removed by *recordari facias loquelam* into the court of Common Pleas. On application by the defendants to set it aside, on the ground, that under the fifth and sixth sections of that statute the plaintiff had no power so to do, that court refused to interfere, but left them to their defence of the action. (1)

Where rule for judgment must be served.

In Ireland, in replevin, where the proceedings have been removed into the superior courts by the plaintiff by *re. fa. lo.*, the rule for judgment must be served; and it is no answer to say, that there is no appearance, as such appearance must, if necessary, be enforced. A judgment therefore, entered without the rule for judgment having been served, was set aside for irregularity. (2)

In a sheriff's return to a writ of *re. fa. lo.*, he must state positively whether any claim be pending or not; and must not return the proceedings which have taken place before him in his court, leaving it to the court to determine that question. (3)

Return by sheriff of *recordari facias loquelam*, must state positively whether any claim be pending or not.

If the claim be levied in a court baron, it is, as previously observed, removed by writ of *accedas ad curiam*. This is an original writ, and similar to the writ of *recordari*, excepting, that it directs the sheriff to go to the lord's court, and there cause the claim to be recorded, and so to return it to the court above. This writ must, it seems, bear teste after the entry of the claim, otherwise it will be bad. (4)

ACCEDAS AD CURIAM.

If to a writ of *accedas ad curiam* the sheriff return, that the lord refused to hold his court, a *distringas* then issues, commanding the sheriff to distrain the lord to hold his court, and after that, a *sicut alias*, &c. (5)

A writ of *certiorari* may issue originally out of the Queen's Bench and Common Pleas, returnable there; but there are said to be difficulties in that practice (6): a writ of *certiorari* can also be issued by the court of Exchequer. (7)

CERTIORARI.

The delivery of any of these writs to the sheriff stays all further proceedings in the suit in the county court, even although delivered after interlocutory, provided it be before final judgment. (8) If the sheriff proceed further, such subsequent proceedings are void, and the sheriff is liable to an attachment (9); and the officer of an inferior court cannot justify a disobedience upon the ground of non payment of his fees, as an action will lie for their recovery. The writ, however, removes the claim only, and not any of the subsequent proceedings; and the claim is removed by it, although the plea in the court below may have been discontinued. (10)

Effect of delivering any of these writs to the sheriff.

Effect of such writs upon the proceedings in the inferior court.

5. THE DECLARATION.

The Uniformity of Process Act (stat. 2 Will. 4. c. 39.) does not extend to actions of replevin removed to a superior court.

THE DECLARATION.

(1) *Wilson v. Weller*, 2 Moore, 574. 1 B. & B. 57.

(2) *Quigly v. Wood*, Fox & Smith (Irish), 138.

(3) *Wright v. Lewis*, 8 Dowl. P. C. 514.

(4) Archb. by Chitt. 830. F. N. B. 71.

(5) Gilbert on Replevin, 144. Wilkinson on Replevin, 27.

(6) F. N. B. 38—43.

(7) Wilkinson on Replevin, 34.

(8) Ibid., vide stat. 5 Geo. 4. c. 106. s. 23. respecting proceedings in the Welch courts.

(9) *Bevan v. Prothesch*, 2 Burr. 1151.

(10) F. N. B. 7—9.

(11) Ibid. 71. (a.) Archb. by Chitt. 831.

THE DECLARATION.

The declaration must be entitled either of the term in which the writ is returnable, or of that in which the declaration is delivered; if entitled of an intermediate term it will be irregular, and the defendant may sign judgment, though it seems he cannot set aside the proceedings. (1)

VENUE.

Reg. Gen.
Hilary Term,
4 Will. 4.

By Reg. Gen. Hilary Term, 4 Will. 4., the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration, or in any subsequent pleading, provided, that in cases where local description is now required, such local description shall be given. (2)

The venue must be laid in the county where the cattle were taken, except when the cattle were driven into another county, in which case the plaintiff had his election to have brought his replevin in either county, and to lay his venue in the county in which the replevin is (3), for the wrong continues wherever the defendant has the cattle. (4)

Certainty in
the description.

The declaration requires certainty in the description, and the number of the goods must be stated with certainty, because a former recovery could not otherwise be pleaded in bar of a second action for the same goods, neither could the defendant properly defend himself (5); the omission is ground of special demurrer; and in one case, where the number of goods was omitted in the declaration in replevin, the court set aside a final judgment obtained after judgment by default (6); and in all the forms of action for a tort respecting goods, it is in general insufficient, even after judgment by default or verdict, to allege, that the defendant injured or took &c. "divers goods and chattels" of the plaintiff without describing them.

The place and vill, or parish, are material and traversable (7), for the defendant may plead *cepit in alio loco*; and as the place must be specially mentioned, no new assignment is permitted. (8)

Where the declaration in replevin does not sufficiently specify the goods and chattels, and the place in which they are taken, the defect is cured by an avowry, justifying the taking of the said goods and chattels in the said place, even though the avowry be a bad plea. (9)

Plaintiff's right
or interest.

In replevin, the plaintiff's right to or interest in the goods, either as absolute owner or as having a limited right therein, is no otherwise described in the declaration than by the averment, that they were the goods "of the plaintiff," or that he was lawfully possessed of them as of his own property. (10)

(1) *Smith v. Muller*, 3 T. R. 624. *Topping v. Fuge*, 5 Taunt. 774. *Stork v. Herbert*, 1 Wils. 242. 7 Taunt. 642. *Keeble v. Hickeringill*, 11 East, 576. 1 Chitt. Pl. 377.

(2) *Vide stat. 3 & 4 Will. 4. c. 42. s. 22.*

(3) *F. N. B.* 159.

(4) *Per Wilmot C. J. in Walton v. Kersop*, 2 Wils. 355. *Wilkinson on Replevin*, 40.

(5) *Pope v. Tilman*, 7 Taunt. 642. *Wilkinson on Replevin*, 42.

(6) 2 Saund. 74. (b.) *Pope v. Tilman*,

(7) 1 Saund. 347. n. 1. *Ward v. Lavelle*.

Cro. Eliz. 896. *Ward v. Lakin*, 5 F. Moore, 678. *Weston v. Carter*, 1 Sid. 3, 10.

Trevorton v. Hicks, Carth. 186.

(8) *Wilkinson on Replevin*, 41.

(9) *Banks v. Angell*, 3 N. & P. 94. 2 Jur. 657.

(10) 2 Saund. 379. n. 13. 1 Chitt. Pl. 550

6. PLEAS TO THE DECLARATION — AVOWRIES AND COGNISANCES.

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.

Whenever the subject-matter of the plea or defence is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not shew that the plaintiff is for ever concluded, should in general be pleaded in abatement. (1) There are, however, some matters which may be pleaded either in abatement or in bar, as in replevin for goods the defendant may plead property in himself or in a stranger, either in abatement or bar. (2)

Plea in abate-
ment or bar of
property.

The new rules do not contain any particular directions as to the mode of pleading in the action of replevin, though subject to the general rules and regulations applicable to all pleadings, &c.; and by stat. 3 & 4 Will. 4. c. 42. s. 1. "no rule or order shall have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he is now, or hereafter shall be entitled to do so, by virtue of any act of Parliament now or hereafter to be in force."

REG. GEN.
Non applica-
bility of the
new rules.
Stat. 3 & 4
Will. 4. c. 42.
s. 1.

By pleading "*non cepit*," the defendant puts in issue not only the taking of the cattle or goods, but also the taking in the place mentioned in the declaration (3); and the defendant can plead property in himself or a third person (4), the question of property not being in issue on the plea of *non cepit* (5); and where he goes for a return of the cattle or goods, he may avow, or make cognisance, &c. (6)

Effect of plead-
ing *non cepit*

If the defendant be desirous of having a return of the goods, he must plead, that he took the goods in another place, describing it, and traverse the place laid in the declaration, and avow or make cognisance, shewing his right to take the goods, as in a plea in abatement. (7)

*Non cepit in
alio loco.*

Where the distress is for poor's rates, the defendant may plead not guilty, and give the cause of taking in evidence (8); and a general plea is given by statute where a distress is taken for sewers' rates (9); and the bankrupt act gives the general issue to a defendant sued for any thing done in pursuance thereof. (10)

NOT GUILTY.

Where the action is against the principal or landlord, he is said to make an avowry, *i. e.* he avows taking the distress in his own right; where, on the other hand, it is against the bailiff or servant, he makes cognisance, *i. e.* he acknowledges the taking in the right of the principal or landlord; and where it is against both, the one avows, and the other makes cognisance.

Distinction be-
tween avowry
and cognisance.

An avowry or cognisance is in the nature of a declaration; it sets forth the merits of the defendant's case, and shews, that the distress was lawful. As the object of the avowry is to obtain a return of the goods, the defendant should state sufficient matter to entitle him to such return. Greater

(1) 1 Chitt. Pl. 446. *Evans, q. t. v. Steens*, 4 T. R. 227. 1 Bac. Abr. Abatement N.), 25. Com. Dig. Abatement (B). *Harman v. Kingston*, 3 Camp. 152.

(5) Gilbert on Distress, 148. Tidd's N. P. 375.

(2) *Presgrave v. Saunders*, 1 Salk. 5. (3) *Johnson v. Wollyer*, Str. 507. *Anon.* Mod. 199. 1 Saund. 347. s. 1.

(6) Tidd's N. P. 375.

(7) 1 Saund. 247.

(8) Stat. 43 Eliz. c. 2. s. 19. Co. Litt. 283. (s.)

(9) Stat. 23 Hen. 8. c. 5. s. 19.

(10) Stat. 6 Geo. 4. c. 16. s. 44.

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.

Particular es-
tates must be
shewn.

Condition sub-
sequent.

Where uncer-
tainty as to the
nature of the
freehold is
matter of form
only.

strictness is required in some cases in stating title in an avowry, than in a declaration. In all cases, except where the defendant claims property in the goods, he must avow in order to entitle himself to a return. A party in justifying a distress may allege a different cause from that which he assigned on making it; if he can shew a legal justification for what he did, it is sufficient; thus he may distrain for rent, and avow for heriot service. (1)

In avowries, the commencement of particular estates must be shewn; as that such a one was seised in fee and demised, &c., that the estate out of which it was derived may appear sufficient to support it; because, the seisin in fee may be traversed, and any of the meane assignments are traversable. (2)

Although in general it is sufficient to allege a mere possessory title against a wrong-doer, yet in replevin there is an exception; and it is not sufficient to plead merely, that the defendant was possessed of a close, and because the cattle trespassed, &c. he took them damage feasant; but it may be alleged generally, that the close was the close, soil, and freehold (*liberum tenementum*) of the defendant. (3)

A replication that the defendant had a power of distress under an award, should shew the authority of the arbitrator to give the power, or that the right to distrain was one of the matters in difference. (4)

Where a grant of an annuity was made by R. W. W. to S. W. during her life, or so long as her conduct and behaviour should be discreet, and meet with the approbation of the testator's wife and his other trustees:—It was held, that the condition of the conduct and behaviour of S. W. being discreet, &c. is a condition subsequent, and need not be alleged by the husband of S. W. as defendant in replevin in setting up his title to her estate; but that the condition, if violated, must be pleaded in bar by the plaintiff in defence of the estate of S. W. (5)

In *M'Calla v. Thompson* (6) it appeared, that R. M. being seised in fee, devised his interest "equally between his three sons to be equally divided between them, share and share alike; it being also his will, that none of his said sons should let or sell his or their part to any other than to one of the testator's sons, or their male issue, lawfully begotten, but the same should descend to each of their male heirs for ever; and in case any one or more of his said sons should die, leaving no lawful issue, his or their part to fall to his or their surviving heirs for ever:"—It was held, that these words did not imply cross remainders between the three sons as tenants in common:—and that where a cognisance for a rent charge, in deducing title to R. M. ancestor of the grantor, stated "that Lord M. being seised in fee released to R. M. and his heirs, to hold during the continuance of a certain estate of freehold still subsisting, whereby R. M. became seised of the said estate so subsisting, the uncertainty as to the nature of the freehold was matter of form only, and was cured by pleading over.

(1) *Crowther v. Ramsbottom*, 7 T. R. 657.
Gwinnet v. Phillips, 3 *ibid.* 646.

(2) *Dally v. Silby* (*in error*), 1 Bro. P. C. 525.

(3) 1 Saund. 346. (c.) n. 2 *ibid.* 285. n.
Stephen on Pleading, 2d ed. 358, 359.

(4) *Pascoe v. Pascoe*, 5 Scott, 117.

(5) *Wynne v. Wynne*, 2 M. & G. 8. 4 Jur. 1114.

(6) 1 Jebb & Symes (Irish), 68.

The stat. 11 Geo. 2. c. 19. respecting avowries in replevin, extends to an avowry for a rent charge. (1)

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.

If one portion of the land conveyed subject to a rent charge be not well charged, the entire rent charge may be avowed for out of the remaining portions; and an avowry claiming out of the entire *locus in quo*, in the possession of the plaintiff, a rent charge, affecting only two undivided thirds of it, is not, on that ground, defective on general demurrer. (2)

Where one portion of the land conveyed, subject to a rent charge, is not well charged.

Where in an avowry, the defendant averred, that all those whose estate he now has &c., from the time whereof &c., have been accustomed to have, and of right during all the time aforesaid ought to have had, and still of right ought to have common of pasture in the *locus in quo*: — It was held bad, and that it did not amount to an averment of right of common at all times of the year. (3)

What does not amount to an averment of a right of common at all times of the year.

In *Ramsey v. Nornabell* (4), which was an action of replevin, the cognisance stated, that the owners and occupiers of lands within the lordship of M. had immemorially repaired a jetty, which defended the sea-coast in the lordship and parish of M.; that the jetty being out of repair, a court of sewers was holden, and a jury impanelled, who presented, finding the prescription as above, and that the owners and occupiers ought forthwith to repair; that notice was given to the owners and occupiers to appear at the next court to plead to the inquisition; that they appeared by L., and pleaded not guilty; that the traverse was tried, and the owners and occupiers found guilty by a jury, who amerced them in 200*l.*, which the commissioners confirmed, and set the amercement on them, and respited the levying thereof, of which they had notice; that at an adjourned court, it was ordered, that, unless the owners and occupiers repaired within fourteen days, the 200*l.* should be levied; that at a subsequent court, the repairs not being proceeded with, N. was appointed to demand and receive the amercement, and afterwards did demand it, but the owners and occupiers refused to pay; that at an adjourned court, the clerk was ordered to give notice that, unless the amercement were paid before a day named, a warrant would be issued to levy it by distress and sale; that such notice was given, but the owners and occupiers did not pay; that at a subsequent court a warrant was made by six commissioners, directing persons therein mentioned to levy the 200*l.* by distress and sale of the goods, &c. of the owners and occupiers; that plaintiff, at the time of the presentment, and thence to the time when &c. was an owner and occupier; that defendant by virtue of the warrant demanded the 200*l.* of him, and on his refusal, the jetty being still unrepaired, defendant, as a constable mentioned in the warrant, and bailiff of the commissioners, well-acknowledged &c.: — It was held a good cognisance, for that the amercement might be on the owners and occupiers of the lordship generally, yet the levy on the individual; and that, whether a sale was justifiable or not, the cognisance was good, because it did not shew that a sale had been made in fact, though directed by the warrant.

An amercement may be on the owners and occupiers of a lordship generally, yet the levy on the individual.

In an avowry for tithe composition under stat. 4 Geo. 4. c. 99. it was held to be sufficient to state in the words of the 58th section, that the

Avowry for tithe compositions under stat. 4 Geo. 4. c. 99.

(1) *Short v. Hubbard*, 2 Bing. 349. S. P. contrà, *Bulpiat v. Clarke*, 1 N. R. 56.

(3) *Hawkins v. Echles*, 2 B. & P. 359.

(4) 11 A. & E. 383.

(3) *M^cCalla v. Thompson*, 1 Jebb & Symes (Irish), 63.

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.

AVOWRY FOR
RENT ARREAR.
Stat. 11 Geo. 2.
c. 19. s. 22.

defendant took the goods, &c. "as a distress, by force of the statute in that case made and provided." (1)

At common law it was requisite to shew in an avowry and cognisance for rent the quantity and commencement of the estate of the defendant, and other particulars respecting title; but stat. 11 Geo. 2. c. 19. s. 22., after reciting that difficulties often arose in making avowries or cognisances upon distresses for rent, quit-rents, reliefs, heriots, and other services, enacts, "that all defendants in replevin may avow, or make cognisance generally, that where the plaintiff in replevin or other tenant of the lands and tenements whereon such distress was made enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress and still remains due, without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor or lessors, owner or owners of such manor."

Stat. 25 Geo. 2.
c. 13. s. 4.

The Irish Act (25 Geo. 2. c. 13. s. 4.) extends to all cases in which the relation of landlord and tenant subsists; and therefore, where the rent is payable in advance, by agreement between the parties, and a distress is made during the quarter for a gale due at the commencement of that quarter by the terms of the contract, and the tenant brings replevin, the landlord may avow generally without setting out title. (2)

An avowry
admits the prop-
erty of the
goods to the
plaintiff.

In replevin, an avowry or cognisance for rent admits the property of the goods in the plaintiff; but if the plaintiff's plea subsequently shew the property of the goods to be in another, the plaintiff cannot maintain the action. (3)

In replevin for taking a stranger's cattle for rent in arrear, a plea, that the cattle "were not levant and couchant in the close in which &c.," is bad on demurrer for not shewing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress. (4)

If the defendant avow or make cognisance, he must do so with particularity under a distress for rent (5), rent charge (6), or damage feasant (7): and it is advisable in some cases to set out the title specially, in order that a traverse of a particular part of it may be taken, and that the parties may proceed to trial upon some particular point in issue. (8)

An avowry for cognisance for rent in arrear must correctly describe the terms of the tenancy (9); but under an avowry for two years' rent, the party will succeed, notwithstanding that the rent was due for one year only. (10)

(1) *Killikelly v. Eyre* (Clerk), 1 Hudson & Brooke (Irish), 157.

(2) *Charters v. Sherrock*, 1 Alcock & Napier (Irish), 17. 506.

(3) *Clarke v. Davies*, 7 Taunt. 72. 2 Marsh. 386.

(4) *Jones v. Powell*, 8 D. & R. 416. 5 B. & C. 647.

(5) Stat. 11 Geo. 2. c. 19. s. 22. 2 Saund. 284. (d.) s. 4. 1 *ibid.* 347. n. 6.

(6) *Leominster Canal Comp. v. Cowell*, 1 B. & P. 213. *Bulpet v. Clarke*, 1 N. R. 56.

(7) *Hawkins v. Eckles*, 2 B. & P. 353. 2 Saund. 284. (d.) 1 *ibid.* 347.

(8) 2 Saund. 284. (d.) Stat. 11 Geo. 2. c. 19. does not extend to avowries for heriot custom, or for a rent charge. *Lepel v. Winton*, 2 Wils. 28. 2 Saund. 108. (a.) n. 6. *Leominster Canal Comp. v. Cowell*, 1 B. & P. 213.

(9) *Brown v. Sayce*, 4 Taunt. 320.

(10) *Forty v. Imber*, 6 East. 434. *Per r. Roach* (Inhab. of), 6 T. R. 248. *Cald v. Bryan*, 3 B. & P. 348.

A husband may avow in his own name for rent due in right of his wife. Where, therefore, there were three avowries, first, by E. W. and J. T. for rent due to them from the plaintiff as tenant to them; secondly, by E. W. and J. T., in their own right, for rent due to them from the plaintiff as tenant of the premises generally; and lastly, by E. W. and J. T. and Ann his wife, in right of the said Ann, for rent due to E. W. and J. T. and Ann his wife, in right of the said Ann, from the plaintiff as tenant to E. W. and J. T. and Ann his wife, in right of the said Ann:—It was held, after a declaration in ejectment served on the plaintiff, on the demise of E. W., J. T., and Ann his wife, to be supported by evidence of an attornment from him to them; and, consequently, that there was no variance. (1)

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.

Husband may
avow in his
own name for
rent due in
right of his
wife.

An avowry for a rent charge devised to A. the wife of B. may be made by B. and A. in the right of A. (2)

Where a distress was made by the command and in the name of a landlord, but he died before the distress was actually made:—It was held, that the bailiff might make cognisance as the bailiff of his executrix, under stat. 32 Hen. 8. c. 37., who ratified the distress, although before probate. (3)

Distress made
by command of
a landlord, who
dies before it is
actually made.

Joint tenants and co-parcenors must join in an avowry, and a cognisance as their bailiff should be for the entire rent (4); but tenants in common must sever, and the avowry of each must be *de und medietate* of the whole rent, and not of a certain sum which amounts to a moiety. When the action is against one of several tenants in common, he should avow for his own proportion, and in general he makes cognisance as bailiff of his companion for the residue (5); or he may avow only for his undivided share of the rent. (6) If the action of replevin be against two tenants in common, they should join, one avowing, and the other as his bailiff making cognisance for an undivided moiety of the rent, and the one who first made cognisance avowing in his own right, and the other who first avowed making cognisance as his bailiff for the other undivided moiety. (7) If three tenants in common distrain thirty beasts, it is said they each should avow separately for ten (8), and one tenant in common cannot avow alone (9) for taking cattle damage feasant, but he ought also to make cognisance as bailiff of his companion. (10) And where two persons are defendants in replevin, they cannot it seems make several avowries in their own right for distinct matters: thus, if one avow for rent service, and the other for rent charge, both the avowries shall abate, for the court would be in doubt to which of them return should be awarded. (11)

Joint tenants
and co-par-
cenors.

It is not necessary that an avowry for rent should allege in precise terms,

(1) *Gravenor v. Woodhouse*, 9 Moore, 148. 2 Bing. 71., *et vide* S. C. 7 Moore, 289. 1 Bing. 38.

(7) *Harrison v. Barnby*, 5 T. R. 247.

(8) *Ibid.* Co. Litt. 314. 317.

(2) *Wynne v. Wynne*, 2 M. & G. 8. So, although the rent charge issue out of a term of years.

(9) *Reeves v. Morris*, 2 Jebb & Symes (Irish), 344.

(10) *Culley v. Spearman*, 2 Hen. Black. 386.

(3) *Whithead v. Taylor*, 2 P. & D. 367.

(4) 4 Bac. Abr. Joint Tenant (K.), 513.

(5) *ibid.* Replevin (K.), 94. *Harrison v. Barnby*, 5 T. R. 246. *Kitchen v. Buckley*, 1 Lev. 109. *Ibid.* Sir T. Raym. 80.

(11) *Slingsby's case*, 5 Co. 19. (a.) *Tey's case*, *ibid.* 38. (b.) A prayer of a return of the goods in a plea by a defendant in replevin, averring such joint ownership, is no ground of objection upon general demurrer, nor (*semble*) upon special demurrer. *Reeves v. Morris*, 2 Jebb & Symes (Irish), 344.

(6) *Harrison v. Barnby*, 5 T. R. 246. *Culley v. Spearman*, 2 Hen. Black. 387.

**PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.**

Not requisite to allege positively, that the plaintiff was tenant to the avowant.

Misdescription of the *locus in quo*, but not a fatal variance.

Terms of the contract under which the tenant holds must be truly stated.

that the plaintiff was tenant to the avowant; if the fact of the tenancy can be collected from the whole of the avowry it is sufficient. (1)

Where in replevin, the defendant avowed for rent in arrear for a dwelling-house with the appurtenances, and it appeared in evidence, that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants:—It was held to be no variance. (2)

In replevin for illegally distraining the plaintiff's growing corn in four closes, the defendants avowed the distress for rent in arrear, averring that the plaintiff held the closes in which &c., at and under a certain yearly rent; to which the plaintiff pleaded, that he did not hold in manner and form as alleged. Upon proof that the plaintiff held the four closes and two others at the rent stated in the avowry, it was holden to be no variance. (3)

Although a landlord may avow generally for rent in arrear under *stat. 11 Geo. 2. c. 19. s. 22.*, yet the terms of the contract under which the tenant holds must be truly stated in the avowry. Where, therefore, the defendant made cognisance as bailiff of J. S., whose tenant he alleged the plaintiff to be, under a demise before them made to the plaintiff, at a certain yearly rent, and the plaintiff pleaded *non tenuit modo et forma*, it was held, that the cognisance was not supported by proof of a conveyance under which J. S. claimed, and which purported to have been made by three trustees, but was executed by two only, as J. S. thereby only took two-thirds of the premises as a tenant in common with the trustee who had omitted to execute the deed. (4)

An avowry for rent, stating—an indenture of demise for years by A. to the plaintiff, reserving rent to A., his heirs and assigns; the death of A., and that B. was his heir; the death of B., and that avowant was his heir, as well as the heir of A.; and that the plaintiff enjoyed the *locus in quo* as tenant to the avowant as such heir of A. by virtue of the demise, but not stating that either A., B., or the avowant, were seised of any estate, is bad upon general demurrer, if considered as an avowry at common law; and upon *non tenuit* pleaded to such an avowry, a reversion will not be presumed in the defendant. (5)

A defendant in replevin will not be allowed to avail himself of the Statute of General Avowries to avoid setting out his title; and at the same time, by adding some specific facts to the common form of avowry, to deprive the plaintiff of the general defence under the plea of *non tenuit*. (6)

It is not necessary to aver, that the rent still remains due (7), nor to state any day of payment. Thus, where the avowry stated that one W. B. G. for two years ending on the 25th of March, 1824, and from thence until, &c. held and enjoyed the place in which, &c. as tenant thereof to the defendant by virtue of a demise at a certain yearly rent (not stating any day of pay-

Defendant cannot avail himself of the Statute of General Avowries to avoid setting out his title.

When not requisite to aver, that rent remains due, or to state day of payment.

A plea to an action of replevin for taking and detaining, denying the taking and justifying the detention, was held to be bad upon special demurrer for duplicity. *Reeves v. Morris*, 2 Jebb & Symes (Irish), 344.

(1) *Innes v. Colquhoun*, 5 M. & P. 63. 7 Bing. 265.

(2) *Page v. Chuck*, 10 Moore, 264.

(3) *Hargrave v. Shewin*, 9 D. & R. 20. 6 B. & C. 34.

(4) *Philpott v. Dobbinson*, 3 M. & P. 530. 6 Bing. 104.

(5) *Ryan v. McAnley*, 1 Jebb & Symes (Irish), 324.

(6) *Ibid.* In Ireland the practice of the Queen's Bench does not require the grounds of general demurrer to a previous pleading to be noted in the judges' books. *Ibid.*

(7) *Clarke v. Davies*, 2 Marsh. 386. 7 Taunt. 72.

ment), and then avowed for a sum due for the rent for two years ending the 25th of March:—It was held, on special demurrer, that the avowry was sufficient. (1)

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
ANCES.

In replevin, the defendant avowed for rent due and in arrear at Martinmas, "to wit, the 29d of November:"—It was held, that Martinmas must be taken to mean New Martinmas, and that the subsequent words, to wit, "the 29d of November," being surplusage, could not be taken to explain that Old Martinmas was intended. (2)

Period at
which the rent
became due.

If a defendant in replevin avow on the contract for 110*l.* rent, and prove a demise at 15*s.* an acre, amounting to 111*l.*, it will be a fatal variance. (3)

To a cognisance for rent in arrear, a plea in bar, that the defendant, on a former occasion made a distress for the same rent, and took goods liable to distress, sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent:—was held ill on special demurrer, assigning for cause, that the plea did not shew that the rent was satisfied by the former distress. (4)

When plea
does not shew
that the rent
was satisfied by
a former dis-
tress.

By stat. 32 Hen. 8. c. 37. executors have power to distrain for rent due to the testator in his lifetime.

AVOWRY BY
EXECUTORS. (5)

To a declaration in replevin for taking the plaintiff's goods, the defendant made cognisance as bailiff of an executrix under stat. 32 Hen. 8. c. 37., for arrears of rent incurred in the lifetime of the testator:—It was held, that such avowry need not set out the title of the testator, nor shew, that the executrix was entitled to distrain under that statute; and that, at all events, it could not be objected to after verdict. (6)

What is a suf-
ficient state-
ment of the
title of the tes-
tator.

An avowry by the defendants, as executors of T. F., that the plaintiff for all the time during which the rent was accruing due, and from thence until and at the time when &c., and until and at the death of T. F., held the place in which &c., as tenant to T. F. in his lifetime, under a demise made to him at a yearly rent, payable quarterly, and because two years' rent due from the plaintiff to T. F. in his lifetime remained unpaid to him or his executors, and because the plaintiff remained in possession of the place in which &c., from the death of T. F., till the time when &c., the defendants, as executors of T. F., well avowed the taking, &c.:—It was held on general demurrer, that such avowry was sufficient within stats. 11 Geo. 2. c. 19. s. 22. and 32 Hen. 8. c. 37., and might be supported. (7)

In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by stat. 11 Geo. 2. c. 19. s. 22. as upon a holding at a certain rent. And if he avow, under the statute, for the entire

AMENDMENT
OF AVOWRY.

(1) *Sheils v. Carter*, Batty (Irish), 55.

(2) *Smith v. Walton*, 1 M. & Sc. 380. *Quare*, Whether an avowry, stating the plaintiff to have held under a demise, at the early rent of 317*l.*, without stating when he rent was payable, does not mean that the rent was payable yearly? *Laycock v. Tufell*, 2 Chitt. 531.

(3) *Brown v. Sayce*, 4 Taunt. 320.

(4) *Hudd v. Ravenor*, 5 Moore, 542. 2 B. & B. 662. *Lingham v. Warren*, 4 Moore, 409. 2 B. & B. 36.

(5) *Vide antè*, 1885. tit. EXECUTORS.

(6) *Martin v. Burton*, 3 Moore, 608. 1 B. & B. 279., vide etiam *Meriton v. Gilbee*, 8 Taunt. 159.

(7) *Staniford v. Sinclair*, 9 Moore, 376. 2 Bing. 193.

PLEAS TO THE
DECLARATION
— AVOWRIES
AND COGNIS-
SANCE.

rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at Nisi Prius may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective particles (1) or parts into which the reversion has been divided. (2)

In *Gayler v. Farrant* (3) the defendant avowed for three quarters of a year's rent, under a holding at 115*l.* a year, payable quarterly; the chief contest at the trial was, whether the rent reserved was 100*l.* or 115*l.* a year; the jury having found that it was 115*l.* a year, but payable half yearly instead of quarterly, and the finding having been entered on the record, the court in the ensuing term gave leave to amend the avowry accordingly, notwithstanding the plaintiff before trial gave notice, that he relied on the variance, and should oppose any application to amend at the trial.

In *Knight v. M'Dowall* (4) an avowry for rent stated a yearly tenancy, commencing at Michaelmas; to which a tender and *non tenuit modo et formâ* were pleaded in bar. There were two actions of replevin. In the first, the evidence of the defendant in support of the second issue tended to shew, that the tenancy commenced at Old Michaelmas instead of New Michaelmas; and an application was made to the judge to amend, in pursuance of stat. 3 & 4 Will. 4. c. 42. s. 23. The judge refused, but directed the jury to find according to the fact; and the jury having found that the tenancy commenced at Old Michaelmas, such finding was stated on the record in pursuance of s. 24. of the foregoing statute. The court refused to enter judgment for the defendant on the second plea; and also refused to expunge the special finding of the jury on the application of the plaintiff.

7. PLEAS IN BAR BY PLAINTIFF.

PLEAS IN BAR
BY PLAINTIFF.

An avowry or cognisance being in the nature of a declaration, the plaintiff's reply thereto is termed a plea, and not a replication as in other actions.

Pleading several pleas.

Stat. 4 Anne, c. 16.

Under stat. 4 Anne, c. 16. the plaintiff in replevin may, with leave of the court, plead several pleas in bar to an avowry or cognisance (5), being in the nature of a declaration, but not to pleas in bar or justification.

By Reg. Gen. H. T. 4 Will. 4. pleas, avowries, and cognisances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed."

De injuriâ cannot be pleaded generally.

The plaintiff cannot plead in bar *de injuriâ* generally, but must take issue upon some particular allegation in the avowry. (6) But in *Bardons*

(1) "*Pro particulâ illâ*" is the expression used in the statute of *Quia Emptores*, Westm. 3., 18 Edw. 1. st. i. c. 2. 2 Inst. 503.

(2) *Roberts v. Snell*, 1 M. & G. 577. It seems that the judge, or the court substituted by consent of parties for the judge, at Nisi Prius, may make such amendment,

although first prayed for after the verdict is delivered, and before it is recorded.

(3) 4 Bing. N. C. 286. 6 Dowl. P. C. 426.

(4) 4 Jur. 939.

(5) 1 Chitt. Pl. 591. 649. *De Costa v. Clarke*, 2 B. & P. 368.

(6) *Jones v. Kitchen*, 1 B. & P. 76.

v. Selby (1) it was holden, that to an avowry under a distress for a poor's rate, a general plea in bar *de injuriâ* was sufficient.

A declaration in replevin for taking cattle, and carrying them four miles, and detaining them, whereby some of them died, is fully answered by a general avowry for rent; and a plea in bar in such a case, stating, that the defendants of their own wrong took the cattle, and unlawfully &c., and, as by the declaration mentioned, carried them to an unnecessary distance, is bad on special (and *semble* also on general) demurrer. (2)

In the action of replevin, as the plaintiff is bound to shew the place where the taking was with certainty, it is said there can be no new assignment. (3)

If the defendant have pleaded *cepit in alio loco*, with an avowry or cognisance for a return, the plaintiff cannot traverse any matter in the avowry or cognisance, but must take issue on the traverse of the place, or amend his declaration; but if the defendant had them in the place mentioned in the declaration, though he took them elsewhere, the plaintiff may safely take issue. (4)

And to any cognisance, the plaintiff may traverse, that the defendant was bailiff, concluding to the country. (5)

In replevin for taking the plaintiff's goods and chattels, to wit, a lime-kiln; avowry for rent; it was pleaded in bar, that the lime-kiln was affixed to the freehold: the court held the plea in bar to be bad, because it was a departure from the declaration. (6)

To an avowry or cognisance for rent, the plaintiff may in one plea or bar deny the demise or tenancy (7); and in another, that any part of the rent was in arrear (8), concluding each to the country (9); or he may plead payment of rent to a ground landlord, or prior incumbrancers, or of land or property tax in respect of the premises, though he cannot avail himself of any other set-off. (10) So a party may plead a former distress and satisfaction under it.

To an action of replevin it was pleaded in bar, 'that long before the said time when &c., to wit, on &c., at &c., the defendant demised the *locus in quo* to the plaintiff;' to which it was replied, "that long before the said time when &c., to wit, on &c., at &c., the defendant did not demise *môdo et formâ*." On demurrer, that the replication was a negative pregnant, and made the day and place of the demise, which were immaterial, part of the issue, it was held, that the words "before the said time when &c." were the material part of the traverse, and proof of a demise at any time before the distress would maintain the action, and that the day and place subsequently mentioned were immaterial. (11)

The plaintiff in replevin may plead in bar to the defendant's avowry or

PLEAS IN BAR
BY PLAINTIFF.

NEW ASSIGN-
MENT.

No new assign-
ment allowed.

To a plea of
cepit in alio loco,
plaintiff cannot
traverse any
matter in the
avowry.

Denial of def-
endants being
bailiff.

NON DEMISIT.

Plea in bar to
an avowry or
cognisance for
rent.

Where day and
place subse-
quently men-
tioned is im-
material.

NON TENUIT.

(1) 9 Bing. 756. 3 M. & Sc. 280. S. C. (in error), 3 B. & Ad. 2.

(2) *Connor v. Bentley*, 1 Jebb & Symes (Irish), 246. *Quare*, Whether in replevin for a distress for rent in Ireland, misuser of the distress can be new assigned. Ibid.

(3) 1 Chitt. Pl. 636. But the *locus in quo* is sufficiently set out by the words "in the parish of— in the city of—, and in a certain dwelling-house there." *Kenny v. Simpson*, 1 Jebb & Bourke (Irish), 17.

(4) 1 Saund. 347. n. 1. Com. Dig. Pleader (3 K.), 11—29. 1 Chitt. Pl. 591.

(5) *Horne v. Lewin*, 1 Ld. Raym. 641. Com. Dig. Pleader (K.), 14.

(6) *Nibley v. Smith*, 4 T. R. 504.

(7) Com. Dig. Pleader (3 K.), 16. 20.

(b.) 1 Chitt. Pl. 591.

(8) Ibid.

(9) 1 Saund. 108. (b.)

(10) 1 Chitt. Pl. 591. *Sapsford v. Fletcher*, 4 T. R. 511. *Dyer (Clerk) v. Bowley*, 2 Bing. 94. *Stubbs v. Parsons*, 3 B. & A. 516. *Dent v. Moore*, 1 ibid. 123.

(11) *Cuff v. Coster*, 1 D. & R. 42. 2 Chitt. 296.

**PLEAS IN BAR
BY PLAINTIFF.**

cognisance, that he did not hold as tenant, and that there was nothing in arrear, with a plea of infancy. (1)

In cognisance for rent in arrear under a demise from W.; it appeared by the lease, that W. was a receiver in Chancery "in a cause wherein A. was plaintiff and B. defendant;" the *reddendum* was to W. or to any future receiver:—It was held, that the lessee could not plead *non tenuit*. (2)

N. having no title to certain premises, let them by parol, and received rent. Afterwards another claimant B. demanded the rent; and N. being satisfied with B.'s title, informed his tenant in B.'s presence, that he had given up the premises to B. who was now the landlord, and that the rent was thenceforth to be paid to B.; the tenant acquiesced; and when B. demanded the next quarter's rent, paid part of it on account:—It was held, that the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him, no deception by any of the parties having been suggested. (3)

**TENDER OF
ARREARS.**

A plea in bar to an avowry stated, that only 16*l.* was due for the rent, and then pleaded a tender of that sum; the proof was, that only 15*l.* 16*s.* was tendered:—It was held a fatal variance, though only the latter sum was proved to be due for rent. (4)

**Where the tor-
tious detention
is a taking.**

In replevin for taking and detaining, to which there was an avowry for rent in arrear, it was pleaded, that after the taking, and before the impounding, the plaintiff tendered the rent and expenses. The plea was objected to on special demurrer, because it did not go to the taking but only to the detaining:—but it was held to be a good plea, because the tortious detention was a taking. (5)

**RIENS IN AR-
REAR.**

When the plaintiff admits the tenancy, and that part of the rent was in arrear, he may plead *riens en arriere* as to part, and a tender of the residue. (6)

PAYMENT.

Payment may be pleaded in bar to an avowry. (7) Therefore, to an avowry for rent, the tenant may plead payment of a ground rent to the original landlord. (8) So he may plead payment of an annuity, secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain. (9)

**Payment of
rent to mortga-
gee.**

In an avowry for rent, it was holden, that the tenant may plead payment of it to a mortgagee, to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff and threatened "to put the law in force" in case of refusal: and that such plea was in substance a plea of payment, and not of *mihi habuit in tenementis*, nor of eviction. (10) Where the plea set out the facts at large, and concluded *et sic riens en arriere*, with a verification, it was held, that it was not specially demurrable on the ground, that it amounted to a plea of *riens en arriere*, and should have concluded to the country. (11)

Where to an avowry in replevin for rent in arrear, the plaintiff pleaded in bar, payments for land tax and paving rates for six successive years, in

(1) *Wilson v. Ames*, 1 Marsh. 74. 5 Taunt. 340.

(2) *Dancer v. Hastings*, 4 Bing. 2.

(3) *Hall v. Butler*, 10 A. & E. 204.

(4) *John v. Jenkins*, 3 Tyrw. 170. 1 C. & M. 227.

(5) *Evans v. Elliott*, 5 A. & E. 142.

(6) Clift. Entr. 646. Com. Dig. *Pleader* (9 K.), 20. 1 Chitt. Pl. 591.

(7) Bull. N. P. 181.

(8) *Sapsford v. Fletcher*, 4 T. R. 511.

(9) *Taylor v. Zamira*, 6 Taunt. 594.

(10) *Johanson v. Jones*, 9 A. & E. 808. 1 P. & D. 657.

(11) *Ibid.*

order to avoid a distress; and that the sums so paid by him exceeded the amount of the rent distrained for:—It was held, that such a plea was bad on demurrer, as the tax and rates should have been deducted by the plaintiff from the rent of the current year, and as the plea in substance amounted, and was equivalent to, a set-off. (1) The plaintiff cannot claim on his plea a deduction for land tax, unless the sum distrained for was due at the time of such payment. (2)

PLEAS IN BAR
BY PLAINTIFF.

The plaintiff may, in his plea in bar, state a demise to himself from the defendant. (3)

DEMISE FROM
DEFENDANT.

Eviction is a good plea in bar. (4)

EVICITION.

In replevin upon a distress for rent, a plea in bar that the defendant pulled down a summer-house, whereby the plaintiff was deprived of the use thereof, without saying that he was expelled or put out of the same, was held insufficient, being a mere trespass, but no eviction. (5)

Nil habuit in tenementis is no plea in bar to an avowry under the stat. 11 Geo. 2. c. 19. (6)

NIL HABUIT IN
TENEMENTIS.

Since stat. 11 Geo. 2. c. 19., when the defendant avails himself of the general avowry, the plaintiff cannot in terms plead *nil habuit in tenementis*, though he may traverse the tenancy, which, if the avowant claim under a derivative title and has never received rent, will put such title in issue. (7)

*Nil habuit in
tenementis* can-
not in terms be
pleaded.

A plea to an avowry of distress for rent in arrear, “that before the lessors had any thing in the premises, and before they (claiming title under a pretended agreement between them and one A. B.) demised them to the lessee, A. B. had mortgaged them in fee to C. D.; that the mortgage being forfeited, and notice of the forfeiture being given to the lessee, and he having been required to attorn, did attorn to C. D. when he distrained for the rent, which the lessee paid him to prevent the goods from being sold under the distress:”—was holden bad on special demurrer, as it amounted in substance merely to a plea of *nil habuit in tenementis*. (8)

To an avowry or cognisance by a freeholder or a copyholder, or his tenant, for a distress damage feasant, the plaintiff may deny his title, and conclude to the country; or state his own title specially, and conclude with a traverse, though the former seems preferable. (9)

DAMAGE FEA-
SANT.

Denial of de-
fendant's title.

In replevin of cattle taken in A., the defendant avowed the taking in A. under a demise of certain premises of which B. was parcel, and because the cattle were damage feasant in B., he took them and drove them through A. on his way to the pound:—upon general demurrer, the avowry was held to be well pleaded. (10)

An avowry that the defendants were owners and occupiers of certain messuages, prescribing for common in the *locus in quo*, and avowing damage feasant, is a bad prescription. (11)

To an avowry in replevin of damage feasant in a certain close, and a

- (1) *Andrew v. Hancock*, 3 Moore, 278. 4 *ibid.* 511. *Alchorne v. Gomme*, 2 Bing. 54.
1 B. & B. 37. 1 Chitt. Pl. 591.
(2) *Stubbs v. Parsons*, 3 B. & A. 516. (8) *Alchorne v. Gomme*, 9 Moore, 130. 2
(3) 1 Chitt. Pl. 591. Bing. 54.
(4) Com. Dig. Pleader (K.), 14. 1 (9) 2 Saund. 206. (a.) n. 22. 1 *ibid.* 103.
Chitt. Pl. 591. (b.) *Archer's case*, 1 Co. 63, 64. 1 Chitt. Pl.
(5) *Hunt v. Cope*, Cowp. 242. 591.
(6) *Sullivan v. Stradling*, 2 Wils. 206. (10) *Abercrombie v. Parkhurst*, 2 B. & P.
(7) 2 Saund. 284. (d.) *Cooke (Clerk) v.* 480.
Losley, 5 T. R. 4. *Sapsford v. Fletcher*, (11) *English v. Burnell*, 2 Wils. 258.

PLEAS IN BAR
BY PLAINTIFF.

taking of the cattle there and driving them along a road to impound them: it was pleaded in bar, that the road was not parcel of the close: — It was holden on demurrer, that the avowry was good, and the plea bad. (1)

DEFECT OF
FENCES.

The plaintiff may plead in excuse for the cattle having been in the *locus in quo*, "defect of fences," which the defendant ought to have repaired. (2) So, admitting that the cattle trespassed in the *locus in quo*, the plaintiff may traverse that the distress was made whilst the cattle were damage feasant (3), or may plead a tender for impounding. (4)

A., having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant, for having broken the stones; B. pleaded, that there was no fence to keep them off, nor did A. otherwise guard or protect the stones; A. replied, that he was not bound to fence: — which replication on demurrer was held to be bad. (5)

ABUSE OF DIS-
TRESS.

It seems, that, in the case of a distress damage feasant, the plaintiff might plead in bar that the avowant, after making the distress, used the cattle, or otherwise became a trespasser *ab initio* (6), stat. 11 Geo. 2. c. 19. s. 19. applying only to distresses for rent. (7)

RIGHT OF
WAY.

The plaintiff can also plead in bar a right of way over the *locus in quo*. (8)

RIGHT OF
COMMON.

The plaintiff may likewise in a plea in bar claim a right of common in the *locus in quo*, either as a freeholder or copyholder, or as his tenant. (9)

In general a freeholder claims a right of common by prescription (10), and a copyholder grounds the right upon a custom within the manor, either for all copyholders within the manor, or for the tenant of the defendant's land in particular. (11)

When a copyholder claims common or other profit in the soil of a stranger, which is not parcel of the manor, he must prescribe in the name of the lord, viz. that the lord of the manor and his ancestors, and all those whose estate he hath, have immemorially had common, &c. in the *locus in quo* for themselves and their customary tenants. (12)

Where the claim of a plaintiff in replevin was founded on a custom to demise right of common appurtenant without deed, and he pleaded in bar a custom to demise the right of common generally, and a demise according to the custom: — It was held on general demurrer, that, even supposing such a custom to be good, the plea was bad on its face, for alleging a demise of a thing by grant without a *profert* of the deed of grant, or without alleging a custom to demise without deed, in lieu thereof. (13)

(1) *Mattravers v. Fosset*, 3 Wils. 295.

(2) 2 Saund. 284. (c.), 285. n. 4., 289. n. 7. *Dovaston v. Payne*, 2 Hen. Black. 527.

(3) *Clement v. Milner*, 3 Esp. N. P. C. 95.

(4) Bull. N. P. 60. (a.) *Anscumb v. Shore*, 1 Camp. 285. *Allen v. Bayley*, 2 Lutw. 1596. Com. Dig. Pleader (3 K.), 23. 1 Chitt. Pl. 592., et vide *Sheriff v. James*, 1 Bing. 341. *Browne v. Powell*, 4 ibid. 230.

(5) *Churchill v. Evans*, 1 Taunt. 529.

(6) Com. Dig. Pleader (3 K.), 20. 7 Bac. Abr. Trespass (B.), 648. *Dye v. Leatherdale*, 3 Wils. 20., sed vide stat. 11 Geo. 2. c. 19.

Wallace v. King, 1 Hen. Black. 13. Stat. 5 Geo. 4. c. 126. s. 144.

(7) *Dwyer v. Peacock*, 2 Fox & Smith, 34.

(8) Com. Dig. Pleader (3 K.), 24. 1 Chitt. Pl. 592.

(9) Ibid.

(10) 1 Saund. 348. n. 10. Com. Dig. Pleader (3 K.), 24.

(11) Com. Dig. Pleader (3 K.), 24. 1 Saund. 348. n. 8. 11.

(12) 1 Saund. 349. n. 11. Com. Dig. Pleader (3 K.), 24. *Clews v. Stevens*, 2 Moore, 464.

(13) *Lathbury v. Arnold*, 8 Moore, 72. 1 Bing. 217.

Where a defendant in replevin having made cognisance for rent service as bailiff of A., B., and C., who were lawfully possessed of a certain manor of which the *locus in quo* was parcel, and holden at a certain rent; and the plaintiff replied, that A., B., and C. were not seised in their desmesne as of fee of the manor:—It was held bad on demurrer. (1)

If defendant in replevin plead by way of justification of the taking, that he was possessed of a messuage with common appurtenant, and that the plaintiff's cattle were damage feasant on the common, and conclude in bar without praying a return, it seems that such a plea is bad. (2)

PLEAS IN BAR
BY PLAINTIFF.

8. THE REPLEVIN BOND.

THE REPLEVIN
BOND.

Whether the replevin be by plaint or by writ, the sheriff before he grants the one, or executes the other, ought to take from the plaintiff pledges *de proseguendo* and pledges *de retorno habendo*. The first are formal pledges at common law to answer to the king for the amerciements *pro falso clamore*, in case the plaintiff shall not prevail in the suit. (3) Other pledges were introduced by stat. 13 Edw. 1. st. i. c. 2. (Westm. 2.) for the security of the avowant or person making cognisance, in case he should have judgment for a return of the beasts; and by this statute these pledges are answerable to the avowant, if the plaintiff dispose of the beasts pending the suit; and if the pledges be insufficient, the sheriff is answerable for their insufficiency. (4)

Mode of taking
replevin bond.

The pledges *pro retorno habendo*, under stat. 13 Edw. 1. st. i. c. 2. (Westm. 2.), may be by bond of the plaintiff (5) in replevin, himself and sureties, or of sureties only. The sum is stated by Bohun (6) to be a sum proportional to the value of the goods. The condition of the bond is, in practice, not only that the plaintiff shall prosecute the suit in replevin, but also that he shall make return of the beasts, if return thereof be adjudged by law.

These pledges under stat. Westm. 2. c. 2. are in the manner of sureties *pro retorno habendo*, and therefore money or cattle being a pawn, are not within the statute, and it seems one sufficient pledge is all that is requisite. (7) But bonds under stat. Westm. 2. are not assignable.

By stat. 1 & 2 Phil. & M. c. 12. s. 3. the sheriff is to appoint four deputies to make replevins.

Stat. 1 & 2 Phil.
& M. c. 12.
s. 3.

By stat. 11 Geo. 2. c. 19. s. 23., to prevent vexatious replevins of distresses taken for rent, "all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses, not interested in the goods or distress, which oath the person granting such replevin is thereby authorised and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and

Stat. 11 Geo. 2.
c. 19. s. 23.

(1) *Bulpet v. Clarke*, 1 N. R. 56.

(5) *Blachett v. Crissop*, 1 Ld. Raym. 279.

(2) *Hawkins v. Eckles*, 2 B. & P. 359.

(6) *Inst. Leg.* 442. *Evans v. Brander*,

(3) *Gilbert on Replevin*, 97. 1 Bro. C. C. 429.

2 Hen. Black. 550.

(7) *Gilbert on Replevin*, 97, 98. *Wilkinson on Replevin*, 12.

(4) *Gilbert on Replevin*, 97.

THE REPLEVIN BOND.

Persons who have authority to grant replevins.

chattels distrained, in case a return shall be awarded before any deliverance be made of the distress."

Under the foregoing statute, a replevin bond may be taken and assigned by any officer who has power to grant replevins; and in *Thompson v. Farden* (1) it was held, that one of the sheriffs of London has such power without his companion, and may therefore take and assign replevin bonds.

Where the plaintiffs, assignees of the sheriff, declared, that at the city of C., and within the jurisdiction of the mayor of the city, they distrained the goods of W. H. for rent, and that W. H., at the said city, made his plaint to the mayor, &c., and prayed deliverance, &c.; whereupon the mayor took from him and the defendant, and another person, a bond, which they all three executed, conditioned for W. H. appearing before the mayor, or his deputy, at the next court of record of the city, and there prosecuting his suit, &c.; and thereupon the mayor replevied, &c.: — It was held, that it was not ground for special demurrer, that the declaration did not shew a custom for the mayor to grant replevin and take bond, and did not shew that the plaint was made in court. (2)

Stat. 36 Geo. 3. c. 38. applies to the case of a sheriff replevying goods under a writ of replevin issued out of Chancery.

The sheriff, having replevied goods distrained for rent, in pursuance of a writ of replevin out of Chancery, and having taken a replevin bond from the defendants, conditioned for appearance at the return of the writ, prosecuting the suit with effect, and making a return, if a return should be adjudged, and indemnifying the sheriff from all charges and damages by reason of the replevin; in an action brought by the assignee of the replevin bond, it was held, upon motion in arrest of judgment: — that stat. 36 Geo. 3. c. 38., which provides that "all sheriffs and other officers having authority to grant replevins" shall in every replevin of a distress for rent take a bond in the manner specified by the act, extends to the case of a sheriff replevying goods under a writ of replevin out of Chancery, and that, therefore, the bond in this case was assignable under that statute; and that the bond in this case was assignable under the same statute, although it contained a condition beyond what the statute directs, viz. a condition to indemnify and save harmless the sheriff. (3)

Replevin clerk.

Where a person had acted for many years as clerk of replevins to several, and had been recognised as such by the present sheriff, but it did not appear, that he had been appointed to his office under stat. 1 & 2 Phil. & M. c. 12., the court granted a prohibition to restrain the sheriff from proceeding in a suit, where a replevin had been granted by such an officer. (4)

WHEN SHERIFF CANNOT GRANT REPLEVIN.

Where the lord of a franchise has the prescriptive right to grant a replevin in the same manner as the sheriff had before the Statute of Marlebridge, the sheriff has no concurrent jurisdiction with him. (5)

The bond should follow

The bond should follow the language of the statute; but a bond conditioned to prosecute the action (in replevin) with effect, and to indemnify

(1) 1 M. & G. 535.

(2) *Wilson v. Hobday*, 4 M. & S. 120.

(3) *Caithness v. Murphy*, Smith & Batty (Irish), 1. *Quare*, Where a replevin bond is taken by the sheriff, who replevies under a writ of replevin, whether such bond is assignable under stat. 8 Geo. 1. c. 6.

(4) *Griffiths v. Stephens*, 1 Chitt. 196.

(5) *Mounsey v. Dawson*, 1 N. & P. 763.

A. and B. were in partnership as attorneys. A. alone was appointed replevin clerk to the sheriff: — It was held, that an action for the expenses of preparing a replevin bond must be brought by A. alone, although it was executed in the office where he and B. carried on their joint business. *Brandon v. Hubbard*, 4 Moore, 367. 2 B. & E. 11.

the sheriff, is good, and may be assigned, although it be not required by the condition, that the suit shall be prosecuted without delay. (1)

THE REPLEVIN BOND.

The condition in a replevin bond, for prosecuting the suit with effect, means the prosecuting it to a not unsuccessful termination: thus, in a declaration in an action on a replevin bond, the breach assigned was, that the defendant did not appear at the next county court, and then and there prosecute his suit with effect: — It was held, that the breach was not well assigned, it being consistent therewith, that the suit might have been begun at the next county court, and be still pending. (2)

the language of stat. 11 Geo. 2. c. 19.

"Prosecuting the suit with effect."

A bond taken by the sheriff upon making replevin, but not in all points conformably to the directions of stat. 11 Geo. 2. c. 19. s. 23., is good and assignable. (3)

Bond executed by one surety.

Though a replevin bond be executed by one of the sureties only, it is nevertheless available by the sheriff against such surety. (4)

In Ireland, a replevin bond, with three sureties, taken by the sheriff, is assignable under stat. 8 Geo. 1. c. 6., and also under stat. 36 Geo. 3. c. 38. (5)

Bond executed by three sureties.

By stat. 11 Geo. 2. c. 19. s. 23. the sheriff, on taking a replevin bond, must ascertain on oath the value (6) of the goods distrained. Where the under-sheriff administered the oath to A. B., the broker, and there was also written on the margin of the replevin bond, "A. B. maketh oath, that the value of the goods within specified is 49*l.* 16*s.*:" — It was held, that this was a mere memorandum, and did not require an affidavit stamp. (7)

Where affidavit stamp not requisite.

A rent charge is within the meaning of stat. 11 Geo. 2. c. 19. s. 23. upon a replevin; therefore, in a distress for such a rent, the sheriff may take and assign a bond, as in a replevin for any other kind of rent. (8)

Distress for rent charge.

A bond so taken by the sheriff, and conditioned for appearance at the next county court, prosecuting the plaint with effect, making a return if adjudged, and indemnifying the sheriff from all charges and damages by reason of the replevin, is authorised by the above statute. (9)

The sheriff is liable to an action on the case, if he refuse to assign the bond; and this liability extends to a bond in a replevin of cattle taken damage feasant (10); and the remedy by action is not affected by stat. 17

ASSIGNMENT OF BOND.

Liability of sheriff for re-

(1) *Dunbar v. Dunn*, 10 Price, 54., et vide *Short v. Hubbard*, 2 Bing. 349.

(2) *Jackson v. Hanson*, 8 M. & W. 477. It seems, that the words "then and there," usually inserted in the conditions of replevin bonds, are not proper. *Ibid.*

Where in an appeal by lodgment with the sheriff, the notice of appeal was to prosecute the appeal before the next going judge of assize: — It was held, that the notice was insufficient. *O'Hara v. McCauley*, 1 Irish Circuit Cases, 256.

(3) *Austen v. Howard*, 7 Taunt. 28. 327. 1 Moore, 68. 2 Marsh. 352.

(4) *Ibid.*

(5) The stat. 8 Geo. 1. c. 6. is not repealed by stat. 36 Geo. 3. c. 38., and includes sheriffs, although they are not expressly named in the act. *Harding v. Lyhane*, 2 Fox & Smith (Irish), 160.

(6) Where a replevin bond was taken in a penalty greater than the amount of goods

distrained, and with a clause in the condition to indemnify the sheriff for granting the replevin; and it appeared that the bond had been executed in September, and assigned in February, but no application to set it aside was made till Easter Term, the court refused to set it aside on those grounds, but intimated that it was objectionable that the bond should be taken in such an amount, and that the frequent practice so to do and the delay were the only causes for not interfering to set it aside. *Miers v. Lockwood*, 9 Dowl. P. C. 975.

(7) *Dunn v. Lowe*, 4 Bing. 193. 12 Moore, 407.

(8) *Short v. Hubbard*, 2 Bing. 349. 9 Moore, 667. 10 *ibid.* 107. S. P. contra *Bulpit v. Clarke*, 1 N. R. 56.

(9) *Ibid.*

(10) *Perreau v. Bevan*, 5 B. & C. 305.

**THE REPLEVIN
BOND.**

fusing to assign
the bail bond.

Stat. 11 Geo. 2.
c. 19. s. 23.

By whom and
to whom the
bond can be as-
signed.

When defend-
ant entitled to
an assignment.

When defend-
ant not entitled
to an assign-
ment.

Car. 2. c. 7., notwithstanding the defendant may proceed under that statute. (1)

By stat. 11 Geo. 2. c. 19. s. 23. the sheriff or officer, having authority to grant replevins, taking any replevin bond, shall, "at the request and costs of the avowant or person making cognisance, assign such bond to the avowant or person making cognisance, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon (2); and if the bond so taken and assigned be forfeited, the avowant, or person making cognisance, may bring an action and recover thereupon in his own name; and the court where such action shall be brought may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond."

Under this statute the assignment is made by the sheriff (3) to the avowant or consor, as expressly directed (4); or to the avowant and consor (5); or to the avowant only, though there be a consor (6); or to the consor only, if there be no avowant (7): but it seems questionable, whether the assignment can be to the consor, when there is no avowant. (8) It may be observed, that taking an assignment of the replevin bond from the sheriff is no waiver of any proceedings afterwards against him (9), as it is in the case of a bail bond. (10)

A defendant in replevin is entitled to an assignment of the replevin bond, if the plaintiff in replevin do not appear in the county court, and prosecute according to the condition. (11)

And he may sue on the bond as assignee of the sheriff in the superior courts, though the replevin be not removed out of the county court. (12)

A defendant in replevin is not entitled to an assignment of the replevin bond, on the plaintiff's neglecting to declare at the next county court, if he himself have not then appeared to the summons; and if he obtain an assignment and bring an action, the court of Exchequer will stay the proceedings (on an affidavit being made, that a writ of *recordari facias loquelam* has been sued out), without payment of costs by the defendant, which will be ordered to abide the event of the proceedings on the *recordari facias loquelam*. (13)

(1) Gilbert on Replevin, 225. *Waterman v. Yea*, 2 Wils. 41. *Turnor v. Turner* (Clerk), 2 B. & B. 107. 4 Moore, 606. *Perreau v. Bevan*, 8 D. & R. 72. 5 B. & C. 305.

(2) The stamp duty is repealed by stat. 5 Geo. 4. c. 41.

(3) An assignment signed, not by the sheriff or under-sheriff, but by a person accustomed to act in the sheriff's office, in the name of the sheriff and under the seal of the office, has been held sufficient. *Middleton v. Sandford*, 4 Camp. 36.

(4) *Phillips v. Price*, 3 M. & S. 163.

(5) *Ibid*.

(6) *Page v. Eamer* (Sir John), 1 B. & P. 379. 381, 382.

(7) *Ibid*. 378. 381. *Dias v. Freeman*, 5 T. R. 197.

(8) *Page v. Eamer* (Sir John), 1 B. & P. 382.

(9) *Vide post*, 2510. PROCEEDINGS AGAINST SHERIFF.

(10) 1 Saund. 125. n.

(11) *Dias v. Freeman*, 5 T. R. 195.

(12) *Ibid*, et vide *Brackenbury v. Fell*, 13 East, 585.

(13) *Seal v. Phillips*, 3 Price, 17. Admitted in a civil bill replevin having been reversed on appeal, upon its appearing that the respondent was not tenant to the appellant:—It was held, that the appellant was not entitled to an assignment of the replevin bond without shewing his right to make the distress as landlord of the premises in question. *Armitage v. Donohue*, 1 Irish Circuit Cases, 256.

It seems that a stranger, whose goods are distrained on the premises for rent, may replevy under the Civil Bill Acts, and does not thereby admit tenancy. *Ibid*.

In an action on a replevin bond conditioned to prosecute with effect and without delay, it is a sufficient breach of the condition, that the plaintiff in replevin did not use due diligence in the prosecution of the suit. (1)

But where the plaint was removed by *recordari facias loquelam*, and the plaintiff in replevin appeared, and the defendant did not:—It was holden, that subsequent delay was not a breach of the bond, even though the sheriff should have neglected to summon the defendant as directed by the *recordari facias loquelam*. (2)

Allowing two years to elapse without proceedings is a breach of the condition of a replevin bond to prosecute the replevin without delay. (3)

And the obligee might recover on such breach, although a judgment of *non pros.* was never signed in the county court. (4)

The condition of a replevin bond is not satisfied by a prosecution of the suit in the county court; but if the plaint be removed by *recordari facias loquelam* into a superior court, it must be prosecuted there with effect, and a return made, if adjudged there. (5)

Where in an action by the assignee of the sheriff on a replevin bond, conditioned for the plaintiff in replevin to appear at the county court and prosecute his suit with effect, and to make a return of the goods distrained, if it should be adjudged; and the plaintiff in replevin, after removing the plaint into the court of Common Pleas, became nonsuited:—It was held, that he had thereby not prosecuted his suit with effect, and that the condition of the bond was broken; that the avowant had his election to proceed by a writ *de retorno habendo*, or to issue a writ of inquiry under stat. 17 Car. 2. c. 7. s. 2. Therefore, to a declaration against one of the sureties on the bond, averring that the plaintiff in replevin did not prosecute his suit with effect, a plea stating the writ of inquiry and judgment to recover the arrears of rent found under stat. 17 Car. 2. c. 7., is no bar to the action on the bond, but will be bad on general demurrer, because it does not shew that any execution had issued on the judgment, or that the sum recovered had been levied and paid to the avowant before action brought. (6)

The bond is not forfeited by the plaintiff's not declaring in the county court, if the defendant has not appeared therein to the summons (7); and if the plaintiff enter his plaint, and afterwards be restrained by injunction till his death, whereby the plaint abates, the bond will not be forfeited (8); so, if the plaintiff die before the termination of the suit, it will abate, and the bond will not be forfeited. (9)

The assignee of a replevin bond (10) may sue in his own name; and the avowant may join with a party making cognisance in an action on the replevin bond. (11)

And both avowant and person making cognisance may take an assignment of a replevin bond, and sue jointly upon it. (12)

THE REPLEVIN BOND.

WHAT IS AND IS NOT A FORFEITURE OF THE BOND.

Not using due diligence in prosecuting the suit.

RIGHTS OF ACTION BY ASSIGNEE OF THE BOND UNDER STAT. 11 GEO. 2. c. 19. Who may sue.

(1) *Harrison v. Wardle*, 2 N. & M. 703. 5 B. & Ad. 146.

(2) *Ibid.*

(3) *Axford v. Perrett*, 4 Bing. 586. 1 M. & P. 476.

(4) *Ibid.*

(5) *Gwillim v. Holbrook*, 1 B. & P. 410.

(6) *Turnor v. Turner (Clerk)*, 4 Moore, 506. 2 B. & B. 107.

(7) *Seal v. Phillips*, 3 Price, 17.

(8) *Ormond (Duke of) v. Bierly*, Carth. 519. 12 Mod. 580.

(9) *Ibid.* Archb. by Chitt. 848.

(10) Stat. 11 Geo. 2. c. 19. s. 23. *Page v. Eamer (Sir John)*, 1 B. & P. 381. (a.) n. *Phillips v. Price*, 3 M. & S. 180.

(11) 1 Chitt. Pl. 16. *Archer v. Dudley*, 1 B. & P. 381. n.

(12) *Phillips v. Price*, 3 M. & S. 180.

THE REPLEVIN BOND.

Not obliged to sue in the court into which the plaint has been removed.

Defendant not bound to procure a return of the writ of replevin.

LIABILITIES OF THE PLEDGES.

Amount of penalty in the bond and costs.

Amount of rent in arrear at the time of the distress.

Value of goods seized.

Defendant taking a verdict and judgment for the arrears of rent.

Pledges when discharged.

Reference to arbitration.

Where sureties will be discharged, although not damnified.

The assignee of a replevin bond is not obliged to sue in the court into which the plaint has been removed by *re. fa. lo.* (1)

The defendant in replevin is not bound to procure a return of the writ of replevin, or to appear to it, before taking an assignment of the replevin bond; and he may proceed against the sureties, notwithstanding the death of the principal before the return of the writ, and before the assignment. (2)

The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the suit on the bond. (3)

They are likewise only liable to the amount of rent in arrear at the time of the distress and costs; and they are not liable for subsequent rent. (4)

The sureties in a replevin bond are only liable for the value of the goods seized and double costs; and if that value exceed the amount of rent due, they will only be liable for the rent (5); and the court will stay the proceedings on the replevin bond on the sureties paying into court the value of the goods distrained, and the costs. (6)

The pledges are not discharged by the defendant's taking a verdict and judgment for the arrears of rent, &c. under stat. 17 Car. 2. c. 7. ss. 2 & 3. (7)

If a plaintiff in replevin be nonsuited for want of a plea in bar, the avowant may sue the sureties on the bond, and need not execute a writ of inquiry for his damages. (8)

If the plaintiff in replevin be nonsuited, the defendant is not bound to have his damages assessed by the jury under stat. 17 Car. 2. c. 7., or to take the earliest moment to prosecute his writ *de retorno habendo*. And he may again distrain the same goods for rent subsequently accrued, previously to executing his *retorno habendo*, without waving his action against the sureties in the bond. (9)

Where plaintiff and defendant in replevin, without the privity of the pledges, agreed to refer the cause to arbitration, and that the replevin bond should stand as a security for the performance of the award, the court relieved the pledges. (10)

A. (a defendant in replevin) having obtained judgment, and issued a writ *de retorno habendo*; and B. (the plaintiff in replevin) having obtained an injunction in a court of equity to restrain A. from proceeding, which injunction was afterwards dissolved; A., instead of proceeding upon his judgment, entered into an agreement with B., the result of which was, an order pronounced in the equity cause, upon the consent of A. and B., that A. should have a sum of money which had been lodged in court by B., and also a further sum, together with the costs of the equity cause, to be paid within a fortnight after taxation; and that thereupon all further proceedings should cease between the parties, and that A., if so required, should execute a

(1) *Wilson v. Hartly*, 7 Dowl. P. C. 461.

(2) *White v. Murphy*, 1 Hudson & Brooke (Irish), 498.

(3) *Hefford v. Alger*, 1 Taunt. 218.

(4) *Ward v. Henley*, 1 Y. & J. 285.

(5) *Hunt v. Round*, 2 Dowl. P. C. 558.

(6) *Gingell v. Turnbull*, 3 Bing. N. C. 881.

(7) *Turnor v. Turner (Clerk)*, 2 B. & B. 107. 4 Moore, 606. 616.

(8) *Waterman v. Yea*, 2 Wils. 41.

(9) *Hefford v. Alger*, 1 Taunt. 218.

(10) *Archer v. Hale*, 1 M. & P. 585. 4 Bing. 464., et vide *Aldridge v. Harper*, 10 ibid. 124. *Ireland (Bank of) v. Beresford*, 6 Dow, 238. *Donnelly v. Dunn*, 2 B. & F. 45.

warrant of attorney to satisfy the judgment. An action having been afterwards commenced by A. against one of the sureties in the replevin bond, and a motion having been made by the latter to set aside the proceedings:—It was held, 1st, that the effect of the above consent was to give time to the principal, and thereby to discharge the sureties; 2dly, that the court had jurisdiction, under stat. 36 Geo. 3. c. 38., to set aside the proceedings on motion; and 3dly, that, to entitle the surety to the interposition of the court, it was not necessary, that he should have been damnified. (1)

THE REPLEVIN
BOND.

Where one of the sureties to a replevin bond was a material witness for the plaintiff in the cause, the court of Common Pleas allowed another to be substituted in his stead on his being approved of by the prothonotary, and giving the defendant's attorney notice to appear before him to sanction such approval, as in case the surety so substituted should be insufficient, the defendant would be deprived of his remedy against the sheriff on the bond. (2)

Substitution of
another surety.

In an action at the suit of the assignee on the bond taken under stat. 11 Geo. 2. c. 19. s. 23., the *venue* may be laid in any county; the plaintiff may declare in the *debet* and *detinet* only. (3) The declaration should state the distress, and that it was for rent; the application and prayer to the sheriff to replevy; and that the sheriff took a replevin bond, the obligatory part and condition of which must be truly set out: it should then be alleged, that the replevin was granted; that at the county court mentioned in the condition, the plaintiff in replevin levied his plaint, and found pledges. The proceedings in replevin are then stated, and the judgment *de retorno habendo*; and it should then be averred, that the plaintiff in replevin did not return the goods, and that the bond became forfeited to the sheriff, who assigned it to the plaintiff.

DECLARATION
AT THE SUIT OF
THE ASSIGNEE.

It is not necessary in an action on a replevin bond to aver, that a return has not been made, although it may appear on the face of the declaration to have been awarded; where it is averred, that the suit has not been prosecuted with effect, a breach of either of the conditions for prosecuting with effect, returning the goods, or indemnifying the sheriff, will singly be sufficient to support the action. (4)

Not necessary
to aver that a
return has not
been made.

A declaration on a replevin bond by two assignees of the sheriff, stating that they distrained the goods for rent due to one of them, need not shew that the other acted as bailiff. (5)

Need not be
shewn that the
other acted as
bailiff.

Nor need it set out the goods distrained. (6)

Growing crops may be considered in the nature of goods and chattels under stat. 11 Geo. 2. c. 19., as they may be distrained in the same manner as articles of the latter description: where, therefore, the condition of a replevin bond was, that the defendant should prosecute his action with effect against the plaintiff for taking and detaining his goods, chattels, and growing crops; and in the declaration the bond was set out as conditioned to prosecute with effect, for taking and detaining the goods and chattels in the said condition mentioned:—It was held, that this was no variance. (7)

Growing crops
considered as
goods and
chattels under
stat. 11 Geo. 2.
c. 19.

In a declaration against a surety by the assignee of a replevin bond (on writ of replevin out of Chancery) the condition of which was, that A. B.

(1) *O'Beirne v. Greene*, 2 Jebb & Symes Irish, 582.

(2) *Bailey v. Bailey*, 7 Moore, 439. 1 King. 92.

(3) *Wilson v. Hobday*, 4 M. & S. 120.

(4) *Dunbar v. Dunn*, 10 Price, 54.

(5) *Phillips v. Price*, 3 M. & S. 180.

(6) *Ibid.*

(7) *Glover v. Coles*, 7 Moore, 231. 1 Bing. 6.

**THE REPLEVIN
BOND.**

should prosecute the replevin suit with effect and without delay: it was alleged as a breach, that A. B. did not prosecute without delay; to which it was pleaded, that A. B. did prosecute without delay, and that final judgment was had in the replevin suit as soon as it could have been obtained, &c. which was holden bad on general demurrer.

Where the declaration omitted to state, that the bond was taken on the replevin of a distress for rent, to which alone stat. 36 Geo. 3. c. 18. is applicable, it was held, that although the bond must be presumed to have been assigned under that statute, the defect was cured by pleading over, and the declaration was good upon general demurrer:—but it seems, that such an omission would have been fatal upon special demurrer. (1)

Proceedings by
scire facias
against the
pledges.

The defendant can, if he has obtained a judgment for a return of the goods taken, and a writ of *retorno habendo* has been issued, and returned *elongata*, or *eloinment*, proceed by *scire facias* against the pledges; but this remedy is seldom adopted. (2)

PROCEEDINGS
AGAINST THE
SHERIFF.

Form of action.

Case lies against a sheriff for not taking a replevin bond, or for taking insufficient pledges in replevin, or for not assigning a bail bond (3): but if the sheriff neglect to take a bond, he is not liable to an attachment (4), because the party injured has a remedy by action; neither will the court stay the suit in replevin because no bond is taken. (5) The action is maintainable even after the avowant or person making cognisance has taken an assignment of the replevin bond, and sued the principal and sureties, for such assignment is no waiver of any proceedings against the sheriff. (6)

By whom ac-
tion ought to
be brought.

An action on the case against the sheriff for taking insufficient pledges in replevin ought to be brought by the person making cognisance, where there is no avowant on the record. (7)

If the defendant in replevin elect to proceed on stat. 17 Car. 2. c. 7., he is not confined to his execution under that statute, but may sue the sureties on the replevin bond, or the sheriff in an action on the case, for negligence in losing the bond. (8)

Under-sheriff
and replevin
clerk equally
liable with the
sheriff.
Extent of lia-
bility.

Not only the high but the under-sheriff and replevin clerk are all answerable to the defendant in replevin for the sufficiency of the pledges *de retorno habendo*. (9)

In an action against the sheriff for taking insufficient pledges in replevin, he is liable to the amount of the penalty in the bond, viz. double the value of the goods distrained (10); but the plaintiff cannot recover damages beyond the value of the distress. (11)

As a general principle, it may be stated, that the sheriff is liable no farther than the sureties would have been, if he had done his duty under stat. 11 Geo. 2. c. 19., which limited their responsibility to double the value of the goods distrained (12); and the assignee of the replevin bond cannot recover.

(1) *Igoe v. O'Hara*, 1 Jebb & Symes (Irish), 449. *Quare*, Whether a bond taken by the sheriff in a Chancery replevin is assignable under stat. 8 Geo. 1. c. 6.?

(2) Archb. by Chitt. 847.

(3) *Jacobs v. Humphrey*, 4 Tyrw. 272. *Tesseyman v. Gildart*, 1 N. R. 292.

(4) *Rex v. Lewis*, 2 T. R. 617.

(5) *Twells v. Colville*, Willes, 376.

(6) 1 Saund. 195. n.

(7) *Puge v. Eamer* (*Sir John*), 1 B. & P. 378.

(8) *Perreau v. Bevan*, 8 D. & R. 72. 5 B. & C. 284.

(9) *Richards v. Acton*, 2 W. Black. 1590.

(10) *Paul v. Goodluck*, 2 Bing. N. C. 294. S. C. nom. *Hall v. Goodricks*, 2 Scott, 363.

(11) *Yea (Bart.) v. Lethbridge*, 4 T. R. 493.

(12) *Evans v. Brander*, 2 Hen. Black. 590.

as special damage beyond the penalty of the bond, the costs incurred by him in suing the sureties without effect, unless notice of his intention to sue them had been previously given to the sheriff. (1)

THE REPLEVIN
BOND.

The sheriff is not bound to warrant or inquire into the actual sufficiency of the pledges in a replevin bond; if they be apparently responsible, it is sufficient. (2)

When sheriff
irresponsible.

Where an avowant in replevin obtained a verdict against the sheriff for having taken insufficient pledges on a replevin bond which had been taken by his replevin clerk, against whom he brought an action for negligence, and the attesting witness to the bond proved, that the sureties did not reside within the bailiwick of the sheriff, and that one of them occupied a well-stocked farm at the time the bond was executed: — It was held, that such clerk was not answerable, as it was not incumbent on him to make personal inquiries as to the responsibility of the sureties; and that if they appeared responsible it was sufficient. It seems, that when they reside out of the bailiwick of the sheriff by whom the bond is taken, it is necessary to search the sheriff's office where they do reside, to ascertain whether any process had been sued out against them before the bond is taken. (3)

The sheriff or replevin clerk is not bound to go out of the office to make inquiries; but if the sureties be unknown to him, he ought to require information beyond their own statement as to their sufficiency. (4)

In an action on the case the declaration states the distress, and the replevin, and the proceedings in the replevin suit, terminating with the judgment *de retorno habendo*; it then states the duty of the sheriff to take a replevin bond, but that he neglected to take such bond, and that the plaintiff hath not obtained a return of the goods, or their value; and where insufficient pledges have been taken, it is stated, that the sheriff did take a bond from certain persons as sureties, and that they were not good, sufficient, or responsible sureties. Special damage is generally added. (5)

THE DECLAR-
ATION.

In an action on the case against a sheriff for negligence in losing a replevin bond given by a party for prosecuting his suit with effect in the county court, the declaration averred, that the plaint had been removed out of "the county court of the said sheriff" by *re. fa. lo. &c.*, and it appeared, that at the time of the removal the sheriff who had taken the bond was out of office: — It was held to be no variance, and that the word "said" might be rejected as surplusage. (6)

When the
word "said"
may be re-
jected as sur-
plusage.

Where a count stated that the sheriff, instead of taking a bond from the plaintiff in replevin and two sufficient sureties, took a bond from the plaintiff in replevin and one surety, who was alleged to be insufficient, it was holden to be bad, because it did not allege, that the plaintiff in replevin was insufficient. (7)

Omitting to
allege that the
bond of the
plaintiff in re-
plevin was in-
sufficient.

A declaration against a sheriff for taking insufficient pledges in replevin should shew, that a writ of *retorno habendo* had been issued, and *elongata* returned thereon. (8)

(1) *Baker v. Garratt*, 10 Moore, 324. 3
Bing. 56.

(2) *Hindle v. Blades*, 5 Taunt. 225. 1
Marsh. 27.

(3) *Sutton v. Waite*, 8 Moore, 27.

(4) *Jeffery v. Bastard*, 4 A. & E. 823.

(5) *Wilkinson on Replevin*, 122.

(6) *Perreau v. Bevan*, 5 B. & C. 284. 8
D. & R. 72.

(7) *Hucker v. Gordon*, 3 Tyrw. 107. 1
C. & M. 58.

(8) *Ibid.*

**THE REPLEVIN
BOND.**

A count against a sheriff for not restoring the goods is bad, for his duty, under stat. 13 Edw. 1. Westm. 2. c. 2., is only to take pledges for that object. (1)

Unnecessary to state or prove the names of the suitors.

Where in case against the sheriff for taking insufficient pledges in a replevin bond, the declaration set out the record, and averred under a *videlicet*, that the plaint in the county court was levied before A., B, C., and D. as suitors of the court; and it appeared from the record, that it was levied before E., F., G., and H.:—It was held to be no variance, as it was unnecessary to state or prove the names of the suitors, and that the allegation might be rejected as surplusage. (2)

In an action against sheriff for a false return, unnecessary to allege that the cattle were in the defendant's bailiwick.

In an action against the sheriff of Leitrim for a false return of *elongata* to a writ of replevin, the declaration stated, that after the delivery of the writ, and before the return, the defendant had the cattle "in his view and presence, so that he might have caused them to be replevied by virtue of the writ," without further stating, that the cattle were then in the defendant's bailiwick. Upon special demurrer upon this ground it was held, 1st, that the declaration was sufficient without an express averment, that the cattle were in the defendant's bailiwick, for (even supposing it were necessary that that should appear) it did appear by inference, which was sufficient, this being only matter of inducement; and 2dly, that the venue was properly laid in Dublin, the gist of the action being the false return, which was filed in Dublin. (3)

**ACTION ON
THE BOND BY
THE SHERIFF.**

Declaration on the replevin bond at the suit of the sheriff.

The declaration on the replevin bond at the suit of the sheriff may be either general, stating merely the obligatory part of the bond, or special, in which latter case it is similar to the action at the suit of the assignee.

Where a sheriff took a replevin bond from one surety only, and was sued thereon by the person making cognisance for having taken insufficient pledges, who recovered damages and costs:—It was held, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches according to stat. 8 & 9 Will. 3. c. 11., is not entitled to recover the costs incurred in defending the action against him as such sheriff; and that as the surety is deprived of calling on his co-surety for contribution, he is only liable to a moiety of the damages awarded by the jury in the action against the sheriff. (4)

PLEADINGS.

Pleas in actions on replevin bonds seldom occur; in general, the defendant either compromises the suit, or demurs to the declaration; and where he demurs, he will not be allowed to withdraw his demurrer, and plead specially, unless full and reasonable cause be shewn. (5)

The defendant can plead, that the action was commenced before breach of the condition of the bond (6); that there was fraud in the judgment (7); but not that time was given to the principal (8), nor that the plaintiff has proceeded under stat. 17 Car. 2. c. 7. by writ of inquiry for the arrears of rent and costs, and obtained judgment thereon, unless it appear, that execution had issued, and the sum recovered had been levied and paid. (9)

(1) *Hucker v. Gordon*, 1 Tyrw. 107. 1
C. & M. 58.

(2) *Draper v. Garratt*, 3 D. & R. 226. 2
B. & C. 2.

(3) *Eley v. Tottenham*, Batty (Irish), 475.

(4) *Austen v. Howard*, 1 Moore, 68. 7
Taunt. 28. 327. 2 Marsh. 352.

(5) *Wilkinson on Replevin*, 118.

(6) *Anon.* 5 Taunt. 776.

(7) 2 Marsh. 392. *Moore v. Bowmaker*,
7 Taunt. 97. 3 Price, 214.

(8) *Ibid.*

(9) *Turnor v. Turner (Clerk)*, 2 B. & R.
107.

To a declaration on a replevin bond, which alleged as a breach that the defendant did not prosecute it according to the conditions, it is a good defence to plead, that the defendant did appear at the next county court, and there prosecute his suit, which he had there commenced against the now plaintiff, and which suit was still depending and undetermined. (1) But where in a declaration on a replevin bond the breach assigned was, that the defendant did not appear at the next county court, and then and there prosecute his suit with effect, it was holden bad, as it was consistent with the breach that the suit was commenced at the first county court, and was still pending. (2)

If a bond purport to be entered into by two sureties, it is not a sufficient plea to state, that it was executed only by the defendant. (3)

In an action by the assignee of a replevin bond against the surety, the declaration alleged, that a return of the goods was adjudged, but that S., the plaintiff in replevin, did not make a return. The defendant pleaded first, that the judgment was obtained by the plaintiff by fraud in collusion with S.; secondly, that before judgment obtained, all matters in difference between the plaintiff and S. were referred to arbitration, pending which the proceedings were stayed:—It was held, that the first plea, not stating, that the judgment was obtained for the purpose of defrauding the sureties, was no answer to the action; and that the second plea was bad, since the reference was as much for the benefit of the sureties as of the principal, and therefore no prejudice could arise to them from the delay. (4)

It is no plea to an action against sureties on a replevin bond, that the replevin cause was referred to an arbitrator, and that he, without their knowledge, enlarged the time for making his award. (5)

Bond only executed by one surety.
Where cause referred to arbitration.

9. EVIDENCE.

EVIDENCE.

In replevin, any issue in which the affirmative is on the plaintiff gives him the right to begin. (6)

RIGHT TO BEGIN.

In replevin, if a defendant plead property in a third person, and issue be taken thereon, he is entitled to begin. (7) And where to an avowry for rent in arrear it was pleaded, that the tenant had let other property to the defendant at a larger rent, and it was agreed, that the two rents should be set off against each other, and that, in consequence, a larger sum was due to the tenant than the sum distrained for by the defendant, to which there was a replication denying the agreement:—It was holden, that on these pleadings the plaintiff was entitled to begin. (8)

So where, in replevin, there was a cognisance for rent in arrear, to which there were two pleas, the one stating, that a certain agreement had been entered into between the landlord and tenant; and that the tenant was sub-

(1) *Brackenbury v. Pell*, 12 East, 585. (5) *Aldridge v. Harper*, 10 Bing. 118. 3
(2) *Jackson v. Hanson*, 1 Dowl. P. C. N. M. & Sc. 519.
& 69. (6) *Vide antè*, 1799. tit. EVIDENCE. *James*
(3) *Austen v. Howard*, 7 Taunt. 28. 327. v. *Salter*, 1 M. & Rob. 501.
Marsh. 352. 1 Moore, 682. (7) *Coltstone v. Hiscolls*, 1 M. & Rob.
(4) *Moore v. Bowmaker*, 2 Marsh. 392. 7 301.
Taunt. 97., *sed vide* S. C. 6 *ibid.* 379. 3 (8) *Curtis v. Wheeler*, 4 C. & P. 196. M.
Price, 214. S. C. nom. *Bowmaker v. Moore*, & M. 493.
Daniel, 264.

EVIDENCE.

sequently induced by the landlord to enter into another agreement, which second agreement was the demise in the cognisance mentioned, and that this latter agreement had been abandoned by mutual consent before any rent became due; and the other plea was similar, except that it averred, that the tenant was induced to enter into the second agreement by fraud; and there was a replication to the first plea denying the abandonment, and to the other denying the fraud:—It was holden, that on these pleadings the plaintiff had the right to begin. (1)

NON CEPIT.

Caption and detention only put in issue by the plea of *non cepit*.

By the plea of *non cepit* the caption and detention is only put in issue, and not the property which is admitted; the simple point in issue to which the evidence must apply is, therefore, whether the defendant took the goods or not (2): but it is not sufficient for the plaintiff to shew, that the goods were originally bailed to the defendant, and wrongfully detained by him; a wrongful taking must be proved. (3)

On issue taken on the plea of *non cepit*, it is incumbent on the plaintiff to prove the taking or having of the cattle or goods, or part of them, in the place (4) specified in the declaration.

But it is not essential to prove, that the cattle or goods were originally taken in the place mentioned in the declaration (5), or that the goods were the property of the plaintiff. (6)

Under *non cepit*, or on issue joined on a traverse of the taking in the place specified in the declaration, it will be sufficient to prove a detention of them by the defendant in that place, because it is a continuance of the original wrong (7); but an original taking of the goods, on a subsequent possession and detention of them there, must be established.

NON TENUIT.

Under the plea in bar of *non tenuit*, the defendant must prove, that the tenant mentioned in the avowry held the premises of the landlord at the precise rent mentioned; and a variance will be fatal. (8)

In replevin, the issue being, whether the plaintiff held certain closes at a fixed rent specified in the avowry:—It was held, that unstamped receipts tending to shew, that the plaintiff had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. (9)

An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted "during a part of the term," *e.g.* for the last three years, by stat. 11 Geo. 2. c. 19. (10)

It may be proved, that rent is due for a less time than that, which is stated in the avowry. (11)

Where the defendant in replevin made cognisance for two years and a quarter's rent in arrear, and alleged, that for a long time, viz. for two years and a quarter, ending at Christmas, 1803, the plaintiff held and enjoyed the

(1) *Williams v. Thomas*, 4 C. & P. 234.

(2) Gilbert on Replevin, 105. Wilkinson on Replevin, 81.

(3) *Reeves v. Morris*, 2 Jebb & Symes (Irish), 699.

(4) As to the description, vide *Jones v. Powell*, 5 B. & C. 647. 8 D. & R. 416., et vide *Kempe v. Crews*, 1 Ld. Raym. 167.

(5) *Walton v. Kersop*, 2 Wils. 354. *Mat-travers v. Fosset*, 3 ibid. 295. Bull. N. P. 54. *Abercrombie v. Parkhurst*, 2 B. & P. 480.

(6) 3 Stark. Ev. 3d ed. 970.

(7) *Walton v. Kersop*, 2 Wils. 354.

(8) *Cossey v. Diggons*, 2 B. & A. 546. *Brown v. Sayce*, 4 Taunt. 320. *Philpott v. Dobbinson*, 6 Bing. 104. *Davies v. Sayce*, 13 A. & E. 506.

(9) *Hawkins v. Warre*, 5 D. & R. 312.

(10) *Roulston v. Clarke*, 2 Hen. Black. 563.

(11) *Forty v. Imber*, 6 East, 434.

premises as tenant thereof to A. B., by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar, that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the supposed demise *modo et formd*; it is sufficient to entitle the defendant to a verdict on such issue, and to recover for two years' rent, if he prove, that the plaintiff held of A. B. from the 23d of December, 1801. (1)

If under an agreement for a lease at a certain rent, the plaintiff be let into possession before the lease be executed, occupation by him under the agreement is not of itself evidence of a tenancy; neither can the landlord distrain for the first rent. (2)

Evidence should be adduced of the taking, and of the lease or agreement, or a *prima facie* case may be made by proving the receipts for rent (3), notice to produce which, should be given to the landlord, though a mere trustee is not a competent witness to prove the title or demise for the person making cognisance. (4)

It will not be competent for the plaintiff to shew, that his landlord had no title (5), though he may have obtained the possession by fraud, and the real title is in another person. (6) But although proof of payment of rent to the avowant is *prima facie* evidence, that he is the owner of the land, yet if the plaintiff did not originally receive the possession of the land from the avowant, it is competent for him to rebut the title of the avowant, by shewing, that he paid rent under circumstances, which did not entitle the avowant to the rent; and such evidence may be given on the issue, *non tenuit modo et formd*. (7)

Eviction by the superior landlord may be given in evidence under the plea of *non tenuit*. (8)

In an avowry for a rent charge, upon issue joined as to the seisin in fee of the grantor of the rent, it was held, that it was competent for the plaintiff, deriving under the grantor by title subsequent to the rent charge, to shew, that the grantor was seised for life only at the time of the grant, and that he was not estopped in evidence from shewing that fact, by a recital in the deed of rent charge, that the grantor was seised in fee. (9)

Where issue was joined upon *non tenuit*, and also upon the plea of *riens in arrear*, it was held, that the first issue being found for the plaintiff, the second became immaterial, and that the proper course was to discharge the jury from giving a verdict, but that if any verdict was entered, it must be for the plaintiff. (10)

Under the plea of *riens in arrear* the plaintiff should prove, that the rent has been paid; but it has been said, he will not be allowed to prove payment of the rent to a person who has a superior title, although under threat of a distress. (11) This is however questionable, for if the payment be good, there is no rent in arrear. (12)

EVIDENCE.

Evidence of the taking, lease, or agreement.

Where plaintiff cannot shew that his landlord had no title.

Eviction by superior landlord.

Where in an avowry for a rent charge, it is competent for a plaintiff deriving under grantor to shew that grantor was seised for life only.

Where issue joined upon *tenuit*, and also upon the plea of *riens in arrear*.

RIENS IN ARREAR.

(1) *Forty v. Imber*, 6 East, 434. 2 Smith, 548.

(2) *Hegan v. Johnson*, 2 Taunt. 148.

(3) *Johnson v. Mason*, 1 Esp. N. P. C. 91.

(4) *Golding v. Nias*, 5 ibid. 272.

(5) *Parry v. House*, Holt's N. P. C. 489. 492.

(6) *Ibid. Cooper v. Blandy*, 1 Bing. N. C. 45.

(7) *Rogers v. Pitcher*, 6 Taunt. 202. 1 Marsh. 541.

(8) *Hopcraft v. Keys*, 2 M. & Sc. 760. 9 Bing. 613.

(9) *Duggan v. O'Connor*, 1 Hudson & Brooke (Irish), 459.

(10) *Cossey v. Diggins*, 2 B. & A. 546.

(11) *Taylor v. Zamira*, 6 Taunt. 524. *Stubbs v. Parsons*, 3 B. & A. 516.

(12) 3 Stark. Ev. 3d ed. 974., vide etiam *Johnson v. Jones*, 9 A. & E. 809.

EVIDENCE.

Cases of set-off allowed to be taken advantage of in replevin, should be specially pleaded; if any part be in arrear, the defendant has a right to the verdict. (1)

The defendant will be entitled to a verdict if it appear, that the rent is in arrear to a less amount than is alleged (2), although a specific sum be alleged to be in arrear (3), for the issue is, whether any rent be in arrear.

Under the issue of *riens en arriere* in replevin, the plaintiff cannot controvert the holding as claimed by the defendant in his avowry. (4)

DAMAGE FEASANT.

Evidence of a more limited right than that alleged.

Issue on the title stated in the avowry for damage feasant.

Issue on the demise.

In general, evidence of a more limited right than that alleged will be insufficient (5); but evidence of a more ample right will support the plea. (6)

When the issue is on the title stated in the avowry for damage feasant, it will be requisite for the defendant to produce the title deeds, proving them of recent date by the subscribing witness, and shewing that the possession has gone with the deed; or, if a seisin in fee, or a freehold be to be proved, It is *prima facie* evidence to shew the possession of the person so entitled.

If the issue be on the demise, the lease or agreement should be proved; and the like evidence will be requisite, when the plea in bar to an avowry damage feasant states a title to other premises, in respect of which a right of common is claimed over the *locus in quo*.

When the lord has distrained, and issue is taken on the levancy and couchancy of cattle, proof, that part only were levant and couchant, will not support the issue for the plaintiff. (7)

DISTRESS FOR RENT.

In an avowry for rent in arrear, the avowant ought to be prepared with proof, not only of the amount of the rent, but also of the value of the distress. (8)

Stat. 17 Car. 2. c. 7. s. 2.

DAMAGES.

In the case of a distress for rent, the jury may, under stat. 17 Car. 2. c. 7. s. 2., inquire concerning the arrears, and the value of the goods or cattle distrained, to entitle the avowant to judgment for such arrearages, or so much thereof as the goods or cattle distrained amount to.

It has been held, that the avowant may still enter up judgment at common law under stat. 17 Car. 2. c. 7. s. 2.; and therefore, if through mistake, or otherwise, it cannot be entered up under the statute, the defendant may take his judgment at common law. Thus, where under an avowry for rent the jury inquired of the value of the cattle, but did not inquire what rent was in arrear, it was holden, that the omission could not be supplied by a writ of inquiry, the statute providing, that the jurors who were impanelled to inquire of the issue, should inquire concerning the sum in arrear, and the value of the distress; but the court held, that the avowant might have his judgment according to the common law. (9)

So where a jury found a verdict for the avowant, and damages to the amount of the rent claimed in the avowry, but did not find either the amount of the rent in arrear, or the value of the cattle distrained:—It was held, that

(1) *Harrison v. Barnby*, 5 T. R. 248. *Cobb v. Bryan*, 3 B. & P. 348.

(2) *Harrison v. Barnby*, 5 T. R. 246.

(3) *Cobb v. Bryan*, 3 B. & P. 348.

(4) *Hill v. Wright*, 2 Esp. N. P. C. 669.

(5) *Pring v. Henley*, Bull. N. P. 58. (b.) *Rotherham v. Green*, Cro. Eliz. 593. Bull. N. P. 59. (a.)

(6) 3 Stark. Ev. 3d ed. 975.

(7) *Sloper v. Allen*, 2 Rol. Abr. Trial (C.). 706. Bull. N. P. 298. (c.)

(8) 3 Stark. Ev. 3d ed. 975.

(9) *Sheape v. Culpeper*, 1 Lev. 255. *Hobert v. Waters*, 1 Salk. 205. *Cooper v. Le Blanc*, C. T. H. 297, 298.

the judgment was erroneous, and could not be amended into a judgment under the statute, because the neglect of such inquiry by the jury could not in any manner be supplied by the court after error brought; but they permitted the defendant to amend, and enter a judgment *pro retorno habendo*, at the common law. (1)

EVIDENCE.

In every other case of replevin the omission of the jury to find damages for the defendant under stats. 7 Hen. 8. c. 4. and 21 Hen. 8. c. 19., or under 43 Eliz. c. 2. s. 10., may be supplied by writ of inquiry (2); and that in every case, unless where the court is tied up by stat. 17 Car. 2. c. 7., which respects only rent in arrear, a writ of inquiry may be granted, in order to do complete justice. (3)

Omission to find damages.

If issue be taken on a plea of tender of amends to the person entitled to receive them, evidence of a tender to the bailiff making the distress, the principal being present, is insufficient. (4)

TENDER OF AMENDS.

Where to a cognisance for rent the landlord pleaded in bar a tender, and the defendant replied a subsequent demand and refusal to himself: — It was held, that the issue was not proved by evidence of a demand by his agent. (5)

But if a distress be made by a bailiff in the absence of the principal, and the bailiff be proved to be his usual receiver, a tender to the latter seems to be equivalent to a tender to the principal. (6)

Where the cattle were distrained, damage feasant, in a private pound, and the distrainer admitted, that they were about to be sent to a public pound, it was held, that a tender of amends, whilst they were in the private pound, was not too late. (7)

In replevin the party under whom the defendant makes cognisance, is not an admissible witness for the defendant, being the person really interested in the event of the cause, and in truth the substantial defendant. (8)

COMPETENCY AND INCOMPETENCY OF WITNESSES.

The declarations of the party under whom the defendant in replevin makes cognisance, are not admissible against the defendant, for the party may be called as a witness. (9)

Replevin cognisances.

A surety in a replevin bond is interested in procuring a verdict for the plaintiff, in the same manner as bail are interested in procuring a verdict for the defendant, and is, therefore, incompetent; but if his testimony be required, the courts will permit the substitution of a new surety in lieu of the witness, in order that the latter may be rendered competent. (10)

Surety in replevin bond.

In *King v. Baker* (11) it was holden, where distinct cognisances were made for the same goods under several parties, who did not appear to be connected in interest, that if one of the cognisances be abandoned at the trial, the party under whom it was made is a competent witness for the defence;—and Lord Denman in delivering the judgment of the court, after observing there was reason to suppose, that the facts of the case of *Upton v. Curtis* (12) were not reported with perfect accuracy, said, “ The court were of opinion,

Distinct cognisances.

(1) *Rees v. Morgan*, 3 T. R. 349.

ton's case, 5 Co. 76. *Browne v. Powell*, 4 Bing.

(2) *Herbert v. Waters*, Carth. 362. 1 Salk. 205. *Johnson v. Adams*, 5 Mod. 77. *Dewell v. Marshall*, 2 W. Black. 921. 3 Wils. 442.

230.

(7) *Browne v. Powell*, 4 Bing. 230.

(8) *Golding v. Nias*, 5 Esp. N. P. C. 272.

(9) *Hart v. Horn*, 2 Camp. 92.

(10) *Bailey v. Bailey*, 1 Bing. 92. 7 Moore, 439.

(3) *Valentine v. Fawcett*, C. T. H. 138.

(4) 3 Stark. Ev. 3d ed. 976.

(5) *Pimm v. Grevill*, 6 Esp. N. P. C. 95.

(11) 2 A. & E. 323.

(6) *Gilbert on Replevin*, 89., sed vide *Bur-*

(12) 1 Bing. 210.

EVIDENCE.

that the plaintiffs offer to abandon the issue, joined on the cognisance under the witness, was tantamount to consenting, that a verdict should be found for the plaintiff on that issue."

Where, in replevin by A. for taking growing crops, the issue was, whether A. and B. were joint tenants to C. of the land on which the distress was made:—It was held, that B. might be examined as a witness to disprove the joint tenancy, he not being liable to costs, and that he might at least have been examined on the *voire dire* as to his interest in the event of the suit. (1)

Stat. 54 Geo. 3.
c. 170. s. 9.

Distress for
non payment
of a highway
rate.

Proof of def-
endant being
bailiff.

In an action of replevin for seizing goods as a distress for non payment of a highway rate, it was held, that one of the surveyors of the parish who received a salary out of the rates was, under stat. 54 Geo. 3. c. 170. s. 9, a competent witness in support of the rates. (2)

To prove that the defendant is bailiff, he must shew either an authority previous to the distress, or that the landlord had afterwards assented to it; and such subsequent authority will be also sufficient in the case of an avowry for damage feasant. (3)

A cognisance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor. (4)

Replevin bond.

On an avowry, or justification of a taking as a distress for the whole rent, a jury may find a verdict for the sum due upon an apportionment. (5) The fact of the replevying of the distress will be proved by the original precept to deliver, which should be called for from the bailiff under a writ of *subpoena duces tecum*; or if the precept be returned to the sheriff's office, notice should be given to produce it on the trial. It should then be shewn, that the bailiff delivered the goods without taking a replevin bond; or if a replevin bond be taken, it should be produced, notice having been given for that purpose; and it seems, that the execution of the bond need not be proved by the subscribing witness.

INSUFFICIENCY
OF PLEDGES.

Very slight evidence of the insufficiency of the pledges is enough to throw the proof of the contrary upon the sheriff. (6) And in proof of the insufficiency of their circumstances, it is good evidence to shew, that they were in debt, had been applied to for payment, and promised payment, but did not pay (7): but the sureties themselves may be witnesses to prove, whether they were sufficient or not. (8)

When persons of respectable appearance were brought to the replevin clerk as sureties by the attorney's clerk, on behalf of the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter caused the sureties to make affidavit in detail as to their sufficiency, with which he was satisfied, and an action was after-

(1) *Bunter v. Warre*, 3 D. & R. 106. 1 B. & C. 689.

(2) *Morrell v. Martin*, 4 Jur. 891.

(3) *Trevillian v. Pine*, 11 Mod. 112. 4 Vin. Abr. Bailiff, 1. [D.]. One joint-tenant can appoint a bailiff for all. *Robinson v. Hofman*, 4 Bing. 562. *Wilkinson on Replevin*, 83.

(4) *Whitehead v. Taylor*, 10 A. & E. 210.

(5) *Neale v. Mackenzie*, 1 Gale, 113.

(6) *Saunders v. Darling*, Bull. N. P. 60.

(c.)

(7) *Gwyllim v. Scholey*, 6 Esp. N. P. C. 100.

(8) 1 Saund. 195. (g.) n. *Hindle v. Blades*, 5 Taunt. 225. 1 Marsh. 27.

wards brought against the sheriff for taking insufficient securities, it was considered, that the jury might properly find that the inquiry made did not excuse the sheriff (1): in truth, if it be shewn that the sheriff had notice of the fact of insufficiency, or neglected the means of information within his power, and did not act under the circumstances, and considering the information he had obtained, with a reasonable degree of caution, and the general reputation as to the want of credit of the sureties in the neighbourhood of their respective residences, it is evidence against the sheriff, who it seems is liable if either of the sureties be insufficient (2); and it is a question for the jury to say, whether he used such caution or not. (3)

In an action against the sheriff for taking insufficient sureties in replevin, if the sheriff have assigned the replevin bond to the plaintiff, it is unnecessary to prove the execution by the sureties, though averred in the declaration. (4)

And the bond produced by the sheriff may be admitted without proof against him as duly executed. (5)

A surety in a replevin bond is interested in procuring a verdict for the plaintiff, in the same manner as bail are interested in procuring a verdict for the defendant, and is, therefore, incompetent; but if his testimony be required, the courts will permit the substitution of a new surety in lieu of the witness, in order that the latter may be rendered competent. (6)

Where a surety in a replevin bond is interested.

10. LIMITATION OF ACTION — SET-OFF — PAYMENT OF MONEY INTO COURT — STAY OF PROCEEDINGS — NEW TRIAL — COSTS — JUDGMENT AND EXECUTION.

Under stat. 21 Jac. 1. c. 16. s. 3. actions of replevin for taking away goods and cattle, must be commenced and sued within six years next after the cause of such actions or suit, and not after.

An avowry stated, that the plaintiff held the *locus in quo* as tenant to the defendant for a long time, to wit, five years ending on a certain day, to wit, March 25. 1836; and that the distress was made for rent for five years, ending as aforesaid on March 25. 1836: to which it was pleaded, that the said rent did not, nor did any part thereof become due to the defendant, and no acknowledgment in writing was given &c. within six years before the taking &c.:—It was held on demurrer, that this plea was sufficient, as the day stated in the avowry was immaterial, and the whole rent might therefore have accrued six years before the distress made. (7)

The statutes of set-off do not extend to the action of replevin. (8) But a plea in bar, that the plaintiff had let other property to the defendant at a larger rent, and that it had been agreed, that the two rents should be set-off against each other, has been held good. (9)

LIMITATION OF ACTION — SET-OFF — PAYMENT OF MONEY INTO COURT — STAY OF PROCEEDINGS — NEW TRIAL — COSTS — JUDGMENT AND EXECUTION.

LIMITATION OF ACTION.

Stat. 21 Jac. 1. c. 16. s. 3.

SET-OFF.

(1) *Jeffery v. Bastard*, 4 A. & E. 823.

(2) *Scott v. Waithman*, 3 Stark. 168.

(3) *Jeffery v. Bastard*, 4 A. & E. 823.

(4) *Burnes v. Lucas*, R. & M. 264.

(5) *Scott v. Waithman*, 3 Stark. 168.

(6) *Bailey v. Bailey*, 1 Bing. 92. 7 Moore, 439.

(7) *Wilson v. Jackson*, 1 Jebb & Symes (Irish), 639.

(8) *Laycock v. Tufnell*, Tidd, 664. 2 Chitt. 531.

(9) *Curtis v. Wheeler*, 4 C. & P. 196.

LIMITATION OF ACTION, &c.

A plaintiff in replevin can pay money into court under stat. 3 & 4 Vict. c. 105. s. 46. (1)

PAYMENT OF MONEY INTO COURT.

Proceedings will be stayed on the motion of the plaintiff after avowry (2); and it seems, that the application will be granted even before avowry. (3)

STAY OF PROCEEDINGS.

The terms on which the court will stay proceedings on a replevin bond, at the instance of the sureties, are the payment of the appraised value of the goods, if that be less than the amount of rent due, the double costs, and the costs of the application.

Terms on which proceedings will be stayed.

Stay of proceedings at the instance of plaintiff or of the sureties.

In *Gingell v. Turnbull* (4), an action on the replevin bond was stayed at the instance of the sureties, upon paying into court the value of the goods distrained and costs; the value to be ascertained by the prothonotary.

Proceedings on the replevin bond will be stayed, if the judgment in the county court in the replevin seems to be irregular.

Irregularity of judgment in county court.

Cause referred without consent of sureties.

In an action against the sheriff for taking insufficient pledges in a replevin bond, the court will not stay proceedings, on an affidavit, that the cause was referred without the consent of the sureties, that being matter of defence at the trial. (5)

Action commenced before breach.

The court of Common Pleas will not set aside proceedings on a replevin bond because the action is commenced before breach, for it may be pleaded. (6)

Tender of rent, and payment of costs up to the time of tender.

Where the rent was tendered before the replevin, with costs up to that time, the court of Common Pleas refused to stay proceedings upon payment of the rent in arrear, and costs up to the time of the tender. (7)

Goods distrained for tithes under stat. 1 Geo. 2. c. 12.

Where a replevin had issued to recover goods distrained under an order of justices for tithes under stat. 1 Geo. 2. c. 12., a motion to quash the replevin was refused. (8)

NEW TRIAL.

After witnesses have been examined for the defence, a plaintiff is not entitled to call on the judge for an order, that the rest of the defendant's witnesses shall remain out of court. A judge cannot (unless the parties consent) direct a verdict for the plaintiff, and reserve liberty for the defendant to apply to the court to have a verdict entered for him, in case the court should think such direction ought to have been given; and without such consent of the parties, the court above could not alter the verdict, but merely grant a new trial. (9)

In replevin for sheep, the defendants made cognisance as bailiffs of the tenant of a messuage and lands called B., that the said tenant, and all those whose estate, &c., occupiers of B., had the sole and exclusive right of pasture and feeding of sheep on L., the *locus in quo* as to the said messuage, &c. appertaining, and that the plaintiff's sheep were damage feasant. By another cognisance they alleged a right of common over L. as appurtenant to B. The pleas in bar denied the above rights, and alleged, that the plaintiff had a right of common over L. as appurtenant to his messuage, &c., called T.:—and issues were joined as to the several rights. At the trial it appeared, that L. was a mountain sheep-walk, upon which no

(1) *Wilson v. Wilson*, 1 Jebb & Bourke (Irish), 79.

(2) *Vernon v. Wynne (Bart.)*, 1 Hen. Black. 24.

(3) *Long v. Buckenridge*, Str. 112.

(4) *Miers v. Lockwood*, 9 Dowl. P.C. 975.

(5) 3 Bing. N. C. 881.

(6) *Dale v. Gordon*, 2 M. & Sc. 532.

(7) *Anon.* 5 Taunt. 776.

(8) *Hopkins v. Shrole*, 1 B. & P. 382.

(9) *Tyndal v. Reade (Clerk)*, Smith & Batty (Irish), 375.

(10) *Reeves v. Morris, Armstrong & McCartney* (Irish), 159.

act of ownership had been exercised but the feeding of sheep. The defendants abandoned their alleged rights of common; and, upon the issue as to the exclusive pasturage, the jury (having had their attention called to the difference between a mere privilege and the right of soil) found a verdict for the defendants, and that "L. was part of the farm of B.," finding also, as to the remaining issue, that the plaintiff had no right of common in respect of T. On motion to enter a verdict for the plaintiff, or for a new trial, or judgment for the plaintiff, *non obstante veredicto*, on the issue as to the exclusive right of pasture, the court held, that, upon the evidence and finding, the cognisance could not be sustained, and granted a new trial. (1)

LIMITATION OF ACTION, &c.

In an action of replevin, commenced after stat. 3 & 4 Will. 4. c. 42. came into operation, but in which the declaration was dated before the first day of Easter Term, 1834, the defendant avowed for rent arrear on a demise at an annual rent of 630*l.*, to which *non tenuit* was pleaded. The plaintiff gave evidence, that the rent was only 500*l.*, and the defendant, before verdict, refused to amend. The jury found for the plaintiff, and found specially, that the rent was 500*l.*, and this verdict was indorsed on the record:—It was held first, that the plaintiff must have judgment; secondly, that the court of Queen's Bench would not amend the avowry by making it conformable to the holding at 500*l.*, and give judgment on the record so amended; thirdly, that the defendant was not entitled to a new trial, in order that he might have an opportunity of amending the avowry as above; and fourthly, that the court would not have granted a new trial under these circumstances, even if the declaration had not been dated before the first day of Easter Term, 1834; the defendant's proper remedy, if any, for the mistake in the avowry, being to apply to the judge at Nisi Prius for leave to amend. (2)

When application should be made to the judge at Nisi Prius for leave to amend.

If the plaintiff recover, he is entitled to costs as in other personal actions.

Costs.

As to the defendant's costs, where the distress is for rent, relief, heriot, or other service, if the plaintiff "become nonsuit, discontinue his action, or have judgment given against him," the defendant under stat. 11 Geo. 2. c. 19. s. 22. is entitled to double costs (3), and which double costs consist of, first, the whole of his single costs, including the expenses of his witnesses, counsel's fees, &c., and then half that amount added to it. (4)

Of plaintiff.
Of defendant.

Where it was alleged, that the distress was made for the purpose of trying a title to certain lands, several avowries in various rights having been pleaded, the defendant was holden entitled to double costs under the statute. (5)

In all other cases he is entitled to single costs only (6), unless otherwise ordered by some particular statute on which the distress or other proceeding may be founded. (7)

As to costs, where there are several issues, some found for the plaintiff,

(1) *Jones v. Richard*, 5 A. & E. 413.

(5) *Johnson v. Lawson*, 2 Bing. 341.

(2) *Serjeant v. Chafy*, *ibid.* 354. The court in this case refused to take the summing up of a judge at Nisi Prius, from a shorthand writer's notes. *Ibid.*

(6) Stats. 21 Hen. 8. c. 19. s. 3., 14 Hen. 8. c. 14. s. 3., 17 Car. 2. c. 7. s. 2. *Butterton v. Furber*, 1 B. & B. 517. *Davies v. James*, 1 T. R. 871.

(3) *Gurney v. Buller*, 1 B. & A. 670.

(7) Archb. C. Att. Prac. 552.

(4) *Staniland v. Ludlam*, 4 B. & C. 869. Archb. C. Att. Prac. 267.

**LIMITATION OF
ACTION, &c.**

and some found for the defendant, the rules which apply under such circumstances to other actions equally apply to this.

If a defendant in replevin reside out of the jurisdiction, he will be compelled to give security for costs (1):—but if some of the defendants in replevin reside within reach of the process of the court, security will not be required for the costs, although the other defendant be resident abroad, and although the defendant may have the substantial interest in the suit, the other defendants being only bailiffs and insolvents. (2)

As to costs generally, it does not appear, that there is any difference as to the mode of taxation between a replevin and any other suit. (3)

Rplevin not
within stat.
8 & 9 Will. 3.
c. 11. s. 1.

A replevin is not within stat. 8 & 9 Will. 3. c. 11. s. 1., which gives costs to persons who are improperly made defendants in actions or plaints of trespass, assault, false imprisonment, or *ejectio firmæ*. (4)

If a defendant in replevin obtain judgment of *non pros.* for a return, and a certain amount for costs, the judgment is not final until taxation, but it would be final if for a return only. In such a case the defendant, in order to obtain his costs, should assess them before a jury as consequential on his damages. (5)

JUDGMENT AND
EXECUTION.
Execution may
be by *fi. fa.* or
ca. sa.

The judgment for the plaintiff is the same as in trespass, and the execution the same as in ordinary cases. (6) The judgment for the defendant at common law is, that he have a return of the goods, irrepleviable for ever and his costs, and the execution may be by *fi. fa.* or *ca. sa.* for the costs, and by writ *de retorno habendo* for a return of the goods, and after that, if *nihil* or *elongata* be returned, a *capias* in Withernam. (7)

Stat. 21 Hen. 8.
c. 19.

The judgment for the defendant under stat. 21 Hen. 8. c. 19. is, that the defendant have a return of the goods, and also his damages and costs; and the execution may be by *fi. fa.* or *ca. sa.* for the damages and costs, and by writ *de retorno habendo*, &c. for a return of the goods.

The sheriff is not bound to execute a writ *de retorno habendo*, unless some person attend on behalf of the defendant to shew him the goods; and it will be a good return to the writ to say, that no person did attend. (8)

WRIT OF RE-
CAPTION FOR
THE PLAINT-
TIF; AND
WRIT OF SE-
COND DELIVER-
ANCE FOR THE
DEFENDANT.

Where the defendant has improvidently issued a writ *de retorno habendo*, he must apply to have it set aside, but the judgment for a return remains, the writ and not the judgment being the foundation for the writ of second deliverance. (9)

WRIT OF RE-
CAPTION.

If after the goods be restored to the plaintiff by the sheriff on replevying, and before the suit be terminated, the defendant make a second distress of the same or of any other goods, for the same rent or duty, the plaintiff may sue out a writ of recaption, in which the defendant cannot avow as in replevin; but he may justify, as in trespass, the taking for another cause. If the defendant be convicted under this writ, he will be liable to pay a fine to the crown, because by the second caption he takes upon himself to determine the justice and legality of the first, while that very point is under the consideration of the court in which the replevin depends. (10)

(1) *Macnamara v. Booth*, 1 Crawford & Dix (Irish), 84.

(2) *Reddick v. Sinnott*, 1 Hudson & Brooke (Irish), 204.

(3) *Spencer v. Hamerton*, 4 A. & E. 418.

(4) *Ingle v. Wordsworth*, 3 Burr. 1285.

(5) *Wright v. Lewis*, 9 Dowl. P. C. 183.

(6) Archb. C. Att. Prac. 552.

(7) *Ibid.*, vide Archb. Forms, 418, 418; 425, 429; 431, 432.

(8) 2 Saund. 74. (b, c.) Archb. by Chit. 846.

(9) *Morris v. M^{rs} Mullen*, 1 Hudson & Brooke (Irish), 281, 283.

(10) Gilbert on Replevin, 237. Wilkin-
son on Replevin, 131.

If however the same cattle, or other cattle of the same proprietor, come on the land damage feasant, they may be distrained again, because such distress is for a distinct injury. (1)

LIMITATION OF ACTION, &c.

By stat. Westm. 2. c. 2. the plaintiff was restrained from replevying after nonsuit, but it at the same time gave him the writ of second deliverance, which is in the nature of a new replevin. If in this writ the plaintiff do not prevail in his suit, the defendant can have a return of the goods irrepleviable. The writ of second deliverance is a *supersedeas* in law to the writ of *de retorno habendo*, but not to the writ of inquiry of damages under stat. 7 Hen. 8. c. 4., 21 Hen. 8. c. 19., or 17 Car. 2. c. 7. When the distress is for rent, it seems, that the latter statute has taken away the writ of second deliverance. (2)

WRIT OF SECOND DELIVERANCE.

In replevin after judgment of *non pros.*, if the defendant issue execution *de retorno habendo*, instead of making a suggestion in the nature of an avowry for rent under stat. 7 Will. 3. c. 22., the plaintiff is entitled to issue a writ of second deliverance. (3)

Where the plaintiff had issued a writ of second deliverance, and declared thereupon, and a rule was afterwards made for setting aside the writ *de retorno habendo*, and all subsequent proceedings:—It was held, that the writ and other proceedings in second deliverance were thereby set aside (4); and that the plaintiff, by appearing at the inquiry upon a suggestion under the statute, waves the proceedings in second deliverance. (5)

Waiver of writ.

The judgment for the defendant under stat. 17 Car. 2. c. 7. is; that the defendant do recover the amount of the arrears of rent, or value of the goods, as found by the jury, and his costs. (6)

The judgment by confession is entered up for the damages confessed, and is final. (7)

Judgment by confession.

The judgment by default is interlocutory, that the plaintiff ought to recover his damages; and from it issues a writ of inquiry, which is unconnected with stat. 17 Car. 2. c. 7. that statute applying only to the defendant's judgment. If the goods have been delivered to the plaintiff on the replevin, which is almost universally the case, damages are only to be assessed for the detention of the goods; but it is usual to prove the expenses of obtaining the replevin, and the circumstances under which the distress was made will most probably have the effect of increasing the damages: to these points, the evidence for the plaintiff on the writ of inquiry should be directed; at the return of the writ of inquiry, the plaintiff signs final judgment for the damages and costs. When the goods have not been delivered to the plaintiff on the replevin, the value of the goods should be proved, and will form part of the damages. (8)

Judgment by default.

The defendant cannot have judgment as in case of a nonsuit for both he and the plaintiff being equally actors, he may himself take the cause down to trial without a proviso. (9)

Defendant cannot have judgment as in case of a nonsuit.

(1) Gilbert on Replevin, 227. Wilkinson on Replevin, 131. F. N. B. 71.

(2) 1 Saund. 195. n. Wilkinson on Replevin, 138. Gilbert on Replevin, 217. 7 Bac. Abr. Replevin (E. S.), 82.

(3) *Morris v. McMullen*, 1 Hudson & Brooke (Irish), 278.

(4) *Ibid.* 282.

(5) *Semide*, that the question of tenancy

is not inquirable before the sheriff; but at all events, if the plaintiff at the inquiry claim credit for rent, it is not open to him afterwards to say he was not tenant. *Ibid.* 281.

(6) *Vide* Archb. Forms, 420, 427, 433, 434.

(7) Wilkinson on Replevin, 42.

(8) *Ibid.* 43.

(9) Archb. C. Att. Prac. 552.

RESCOUS. (1)

DEFINED — *Degree of detention* — THE RETURN — *Attachment* — *Punishment* — ACTIONS BY SHERIFF AGAINST RESCUERS — REMEDIES BY PLAINTIFF AGAINST RESCUERS AND AGAINST THE SHERIFF — DAMAGES — COSTS, pp. 2524—2526.

DEFINED.

The term "rescous" means the setting at liberty, against law, the person or goods of another, arrested or seized by process or course of law. (2)

Rescous is twofold, and applicable first to goods and chattels distrained, and secondly to a person arrested.

Rescous, in its first sense, is where the owner or other person takes away a thing distrained from the person distraining. (3)

Rescous, in its second sense, may be made of any one taken up on legal process; and, for such rescous, the plaintiff can bring an action of rescous, or an action on the case against the rescuers (4), which latter remedy is usually adopted, the former having fallen into desuetude.

Degree of detention.

The degree of detention which will constitute an arrest, has been previously considered under the title IMPRISONMENT.

An arrest made by a bailiff's servant is sufficient, if the bailiff be near and acting in the arrest. (5) It is not requisite for the bailiff to shew the warrant (6), or tell at whose suit the arrest is made, unless it be demanded. And if a bailiff have in his pocket two warrants against the arrested, and produce neither, yet if he be rescued, either party at whose suit the warrants were made out can bring an action against the rescuers. (7)

THE RETURN.

Reg. Gen. H.
T. 2 Will. 4.
s. 12.

The writ and return must be filed with one of the masters before or on the day on which the rule or order to return the writ expires. By Reg. Gen. H. T. 2 Will. 4. r. 12., in order to make sheriffs punctual in their returns of writs, it is ordered, that "the officer with whom it is filed shall indorse the day and hour when it was filed." The return must be certain, and should answer the whole writ.

It is not necessary to aver the place where the rescous was made, if the place of the arrest be shewn, for the rescous shall be intended to be in the same place. (8)

It seems, that a return by the sheriff to a bill of Middlesex, stating that he took and detained the defendant until he rescued himself, is sufficient without naming the rescuers, or stating them to be people of the county; but the return not stating the arrest to have taken place in the county was held to be bad. (9) And a return made by the sheriff, that the person

(1) *Vide antè*, 1212—1222. tit. DEBT — 1357, 1358. tit. DISTRESS.

(2) 1 Inst. 160. (b.)

(3) *Ibid.* Bull. N. P. 61. (a.)

(4) Bull. N. P. 62. (a.)

(5) *Blatch v. Archer*, Cowp. 65.

(6) *Mackallie's case*, 9 Co. 68, 69. Bull. N. P. 63. (a.)

(7) *Hodges v. Marks*, Cro. Jac. 485.

(8) *Rex v. Clark*, cit. Bull. N. P. 63. (b.)

(9) *Rex v. Middlesex (Sheriff of)*, 1 B. & A. 190. *Fermor v. Phillips*, Holt's N. P. C. 537. 3 B. & B. 27. n.

arrested was rescued out of the custody of the bailiff, would be likewise insufficient, because it should be out of his (the sheriff's) custody. (1)

RESCOUS.

If the sheriff return a rescue, the court will grant an attachment against the rescuers absolute in the first instance (2), as it would be useless to grant a rule nisi, for the sheriff's return in this case being in the nature of a conviction, and not traversable, the only remedy for the party, if he be not guilty, being by action against the sheriff for his false return (3); but, without the sheriff's return, the court will not grant an attachment upon a mere affidavit of the fact. (4)

Attachment.

This decision is opposed to *Clenton v. Moreton* (5), in which it was held, that where a party is arrested under final process and rescued, the court will grant a conditional rule for an attachment on an affidavit of the rescue; but in the case of mesne process, the sheriff must first return a rescue, and then the rule is absolute in the first instance.

Formerly the punishment on an attachment for a rescue was a fine of four nobles; but latterly the courts have discretionally fined the parties according to the circumstances of each case. (6)

Punishment.

If the party rescued were taken upon process of execution, the sheriff can maintain an action against the rescuers, because he is liable to an action of escape, for he cannot return a rescous as he may upon mesne process. (7) But if the prisoner have been once in gaol upon mesne process, the sheriff ought at his peril to keep him, and a rescous from thence is no excuse for him; neither is it an excuse, when the sheriff is bringing him up by *habeas corpus* (8); and consequently, in such case likewise, he may have an action against the rescuers. (9)

ACTIONS BY SHERIFF AGAINST RESCUERS.

Upon the sheriff's return of a rescue, the plaintiff has a triple remedy against the rescuers—by attachment, action on the case, or indictment (10); but the court will not grant an attachment for a rescue, if it appear, that the party was not legally arrested. (11)

REMEDIES BY PLAINTIFF against the rescuers; and

In the case of a rescue, the party at whose suit the arrest was made, can maintain his action either against the sheriff or against the rescuers. If, therefore, he elects to proceed against the rescuers, it seems, that the sheriff is discharged. (12)

against the sheriff.

It may be laid down as a general principle, that wherever the sheriff has time to prepare the *posse comitatus*, he will be liable in case of a rescue. (13)

To support case against the sheriff for the rescue of a person arrested on mesne process (14), it is requisite to prove the original cause of action; the writ and warrant, which must be by producing sworn copies; the

(1) *Woodgate v. Knatchbull*, 2 T. R. 156.

(2) *Anon. Sayer*, 121. *Rex v. Elkins*, 4 Burr. 2129. *Sheather v. Holt*, Str. 531.

(3) *Rex v. Pember*, Hardr. 112.

(4) *Anon.* 2 Salk. 586. *Regina v. Pugh*, 6 Mod. 141. *Sheather v. Holt*, Str. 531., Tidd, 237.

(5) 1 Alcock & Napier (Irish), 92.

(6) Tidd, 237. *Rex v. Minify*, Str. 642. *Rex v. Elkins*, 4 Burr. 2129.

(7) *May v. Probe*, Cro. Jac. 419. 1 Rol. 440.

(8) *Ibid.*

(9) *Crompton v. Ward*, Str. 434. Bull. N. P. 63. (a.)

(10) Com. Dig. Rescous (D.). An indictment for preventing an arrest on process issuing out of an inferior court, must state that the process was directed to the officer of the court. *Rex v. Omer*, 5 East, 304. Tidd, 237.

(11) *Genner v. Sparks*, 6 Mod. 173.

(12) *Mynn v. Coughton*, Cro. Car. 109. *Congham's case*, Hutt. 98. 2 Esp. N. P. 117.

(13) 1 Rol. Abr. Escape (B.), 806.; (D.), 807. *Crompton v. Ward*, Str. 432. *O'Neil v. Marson*, 5 Burr. 2812.

(14) *Wentworth v. Bullen*, 9 B. & C. 840.

RESCOUS.

arrest, to shew it legal; and in point of damage it is expedient to prove, that the person arrested became insolvent, or not to be found: but this is not essentially necessary. (1)

Where a sheriff was sued for an escape on meane process, and he pleaded a rescue, it was holden, that he was not bound to shew, that the rescue was returned. (2)

DAMAGES.

The damage sustained by the plaintiff in consequence of the rescue must be proved, such as the loss of the debt by reason of the escape of the defendant; and it was said by Chief Justice Holt in *Wilson v. Gary* (3), that "in case of rescous you shall have no favour, because guilty of a violence against the process of the law; and therefore not like the case of a negligent escape."

In an action against the sheriff for a false return on meane process, the jury may give the whole debt in damages. (4)

The defendant can give evidence, in mitigation of damages, of the ability of the person rescued, and that he is still amenable to justice; yet if the jury give the whole debt in damages, no new trial will be granted. (5) The party rescued can be a witness, and though *particeps criminis*, if the defendant be guilty, yet shall this only go to his credit, not to his competence. (6)

COSTS.

By stat. 2 Will. & M. sess. i. c. 5. treble costs and damages are given against a person guilty of a rescous of a distress. (7)

(1) *Wilson v. Gary*, 6 Mod. 211. Bull. N. P. 62. (a.)

(2) *Gorges v. Gore*, 3 Lev. 46. Bull. N. P. 63. (a.)

(3) 6 Mod. 211.

(4) *Powell v. Hord*, Str. 649.

(5) *Wilson v. Gary*, 6 Mod. 211. 2 Esp.

N. P. 167.

(6) *Ibid.*

(7) *Lawson v. Storie*, 1 Salk. 205.

SHIPPING.

1. BRITISH SHIP DEFINED, p. 2528.

2. GENERAL RIGHTS, DUTIES, AND LIABILITIES OF SHIPOWNERS, pp. 2528—2530.

Mode of acquiring the property of a ship — A ship is a chattel of which the owners are possessed, as tenants in common — Part owners have no lien on the shares of each other — Part owners can dissolve their connection when they think proper — Effect of breaking up the vessel — The delectus personæ does not hold between part owners — One part owner cannot dispose of the share of another — One part owner can bind the other part owners for repairs and necessities — When each part owner should contribute his share of the capital for expenses — SHIP'S HUSBAND — Duties of — Cannot borrow money or insure — Can claim for the balance of advances — THE CAPTAIN.

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4. ACTIONS AGAINST PART OWNERS, pp. 2535—2542.

In actions against part owners upon any contract relating to the ship, they should be sued jointly — Non joinder of the bankrupt assignees of a co-part-owner — Liability of part owners cannot be affected by any private arrangement between themselves — Judgment of Lord Mansfield in Rich v. Coe — Judgment of Mr. Justice Littledale in Reeve v. Davis — When part owners are answerable in solido — LIABILITIES FOR REPAIRS — Each part owner is liable in solido for repairs — When one part owner assigns his interest, but retains his name on the register — One part owner is an agent for another as to repairs — Agents can bind part owners — Doubtful whether one part owner can bind another by bills of exchange — Irresponsibility of secret part owner — What is requisite to constitute exclusive credit — Liability of part owners to third persons not affected by the registry acts — Judgment of Chief Justice Abbott in Jennings v. Griffiths — SET-OFF — The share of one part owner will not be liable to condemnation for acts done by his co-part-owner — SEAMEN'S WAGES — Stats. 5 & 6 Will. 4. c. 19. and 8 Geo. 1. c. 24. — Owners can be sued for seamen's wages — Seamen's wages have the priority of all other charges — Requisites of an agreement for seamen's wages under stat. 5 & 6 Will. 4. c. 19. — TIME OF PAYMENT — Stat. 8 Geo. 1. c. 24. s. 7. — Seamen disabled by accident — Impressment — DESERTION — When an action for wages cannot be maintained.

5. EVIDENCE, pp. 2542, 2543.

THE REGISTER — Admission of one part owner not binding on the other — Where

charter party not evidence — Written agreement for seamen's wages — Vessel earning freight — Incompetency of the partner of one of the registered owners — Right to begin.

6. STAT. 3 & 4 WILL. 4. C. 55. (SHIP REGISTRY STATUTE), pp. 2548—2549. •

What ships are entitled to be registered — Foreign repairs not to exceed 20s. per ton. — Ships declared unseaworthy to be deemed ships lost or broken up — British ships captured — Who may be registered as owners — Mode in which the property in ships is to be divided — Place at which ships must be registered — Requisites of certificate of registry — What is required on the part of the owners to obtain registry — The transfer — When and how registry de novo is to be made — What is required upon the change of a master.

BRITISH SHIP
DEFINED.

Stat. 3 & 4
Will. 4. c. 54.
s. 12.

1. BRITISH SHIP DEFINED.

By stat. 3 & 4 Will. 4. c. 54. s. 12. no ship shall be admitted to be a British ship unless duly registered and navigated as such; and every British registered ship shall be navigated during the whole of every voyage (whether with a cargo or in ballast), in every part of the world, by a master who is a British subject, and by a crew, whereof three-fourths at least are British seamen; and if such ship be employed in a coasting voyage from one part of the United Kingdom to another, or in a voyage between the United Kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or be employed in fishing on the coasts of the United Kingdom, or of the said islands, then the whole of the crew shall be British seamen.

It may be here observed, that the laws respecting navigation are embodied in stat. 3 & 4 Will. 4. c. 54., amended by stat. 4 & 5 Will. 4. c. 89. s. 11. (1)

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Mode of ac-
quiring the
property of a
ship.

2. GENERAL RIGHTS, DUTIES, AND LIABILITIES OF SHIPOWNERS.

"One or more persons may acquire the property of a ship by building it at their expense, or by purchasing it of another, who has authority to dispose of it. Upon the death of the owner his interest devolves upon his executors or administrators, his personal representatives. In the case of purchase, however, it is necessary, that the person who takes upon him to sell, should have power to do so; for, although a sale of other goods by the person, who is in possession of them, does in many cases vest the property in the buyer, even when the seller himself has neither property in them nor authority to dispose of them, the same cannot take place with respect to ships, as there is no open market for the sale of them. Indeed, this species of property appears from very early times to have been evidenced by written documents, and at present always is so, while other moveable goods rarely are; and therefore the buyer has in this instance the means of ascertaining the title of any person, who offers to sell, and can seldom be deceived, except by his own fault." (2)

A ship is a

A ship is a chattel of which the owners are possessed as tenants in

(1) Stat. 5 & 6 Will. 4. c. 53. contains regulations as to the carriage of passengers from the United Kingdom. Stat. 7 Will. 4. & 1 Vict c. 89. applies to the burning & destroying of ships.
(2) Abbott on Shipping, by Shee, l.

common, though, if it be conveyed to them at one time and by one instrument, they are more properly joint tenants without benefit of survivorship. (1)

Shipowners generally let the ship out to freight to third parties, freight being the consideration money agreed to be paid for the use or hire of a ship; but if the part owners work their own ship, they are as partners in the adventure, though part owners of the ship.

Part owners of a ship, being tenants in common, have not a lien on the shares of each other. (2)

But if part owners join in a particular adventure in which the ship is employed, they have a lien on the other goods of the adventure in respect of the balance due to them for the whole transaction, including the expenses of the ship. (3)

Part owners are not bound to continue their paction or partnership longer than they please. (4)

It has been stated by Molloy (5), that "if a ship be broken up or taken in pieces with an intent to convert the same to other uses, and afterwards, on change of mind, she be rebuilt with the same materials, she is now another and not the same ship, especially if the keel be ripped up or changed, and the whole ship be all at once taken asunder and rebuilt, there determines the partnership, *quoad* the ship. But if a ship be ripped up in parts, yet she remains still the same vessel, and not another; nay, though she hath been so often repaired, that there remains not one stick of the original fabric."

The *delectus personæ* does not hold between part owners, and any owner may sell or transfer his right at what time he pleases. (6)

The interest of part owners is so far distinct (and unlike to that of partners) that one of them cannot dispose of the share of another; and although the master himself be a part owner of the ship, yet will not his sale thereof be good for more than his own part.

One part owner may bind his fellow by contracts for repairs and necessities. He has, however, no implied authority to order insurances to be effected on account of the other part owners (7), and therefore he cannot by so doing charge the others with any part of the premium, unless they afterwards assent to the insurance (8); nor can he, though he be a ship's husband, pledge the others to the expenses of a lawsuit. (9)

Before a voyage be commenced, it is the duty of each owner to contribute his share of the capital for the expenses of the outfit. Hence, if one part owner advance the share of another, or if the ship's husband, being a part owner, at the request of the others, advance their shares for them, that constitutes a debt, which he is entitled to recover in an action of law independently of the profits of the voyage. (10)

A person called a "ship's husband" is sometimes appointed either by

GENERAL
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chattel, of which the owners are possessed, as tenants in common.

Part owners have no lien on the shares of each other.

Part owners can dissolve their connection when they think proper.

Effect of breaking up the vessel.

The *delectus personæ* does not hold between part owners.

One part owner cannot dispose of the share of another.

One part owner can bind the other part owners by contracts for repairs and necessities.

When each part owner should contribute his share of the capital for the expenses.

SHIP'S HUSBAND.

(1) Collyer on Partnership, 793.

(2) *Exp. Young*, 2 V. & B. 242. *Exp. Harrison*, 2 Rose, 76.

(3) *Holderness v. Shacks*, 8 B. & C. 612. 3 M. & R. 95. Collyer on Partnership, 667.

(4) Molloy, de Jur. Mar. 222.

(5) *Ibid.* 224.

(6) *Ibid.*

(7) *Hooper v. Lusby*, 4 Camp. 66.

(8) *Bell v. Humphries*, 2 Stark. 345. *Ogle v. Wrangham*, Abbott on Shipping, by Shee, 92.

(9) *Campbell v. Stein*, 2 Dow, 135.

(10) *Helme v. Smith*, 7 Bing. 702.

**GENERAL
RIGHTS,
DUTIES, AND
LIABILITIES OF
SHIPOWNERS.**

**Duties of a
ship's husband.**

Cannot borrow
money or in-
sure.

Can claim for
the balance of
advances.

THE CAPTAIN.

writing or parol, whose duty is to administer the affairs of the ship on the behalf of the owners, and who may be either a part owner or a stranger.

His duties are to see to the proper outfit of the vessel; to have a proper master, mate, and crew; to see to the furnishing of provisions and stores; to see to the regularity of all the clearances from the custom house; to settle the contracts; to enter into proper charter-parties, or engage the vessel for general freight; to settle for freight, and adjust averages with the merchant; to preserve proper certificates and documents, in case of future disputes with insurers or freighters; and to keep regular books of the ship. (1)

A ship's husband cannot, without special powers, borrow money generally for the use of the ship, though he may settle accounts and grant bills for them, which will form debts against the concern (2); nor can he, without special authority, insure the ship. (3)

The ship's husband will be entitled, on the failure of the owners, to claim for the balance of his advances and commission, to claim in relief of bills and engagements in his own name for the price of repairs, furnishing, &c., and to hold a lien for his security and indemnification over the documents and warrants of the ship, and over the freight recovered, or which he has been employed to recover. (4)

The captain can pledge the credit of the owners resident in England for money advanced in an English port where the owners have no agent, if such advances be essentially requisite for the prosecution of the voyage, the necessity being a question of fact for the jury (5); but if the money have not been borrowed expressly for the purpose of prosecuting the voyage, no action can be maintained against the owners. (6)

**ACTIONS AND
SUITS BY PART
OWNERS.**

**ACTIONS, &c.
INTER SE.**

Majority in
value can
manage the
ship.

Causes for,
which the court
of admiralty
will arrest and
detain a ship.

When a bond
is taken in the
admiralty
court, the dis-
sident ship-
owner incurs
no risk, and is
entitled to no
profits.

3. ACTIONS AND SUITS BY PART OWNERS.

In England, the majority in value of the shipowners are entitled to send out the ship "upon any probable design." (7)

But the court of admiralty is invested with absolute powers to arrest and detain a ship upon the application of a part owner who dissents from her intended employment, until security be given by the other part owners to the full value of his share (8); and can likewise enforce payment of the sums stipulated to be paid.

The court of admiralty will sometimes declare the bond to be forfeited, if the vessel do not return within a certain time. (9)

Where a bond is required and taken in the admiralty court, the dissident part owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking. (10)

(1) 1 Bell, Comm. 410. Beawes, 407.
Collyer on Partnership, 810.

(2) 1 Bell, Comm. 411.

(3) *French v. Backhouse*, 5 Burr. 2727.

(4) 1 Bell, Comm. 411.

(5) *Arthur v. Barton*, 6 M. & W. 138.,
vide etiam *Weston v. Wright*, 7 ibid. 396.

(6) *Thacker v. Moates*, 1 M. & Rob. 79.

(7) Abbott on Shipping, by Shee, 86.

(8) *The Apollo*, 1 Hagg. 306. *Stolly v. Winson*, 1 Vern. 297. *Anon.* 2 Ch. Ca. 36.

(9) *The Anne and the Waterhen*, cit. 3 Hagg. 279.

(10) Abbott on Shipping, by Shee, 88.,
vide *Knight v. Parry*, 1 Show. 15. *Dunn v. Johnston*, 4 Simons, 539.

If the dissentient part owners expressly notify their dissent to the others, and to the merchants also who freight the ship, without having recourse to the court of admiralty, although it may be doubtful, whether the court of Chancery would give relief to a part owner in respect of the loss of a ship sent to sea without his assent, yet if a part owner expressly notify his dissent, that court will not compel him to contribute to a loss. (1)

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The court of admiralty have likewise jurisdiction to detain a vessel in a suit instituted by the real owner against a mere wrong-doer. (2)

The court of admiralty can detain a vessel against a mere wrong-doer.

The court of admiralty cannot compel the sale of a part owner's interest under any circumstances (3), and has no power to interfere if the amount of shares be a subject of dispute. In such case the court of Chancery will interpose, and by injunction restrain the sailing of the ship, till the amount of the share for which security is to be given shall be ascertained. (4)

Sale of a part owner's interest cannot be enforced.

The court will sometimes be inclined to uphold the interests of the few against the encroachments of the many (5); and the judgment of Chief Justice Abbott in *Card v. Hope* (6) affords an illustration of such a principle, where his lordship observed, "We think a contract like the present, regarding a ship engaged in any trade or service, must be void in law, as being contrary to the interest of the charterers and of the other owners. It is a part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration, the law enables a majority of the part owners (under guards, indeed, to the interest of the minority peculiar to itself) to employ their ship even against the will of the minority, that the ship may not remain unemployed. A power of employment vested in the majority, seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty, the duty of exercising a free and impartial judgment in the choice of every person who is to be intrusted with the management of the outfit, and with the navigation of the ship, *ut dentur digniori*. And any contract which is calculated to have the effect of fettering the judgment, and of binding the party to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractor. All the part owners ought to share rateably in every profit, that may be made of the ship; and if such contracts could be allowed by law, they must operate as a discouragement to persons to become part owners of ships. The duty, however, is owing, not only to the charterers and other part owners of a ship, but also to all, whose life or property may be embarked in her; and, consequently, a violation of the duty is contrary not only to the interests of the charterers and part owners, but also to another most important object, namely, the protection and safety of the lives and property embarked on the sea. I have already observed, that although the charterers

Interests of the few will sometimes be upheld against the encroachments of the many.

Judgment of Chief Justice Abbott in *Card v. Hope*.

(1) *Horn v. Gilpin*, Ambler 255.

(2) *In re Blanchard*, 2 B. & C. 244.

(3) *Ouston v. Hedden*, 1 Wils. 101.

(4) *Haly v. Goodson*, 2 Mer. 77. Collyer on Partnership, 808. But the court will decline to interfere if the plaintiff have

been guilty of delay. *Christie v. Craig*, 2 Mer. 137.

(5) *Card v. Hope*, 2 B. & C. 661. 4 D. & R. 164.

(6) *Ibid*.

**ACTIONS AND
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OWNERS.**

in this case may have the control over the appointment of the officers of the ship, yet that they are nevertheless entitled to the security of a free and impartial choice of the officers to be recommended to them. And with regard to the other owners, although it may be true that, by becoming owners at a time when a majority of the interest was vested in the plaintiffs, they knew that this majority of interest might, as it respects themselves, carry with it every power for the exercise and continuance of which this deed provides, yet they might well rely for the faithful exercise of every authority on the interests which the plaintiffs had in the prosperity of the ship, as being paramount to all other considerations. But this deed is calculated to deprive them of that security, because it continues a very large part of the same powers in the plaintiffs after their interest in the ship is diminished, and may, by a still further severance, not only of the interest retained by them, but of that which they have conveyed to the defendants, accompanied with stipulations and obligations like those which are contained in this deed, ultimately place the entire management of the ship, by land and at sea, in the hands of persons who have very little interest in her."

When the minority of the shipowners have possession of the ship, but refuse to employ her.

For an adjustment of disputed accounts, a suit in equity is the remedy.

If the minority happen to have possession of the ship, and refuse to employ it, the majority may, by a similar warrant from the court of admiralty, obtain possession of it, and send it to sea, upon giving proper security. (1)

The ordinary remedy for part owners to obtain an adjustment of the ship's accounts among themselves is a suit in a court of equity. But in a case where several part owners entered into a written agreement, whereby they, and each, and every of them did agree to and with the others, and each and every of the others, that the ship should proceed on a certain voyage, and be under the exclusive management and control of one of the parties as husband thereof; and that, after the ship's return, a full account should be made out of the ship and her concerns, and the neat profits be divided according to the proportions:—It was held, that each individual party to the agreement might maintain an action at law upon it against him, who had acted as the husband, for not making out an account and dividing the profits within a reasonable time after the ship's return. (2)

To a bill filed for an account, all the part owners must be parties.

Covenant to pay a sum of money in lieu of profits.

One part owner cannot maintain trover against the other.

Fraudulent sale of ship.

To a bill filed for an account of the profits of the ship, all the part owners must in general be parties. (3)

A covenant to pay a certain sum of money yearly, in lieu of the profits of a vessel as a part owner, is not discharged by the captain of the vessel, provided the property be not altered by legal condemnation. (4)

Part owners being tenants in common, one part owner cannot maintain trover against the other for detaining, or even for forcibly taking and carrying away the ship; *secus*, if the delinquent part owner destroy the ship. (5)

It has likewise been held, that one part owner cannot recover damages from another part owner for fraudulently and deceitfully sending a ship on a voyage and selling it abroad. (6)

(1) *Abbott on Shipping*, by Shee, 87.

(2) *Owston v. Ogle*, 13 East, 538. *Abbott on Shipping*, by Shee, 98.

(3) *Moffat v. Farquharson*, 2 Bro. C. C. 358.

(4) *Grigg v. Stoker*, Forrest, 4. *Collyer on Partnership*, 812.

(5) *Barnardiston v. Chapman*, cit. 4 East, 121.

(6) *Graves v. Sawyer*, Sir T. Raym. 15.

It has been said, that in an action for the freight of goods conveyed in a general ship, all the part owners ought to join as plaintiffs. (1)

Hence it seems, that, admitting the original interest of the part owners in the profits of a ship to be joint, that will not prevent them from suing separately for their respective shares of the profits, when the covenant or agreement for payment of those profits is separate; and it is clearly intended, that they should have a separate interest under the covenant or agreement. (2)

The charterer of a ship for the conveyance of a cargo from a foreign port is not liable to the owner for the unavoidable detention of the ship by the frost after the completion of the lading. (3)

By a memorandum of charter-party it was agreed, that a vessel should proceed to Trieste, and there load a full cargo, and being so loaded should proceed to a port in the United Kingdom, and deliver the same upon payment of freight at a certain rate; that forty running days should be allowed the merchants (if not sooner dispatched) for loading at Trieste, and for unloading at the port of discharge, and twelve days on demurrage, at 6*l.* per day, and that the vessel should sail from England on or before the 4th of February next; and be addressed to the charterer's agents at the port of loading and discharge:—It was holden, that the sailing on or before the 4th of February was a condition precedent. (4)

A memorandum of charter-party provided, that a vessel should ship goods for Kingston, or any other port in Jamaica, and having discharged the same, should receive on board a cargo from thence, or from a port on the Spanish main, if required, and deliver the same at a port in the United Kingdom, on being paid freight, 250*l.*, in ten days after sailing from Gravesend, and 750*l.* more in two months after a right delivery of the homeward cargo, provided she should be required to proceed to one port only in Jamaica, and 25*l.* more should she be required to go to two or more ports in that island; and in case the vessel should be ordered to the Spanish main, 4*l.* per day was to be paid for every day after the twenty-fifth after her arrival at Jamaica, until dispatched from her loading port: demurrage, 100*l.* per month, or in proportion for a less period, payable on settlement of the hire of the vessel. In *assumpsit* on the memorandum of this charter the declaration averred, that the vessel, after discharging a portion of her outward cargo at Kingston, and the rest at another port in Jamaica, sailed thence to a port on the Spanish main, to receive a homeward cargo, and was detained there 139 days after the twenty-fifth day of her arrival at Jamaica, and alleged for breach, the non payment of the 4*l.* per day, for the 139 days. The plea stated, that the vessel never delivered her homeward cargo at any port of discharge in the United Kingdom:—It was held on demurrer to the plea, that the 4*l.* per day was not payable until two months after the delivery of the homeward cargo. (5)

In an action of tort by part owners, for instance, for any injury done to the ship, all the part owners ought to be plaintiffs. So, in an action of trover, all the part owners ought to join as plaintiffs, though one only may bring trover for the whole ship, if the defendant do not plead in abatement. (6)

ACTIONS AND
SUITS BY PART
OWNERS.

ACTIONS, &c.
AGAINST THIRD
PARTIES.

In an action
for freight, all
the part owners
ought to join
as plaintiffs.

When charterer
of a ship not
liable to the
owner for the
unavoidable
detention of
the ship.

Where time of
sailing is a
condition pre-
cedent.

When freight
not payable
until two
months after
the delivery of
the homeward
cargo.

Actions of
tort.

(1) Abbott on Shipping, by Shee, 99.,
semb. contra *Stanley v. Ayles*, 3 Keb. 443.

(2) *Owston v. Ogle*, 13 East, 538. *Serv-
ants v. James*, Lloyd & Welsby, 54. 10 B.
& C. 411. *Collyer on Partnership*, 821.

(3) *Fringale v. Mollett*, 6 M. & W. 80.

(4) *Glaholm v. Hays*, 2 M. & G. 257.

(5) *Crozier v. Smith*, 1 ibid. 407.

(6) *Addison v. Overend*, 6 T. R. 766.
Dockwray v. Dickenson, Comb. 366. *Skin-
640.*

ACTIONS AND SUITS BY PART OWNERS.

When one part owner cannot sue alone.

Shipowner ratifying the sale of the ship by the captain.

When agent cannot dispute the title of his part owners.

To maintain the interest of each part owner against third persons, the names of all the part owners should appear in the registry.

The disqualifying laws of registration do not apply if the title to the ship and freight be separate.

PENALTY FOR A WILFUL DETENTION OF THE CERTIFICATE.

Stat. 3 & 4 Will. 4. c. 55. s. 27.

Where A. was entitled to certain shares in a ship, and B. and C. were owners of the remaining shares, and B. and C. employed D. to sell the vessel, which he accordingly did, and paid over to B. and C. their proportion of the purchase money, but refused, without the concurrence of B. and C., to pay A. his proportion of the proceeds of the sale of the vessel:—It was held, in an action brought by A. against D., that it was not maintainable, and that A. could not sue alone. (1)

It seems, that the master of the ship has authority, when, in consequence of injury to the ship during the voyage there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested; but if the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser, or one claiming under him; and it is equally a ratification of a sale by an auctioneer acting under a parol authority from the master. (2)

In an action *ex contractu* by part owners against their agent, the defendant cannot dispute their title, by shewing it to be defective under the registry acts. (3)

Although the respective shares in the ship to which the partners are individually entitled need not be defined, yet, in order to maintain the interest of each partner against third persons, the names of all the partners must appear on the register, although the name of the partnership firm may also be added. (4)

If the title to the freight and the title to the ship be separate, the contract as to freight, both as against third persons and as between the partners themselves, will not be invalidated in equity by a breach of the laws of registration. (5)

Bystat. 3 & 4 Will. 4. c. 55. s. 27., in case any person who shall have received or obtained by any means or for any purpose the certificate of registry of any vessel (whether such person shall claim to be the master or owner of such vessel, or not), shall wilfully (6) detain and refuse to deliver up the same to the proper (7) officers of her majesty's customs, for the purposes of such vessel as occasion shall require, or to the person having the actual command, possession, and management of such vessel as the ostensible and reputed master, or as the ostensible and reputed owner thereof, any such last-mentioned person may make complaint on oath of such detainer and refusal to any justice of the peace residing near to the place where such detainer and refusal shall be, in Great Britain or Ireland, or in any territory belonging to her majesty; and on such complaint, the justice is required, by warrant under his hand and seal, to cause the person so complained against to be brought before him to be examined, touching such detainer and refusal; and if it shall appear on examination of such person or otherwise, that the certificate of registry is not lost or mislaid, but is wilfully detained by the said person, such person shall be thereof convicted, and shall forfeit and pay the sum of 100*l.*, and on failure of payment thereof he shall be com-

(1) *Hatsell v. Griffith*, 2 C. & M. 679.

(2) *Hunter v. Parker*, 7 M. & W 322.

(3) *Dixon v. Hamond*, 2 B. & A. 311.

(4) *Slater v. Willis*, 1 Beavan, 354.

(5) *Davenport v. Whitmore*, 2 M. & C. 177. *Master v. Gillespie*, 11 Ves. 621.

(6) *Vide Bowen v. Fox*, 10 B. & C. 41.

(7) *Rex v. Walsh*, 1 A. & E. 451. 3 N. & M. 632.

mitted to the common gaol, there to remain without bail or mainprise for such time as the said justice shall in his discretion deem proper, not being less than three months, nor more than twelve months; and the justice shall certify the aforesaid detainer, refusal, and conviction to the person who granted such certificate of registry for such vessel, who shall, on the terms and conditions of law being complied with, make registry of such vessel *de novo*, and grant a certificate thereof conformably to law, notifying on the back of such certificate the ground upon which the vessel was so registered *de novo*; and if the person who shall have detained and refused to deliver up such certificate of registry as aforesaid, or shall be believed to have detained the same, shall have absconded, so that the said warrant of the justice cannot be executed upon him, and proof thereof shall be made to the satisfaction of the commissioners of her majesty's customs, they may permit such ship or vessel to be registered *de novo*, or otherwise, in their discretion, to grant a license for the present use of such ship or vessel in like manner as is hereinbefore provided in the case wherein the certificate of registry is lost or mislaid.

A conviction under the foregoing section must state for what purpose the certificate was required. (1)

ACTIONS AND SUITS BY PART OWNERS.

Justice to certify detainer, and ship to be registered *de novo*.

If person detaining certificate have absconded, ship may be registered as in case of lost certificate.

4. ACTIONS AGAINST PART OWNERS.

In an action against part owners, upon any contract relating to the ship, all should be sued jointly, but the defendants can only avail themselves of the objection by plea in abatement. (2) The same observation seems to be applicable to actions, *ex quasi contractu*, against partners.

However, if the creditor were ignorant at the time of the contract, that there were other part owners, he may sue him alone to whom the credit was given, and the defendant cannot plead the non joinder of the other part owners in abatement. (3)

In an action by an attorney, against one of several part owners whose interest is insured, for business done for the assured, the defendant may plead in abatement the non joinder of the assignees of his bankrupt co-partners. (4)

The liability of part owners cannot be affected by any private arrangement between themselves. Thus, in *Rich v. Coe* (5) Lord Mansfield said, "Whoever supplies a ship with necessaries, has a treble security: 1. the person of the master; 2. the specific ship; 3. the personal security of the owners." The creditors trust specifically to the ship, and generally to the owners. "In this case the defendants are the owners, and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But how does that affect the creditors, who, it is expressly stated, were total strangers to the transaction?"

ACTIONS AGAINST PART OWNERS.

In actions against part owners upon any contract relating to the ship, they should be sued jointly.

Non joinder of the bankrupt assignees of a co-part-owner.

Liability of part owners, cannot be affected by any private arrangement between themselves.

Judgment of Lord Mansfield in *Rich v. Coe*.

(1) *Rex v. Walsh*, 1 A. & E. 481. 3 N. & M. 632. by Shee, 91. *Baldney v. Ritchie*, 1 Stark. 338. *De Mandot v. Saunders*, 1 B. & Ad. 398.

(2) *Abbott on Shipping*, by Shee, 100.

(4) *Pasmore v. Bougfield*, 1 Stark. 296.

Att. Gen. v. Borrodale, 1 Price, 162.

(5) Cowp. 636., et vide *Gleason v. Tinch-*

(3) *Doo v. Chippenden*, *Abbott on Shipping*, 1er, Holt's N. P. C. 586.

**ACTIONS
AGAINST PART
OWNERS.**

Judgment of
Mr. Justice
Littledale in
Reeve v. Davis.

In *Reeve v. Davis* (1) Mr. Justice Littledale said, "The rule is, that upon a general order for repairs given by the captain, the party executing them has the security of the ship, of the captain, and of the owners. The question is, Who are so for this purpose? The persons registered are not necessarily so; the register acts were not passed for this purpose; and the question of ownership, as it regards the liability for repairs, must be considered as it would have been before those acts passed. Nor is there, on this view of the subject, any hardship thrown upon the tradesman; he has always the means of knowing who are substantially the owners, by asking the captain to shew the charter-party; if this is refused, he may decline dealing. In this case the benefit of what was done enured to Thompson. The party for whose profit the ship is in reality employed at the time, has the benefit of the work done on board, and is liable to the tradesman who does it. Here, if the charterer had been a different person from the captain, the charterer would have been liable."

When part
owners are an-
swerable *in*
solido.

**LIABILITIES
FOR REPAIRS.**
Each part
owner is liable
in solido for
repairs.

Part owners are answerable *in solido* for costs and damages for wrong capture and condemnation of another ship. (2)

Each part owner is answerable *in solido* to the tradesman who builds or fits out the ship. (3) Hence, if a tradesman who has repaired a ship, take from some of the part owners, sums equivalent to their shares, they still remain responsible for the residue, if not paid by the others, unless at the time of the payment the tradesman release them by deed, or specially agree to discharge them from all further demand upon some good consideration inducing him so to do, such as payment before the expiration of the usual credit. (4)

Where one
part owner
assigns his
interest, but
retains his
name on the
register.

Where there were two joint owners of a ship, and one by private agreement parted with his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register by way of collateral security for the payment of the bills:—It was held, that he was liable for repairs done to the ship subsequent to such agreement, although he had never afterwards interfered in the concern or management of the vessel. (5)

One part owner
is an agent for
another as to
repairs.

In contracts for the repairs and necessities of a ship, one part owner is agent for the other part owners, and where the ship is under the management of the master, and the owners divide the profits, the master is agent for them all. And where the master makes no contract personally, but the owners themselves contract, they are alone liable, and not the master (6), otherwise an action will lie against either masters or owners. (7)

Although
credit be given
to one part
owner.

Although credit be given to one part owner particularly, the contract for the repairs being entered into with one alone, that of itself does not exclude the creditor from resorting to the other part owners for payment of his debt. To accomplish this end, the creditor must be expressly excluded by the terms of the contract. (8)

Agents can
bind the part
owners.

An agent may make himself, or his principal, liable for repairs.

- | | |
|---|---|
| (1) 1 A. & E. 315. | (5) <i>Dowson v. Leake</i> , D. & R. N. P. C. |
| (2) <i>The Karasan</i> , 5 Rob. 291. <i>Prarie v. Martine</i> , 2 Stair, 319. | 52. |
| (3) <i>Doddington v. Hallet</i> , 1 Ves. sen. 498., et vide <i>Samsun v. Brag[g]ington</i> , <i>ibid.</i> 443. <i>Weston v. Wright</i> , 7 M. & W. 396. | (6) <i>Briggs v. Wilkinson</i> , 7 B. & C. 55. <i>Exp. Bland</i> , 2 Rose, 92. <i>Farmer v. Davies</i> , 1 T. R. 108. |
| (4) <i>Tead v. Baring</i> , Abbott on Shipping, by Shee, 101., vide <i>anté</i> , 309, 310. tit. As-SUMPAIT. | (7) <i>Samsun v. Brag[g]ington</i> , 1 Ves. sen. 443. |
| | (8) <i>Exp. Bland</i> , 2 Rose, 91. |

It seems doubtful, however, whether one part owner can bind his fellow by bills of exchange, even for repairs (1); but admitting that he might so bind him on the ship account, yet, as it is clear, that he cannot bind him by bill on any other account, a part owner will not be liable even to a *bond fide* indorsee, if he can shew, that the bill was given on another account. (2)

But in *Reed v. White* (3) Lord Ellenborough held, that a creditor taking the separate bill of the ship's husband, a part owner, for stores supplied to the ship, discharges the other part owners.

It seems from *Harrington v. Fry* (4), that if the person charged have a beneficial interest as part owner, but be not named in the register, or in other words, if he be a dormant or secret part owner, it seems, on the authority of one case, that he will not be liable for necessities furnished to the ship. (5)

Where the person who ordered the repair was a ship's husband, and the part owner charged in the action was unknown at the time of the order, and being a female, took no part in the management of the vessel, Chief Justice Tindal held, that she was liable, and observed, "that in order to constitute exclusive credit, there must be a giving up of the owners generally, and the making an exclusive bargain with the person who orders the goods, and an agreement to furnish them on his credit only." (6)

It seems, that the liability of part owners to third persons is not in any manner affected by the Registry Acts: thus, in *Annett v. Carstairs* (7) Lord Ellenborough said, "Title has nothing to do with these cases; we must look to the contract between the parties."

In *Briggs v. Wilkinson* (8) Lord Tenterden said, that "the acts enable a person to ascertain who are the legal owners of a vessel; but that might be ascertained *aliunde*; and if the legal owners would not at common law be liable to demands for repairs and necessities merely on account of their ownership, I cannot think that they are so by reason of any thing found in the Register Acts."

So likewise in *Jennings v. Griffiths* (9) Chief Justice Abbott said, "The object of the legislature in passing those statutes, was clearly one of general policy, viz. to prevent foreigners from participating in the advantages which it was intended to give to British shipping only; and the use of the registry is to enable the government to ascertain, at all times, that the real owners are British subjects. Soon after the passing of those acts, the leaning of courts of law in the construction of them, was, to say that the registered owners of ships should at all events be liable for the repairs; but the subject having become more accurately understood, a better and more correct principle now prevails; and the recent cases have decided, that the true question in matters of this description is, 'Upon whose credit was the work done?'" (10)

The rule that joint and separate debts cannot be set off against each other

ACTIONS AGAINST PART OWNERS.

Doubtful whether one part owner can bind another by bills of exchange.

Irresponsibility of secret part owner.

What is requisite to constitute exclusive credit.

Liability of part owners to third persons not affected by the Registry Acts.

Judgment of Chief Justice Abbott in *Jennings v. Griffiths*.

SET-OFF.
When debts

(1) *Dickinson v. Valpy*, 10 B. & C. 135.

(2) *Williams v. Thomas*, 6 Esp. N. P. C. 18.

(3) 5 *ibid.* 122.

(4) 2 Bing. 179. 9 Moore, 344.

(5) See *vide M'Iver v. Humble*, 16 East, 176., *dissent.* Wood B. in *Hubbard v. Johnstone*, 3 Taunt. 203. *Edwards v. Dick*, 4 B.

& A. 212. *The Nostra Signora de los Dolores*, 1 Dods. 290.

(6) *Thompson v. Finden*, 4 C. & P. 158.

(7) 3 Camp. 354.

(8) 7 B. & C. 35.

(9) R. & M. 43.

(10) *Vide etiam M'Iver v. Humble*, 16 East, 169. *Briggs v. Wilkinson*, 7 B. & C. 30., *ante*, 309. tit. ASSUMPSIT.

ACTIONS AGAINST PART OWNERS.

cannot be the subject of set-off.

The share of one part owner will not be liable to condemnation for acts done by his co-part-owner.

SEAMEN'S WAGES.

Stats. 5 & 6 Will. 4. c. 19. and 8 Geo. 1. c. 24.

Owners can be sued for seamen's wages.

When seamen can sue in the court of admiralty.

Seamen's wages have the priority of all other charges.

Requisites of an agreement for seamen's wages under stat. 5 & 6 Will. 4. c. 19.

applies as well to part owners as partners. Therefore, upon the bankruptcy of a person separately indebted to each of the part owners of a ship, they cannot set off their proportions of a debt due from them jointly to the bankrupt on the ship account, against the debts due by the bankrupt to them separately. (1)

Neither will the share of one part owner be liable to condemnation for acts done by his co-partner without his privity. Where one of several part owners is owner of the whole cargo, condemnation of the cargo will carry with it condemnation of his share of the ship. But the shares of the other part owners, will remain safe, if they can shew by attestation, that they had no knowledge of the contraband goods. (2)

Stats. 5 & 6 Will. 4. c. 19. and 8 Geo. 1. c. 24. embody the principal provisions relative to securing the wages of seamen, and to punish and prevent their desertion. (3)

At common law the seamen can sue either the master as the person immediately contracting with them, and answerable to them, or the owners as the persons virtually contracting with them through the agency of the master, and answerable for the performance of his engagement. (4)

A woman, if a feme sole, can maintain an action for her wages, if she have performed her contract, although hired in ignorance of her sex. (5)

If the hiring be on the usual terms (6), and made by word or by writing only, and not by deed, any seaman except the master can sue in the court of admiralty, and the ship can be arrested as a security for their demand, or the master or owner can be personally cited to answer to them. But if the agreement be by deed, and the terms of such agreement are not the usual terms, then the only remedy is at common law.

In proceedings against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges; for the labour of the seamen having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had.

By stat. 5 & 6 Will. 4. c. 19. the agreement for seamen's wages must be in writing (7)—and must state the monthly or other wages which each seaman is to have—the capacity in which the seaman is to act—the nature of the voyage in which the ship is intended to be employed—the day and month of the year in which the agreement was made—be signed by the master in the first instance, and by the seamen respectively, at the port or place where such seamen shall be respectively shipped—and be read over in the presence of the attesting witness, before the seaman is required to sign the same.

A non compliance will render the master of the vessel liable to a penalty of 10*l*. (8), for every seaman who has not signed such an agreement.

By stat. 5 & 6 Will. 4. c. 19. s. 5. seamen by signing the foregoing agree-

(1) *Exp. Christie*, 10 Ves. 105.

(2) *The Jonge Tobias*, 1 Rob. 329.

(3) By stat. 5 & 6 Will. 4. c. 19. s. 15. justices can settle disputes respecting seamen's wages, where they do not exceed 20*l*.

(4) *Abbott on Shipping*, by Shee, 553.

(5) *Jane and Matilda Chandler*, 1 Hagg. 187.

(6) *Benne v. Parre*, 2 Id. Rayn. 1206. *Ragg v. King*, Str. 858. *Read v. Chapman*, ibid. 937.

(7) But it seems a parol agreement will be equally binding against the owners in an action for wages.

(8) Sect. 4.

ment do not waive any common law remedies for the recovery of their wages, but they cannot recover a greater sum for wages, than what is mentioned in the agreement. (1)

ACTIONS
AGAINST PART
OWNERS.

If after the hiring of seamen, the owners of a ship do not think proper to send her on her intended voyage, the seamen are to be paid for the time during which, they may have been employed on board the ship. (2) And if they sustain any special damage by breaking off the contract, it seems reasonable also, that they should recover such damage by an action upon the agreement. (3)

By stat. 5 & 6 Will. 4. c. 19. s. 11. the master or owner shall pay to every seaman entering into such contract as aforesaid his wages, if the same shall be demanded within the respective periods following, that is to say, if the ship shall be employed in trading coastwise, the wages shall be paid within two days after the termination of the agreement, or at the time when the seaman shall be discharged, whichever shall first happen; and in every other case the wages shall be paid at the latest within three days after the cargo shall have been delivered, or within ten days after the seaman's discharge, whichever shall first happen; in which two cases of delayed payments the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one-fourth part of the estimated balance due to him; and if any master or owner shall neglect or refuse to make payment in the manner required, he shall for every such neglect or refusal forfeit to the seaman the amount of two day's pay for each day, not exceeding ten days, during which payment shall without sufficient cause be delayed beyond the period prescribed, for the recovery of which forfeiture the seaman shall have the same remedies as he is entitled to for the recovery of his wages.

TIME OF PAY-
MENT.

Stat. 5 & 6
Will. 4. c. 19.
s. 11.

It is declared, moreover, that the payment shall be valid, notwithstanding any previous assignment by the seaman of his wages, or of any attachment or incumbrances thereon; and that no assignment of wages, made prior to the earning of them, shall be valid or binding upon the party making it.

By stat. 5 & 6 Will. 4. c. 19. s. 44. when a seaman is left on shore at any place abroad, under a certificate of his inability from sickness to proceed on the voyage, the master is to deliver to certain functionaries or merchants (mentioned in the act) a just and true account of the wages due, and to pay the same to the seaman either in money or by a bill drawn upon the owner of his ship, and if by a bill, then such functionary or merchants are authorised and required by certificate indorsed on the bill, to testify that it is drawn according to the act, for money due on account of wages of a seaman, or to that effect. The penalty upon the master for a refusal or neglect to give such accounts, and to pay the amount thereof, or for giving a false account, is 25*l*.

Stat. 5 & 6
Will. 4. c. 19.
s. 44.

By stat. 8 Geo. 1. c. 24. s. 7. (made perpetual by stat. 2 Geo. 2. c. 28. s. 7.) masters or owners of merchant ships or vessels are prohibited from paying or advancing to any seaman or mariner, while he is in parts beyond the seas, any money or effects upon account of wages, exceeding one moiety of the wages due at the time of such payment, until the return of the ship to Great Britain or Ireland, or the Plantations, or to some other of his majesty's

Stat. 8 Geo. 1.
c. 24. s. 7.

(1) *White v. Wilson*, 2 B. & P. 116. *Elsworth v. Woolmore*, 5 Esp. N. P. C. 84.

(2) *Wells v. Osman*, 2 Ld. Raym. 1044.

(3) *Abbott on Shipping*, by Shee, 563.

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dominions whereto they belong, under a penalty of double the money so paid or advanced, recoverable by common informer in the high court of admiralty. The most important rule on this head is, "that freight is the mother of wages" (1), i. e. if the ship has earned its freight; and the seaman has performed his stipulated duty, he becomes entitled to his wages. If the ship be captured (2), or lost in the voyage, the seamen lose their wages.

If a seaman fall sick and die during the voyage, the laws of Oleron (3), of Wisbuy (4), and of the Hanse Towns (5), direct that his wages shall be paid to his heirs, in general words, without distinction as to the terms upon which he was hired. There is no general decision on this subject in our law books, but the legislature appears to have considered that some wages might be owing to seamen who died in the course of a voyage (6); and in *Cutter v. Powell* (7) it seems to have been admitted, that the representatives of a seaman hired by the month, would be entitled to a proportion of wages to the time of his death.

The payment of wages is generally dependent upon the payment of freight; if the ship has earned its freight, the seamen who have served on board the ship have in like manner earned their wages. And if, as in general, a ship destined on a voyage out and home has delivered her outward bound cargo, and perishes on the homeward voyage, but the freight for the outward voyage is due, so the seamen will be entitled to receive their wages for the time employed in the outward voyage and the unloading of the cargo, unless by the terms of their contract the outward and homeward voyages are consolidated into one. (8) And if a ship sail to different places, wages are payable to the time of the delivery of the last cargo. Upon the same principle, where money had been advanced to the owners in part of the freight outward, and the ship perished before her arrival at the port of delivery, it was held, that the seamen were entitled to wages in proportion to the money advanced. (9)

**Seamen.
Disabled by
accident.
Impressment.**

If a seaman be disabled from performing his duty by an accident (10), *e. g.* by receiving a blow from a piece of timber accidentally falling on him, he will be entitled to recover his wages for the whole voyage. A seaman who is impressed is entitled to his wages *pro tanto* (11), if the ship complete her voyage, but not if she be captured on her return. (12)

DESEPTION.

As a general principle, if seamen desert, they cannot maintain an action for any of their wages. (13)

**When seamen
quitting the
ship will only
forfeit a
month's wages.**

If a seaman, after having signed the articles directed by stat. 5 & 6 Will. 4. c. 19., absolutely quit the ship after her arrival and being moored at her port of delivery, but anterior to the discharge of her cargo, he will not incur a total forfeiture of his wages under sect. 9., but only a month's under sect. 7. (14)

(1) *Anon.* 2 Show. 291.

(2) *Abernethy v. Landale*, Doug. 539.

(3) Art. 7.

(4) Art. 19.

(5) Art. 45.

(6) Stats. 37 Geo. 3. c. 73. s. 7. and 6 Geo. 4. c. 107. s. 15.

(7) 6 T. R. 320., vide *Armstrong v. Smith*, 1 N. R. 299.

(8) *Anon.* 1 Ld. Raym. 639. 739. *West*

v. West, cit. 12 Mod. 408. Ordin. of Rotterdam, Art. 214. 2 Magens, 113.

(9) *Anon.* 2 Show. 291.

(10) *Chandler v. Grieses*, 2 Hen. Black. 606. n., sed vide *Cutter v. Powell*, 6 T. R. 325.

(11) *Wiggins v. Inglaton*, 2 Ld. Raym. 1211.

(12) *Anon.* 2 Camp. 320. n.

(13) *Abbott on Shipping*, by Shee, 576.

(14) *McDonald v. Jopling*, 4 M. & W. 283.

By stat. 5 & 6 Will. 4. c. 19. s. 45. entering or being received into the service of his majesty, on board any of his majesty's ships, will not occasion a forfeiture of clothes or wages, nor is it to be deemed a desertion.

If a seaman be compelled to quit the ship through the inhuman treatment of the master (1), or be dismissed without any lawful cause (2), or, if he be impressed into the navy, it will not be a desertion. (3)

If foreign sailors stipulate in their own country, before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance them abroad in deduction of their wages, such stipulation is binding, and no action can be maintained. (4)

If the vessel earn no freight, seamen can recover no wages (5), as where the ship is captured by an enemy, and absolutely prevented from earning freight (6); but if a ship be even seized by the enemy, and subsequently released, by which she has the power of earning freight, this will not be such a capture as to deprive seamen of their wages. (7)

If the vessel be shipwrecked, no seamen's wages are recoverable (8); but if the cargo be saved, and a proportion of the freight paid by the merchant in respect thereof, it seems, upon principle, that the seamen are also entitled to a proportion of their wages. (9)

The legislature has also punished with the forfeiture of wages the offence of neglecting or refusing to assist the master in defending the ship against the attack of pirates. (10) It seems, also, that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during the voyage, will also deprive a seaman of his wages (11): but a single act (12), or even occasional acts of intemperance, will not have that effect. (13)

If the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may, by the custom of merchants, deduct the value thereof from the wages of the seamen by whose misconduct the injury has taken place. (14) And the last proviso introduced into the usual agreement (15), signed by the seamen, is calculated to enforce this rule in the case of embezzlement, either of the cargo, or of the ship's stores. The proviso is to be construed individually, as affecting only the particular persons guilty of the embezzlement, and not the whole crew. (16) Nor, as it seems, is any innocent person liable to contribute a portion of his wages to make good the loss occasioned by the misconduct of others. (17)

If the action for wages be not brought within six years after the cause Action must

ACTIONS AGAINST PART OWNERS.

Stat. 5 & 6
Will. 4. c. 19.
s. 45.

What is not a
desertion.

Ill treatment
by master.

Impressment.

WHEN AN AC-
TION FOR WAGES
CANNOT BE
MAINTAINED.

When vessel
earns no freight,
or is captured
or shipwrecked.

Habitual
drunkenness
of seamen.

Cargo injured
by the fraud or
negligence of
seamen.

(1) *Limland v. Stephens*, 3 Esp. N. P. C. 269.

(2) *Sigard v. Roberts*, *ibid.* 72. *Sherman v. Bennett*, M. & M. 489.

(3) *Wiggins v. Ingleton*, 2 Ld. Raym. 1211. *Clements v. Mayborn*, B. R. T. T. 24 Geo. 3. *Abbott on Shipping*, by Shee, 554.

(4) *Johnson v. Machielse*, 3 Camp. 44.

(5) *Anon.* 2 Show. 283. *Abbott on Shipping*, by Shee, 558.

(6) *Abernethy v. Landale*, Doug. 539.

(7) *Beale v. Thompson*, 4 East, 501.

(8) *Appleby v. Dods*, 8 *ibid.* 300. *recog.* in *Jesse v. Roy*, 1 C. M. & R. 316. *Beale v. Thompson*, 4 East, 546. 1 Dow, 299.

(9) *Abbott on Shipping*, by Shee, 564.

(10) Stat. 22 & 23 Car. 2. c. 11. s. 7.

(11) *Vide* the judgment pronounced by Sir W. Scott in the case of *Robinet v. the Ship Exeter*, 2 Rob. 61.

(12) *The Martha*, 2 Hagg. 158. *The Ealing Grove*, *ibid.* 15. *The Gondolier*, 3 *ibid.* 190.

(13) *Lady Campbell*, 2 *ibid.* 5.

(14) *Molloy*, b. ii. c. 3. s. 9. *Lane v. Cotton*, 1 Ld. Raym. 650.

(15) Stat. 5 & 6 Will. 4. c. 19. in Sched.

(16) *Thompson v. Collins*, 1 N. R. 347. *Prince Frederick*, 2 Hagg. 394.

(17) *Ibid.*

**ACTIONS
AGAINST PART
OWNERS.**

be brought
within six
years.

has accrued, no action can be maintained either at common law, or in the admiralty courts (1), unless the contract be under seal; and then a claim will not be found until after the lapse of twenty years.

EVIDENCE.

5. EVIDENCE.

THE REGISTER.

The register alone does not furnish even *prima facie* evidence to charge a person as owner of a ship in a suit between private individuals. Hence, in an action for stores supplied to a ship, if the defendant plead in abatement, that he is only liable jointly with others, it is not enough for him to produce the ship's registry containing the names of himself and those others as owners of the ship. (2)

Stat. 3 & 4
Will. 4. c. 55.
s. 40.

Copies of
declarations,
&c. and of ex-
tracts from
books of regis-
try, admitted in
evidence.

By stat. 3 & 4 Will. 4. c. 55. s. 40. the collector and controller of his majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any persons whomsoever, produce and exhibit for their inspection and examination any oath or declaration sworn or made by any such owner; and also any register or entry in any book or books of registry required by this act to be made or kept relative to any ship or vessel; and shall, upon every reasonable request by any persons whomsoever, permit them to take copies or extracts thereof respectively; and the copies of any such oath or declaration, register or entry, shall, upon being proved to be true, be allowed and received as evidence upon every trial at law without the production of the originals, and without the testimony or attendance of any collector or controller, or other person or persons acting for them respectively in all cases, as fully and to all intents and purposes as such originals, if produced by any collector or collectors, controller or controllers, or other person or persons acting for them, could or might legally be admitted or received in evidence.

Admission of
one part owner,
not binding on
the other.

But part owners, though jointly liable to the persons with whom they contract on account of the ship, yet in many respects stand in a very different situation from that of partners. Thus it has been ruled, that the admission of one part owner as to a subject of part ownership is not binding on the others. (3)

"In the case of a partnership, every man knows who his partner is; but when one part owner sells his share, the remaining part owners not being privy to the instrument by which the new part owners are created, may be entirely ignorant of the fact who the person is, who has become a part owner with them." (4)

Where charter-
party not evi-
dence.

J. M. as agent to the defendant for that purpose executed a charter-party, from the plaintiff to the defendant. Only one part was executed, and this was not stamped. The defendant having afterwards repudiated the contract, J. M. was sent by the captain of the chartered vessel to remonstrate with the defendant, and obtained from him a copy of the charter-party, in order to enable the captain to make a protest. This copy was

(1) *Stats.* 21 Jac. 1. c. 16. ss. 3. & 7., and
4 Anne, c. 16. ss. 17, 18, 19.

(2) *Flower v. Young*, 3 Camp. 240.

(3) *Jagers v. Binnings*, 1 Stark. 64.

(4) *Per* Bayley J. in *Wilson v. Dickson*, 2
B. & A. 12.

made about a month after the original, and it was all in the handwriting of J. M. The plaintiff brought *assumpsit* on the charter-party, and produced the copy, stamped, in evidence; and also called on the defendant to produce the original, which he did:—It was held, that neither the original, nor the copy, was admissible in evidence. (1)

EVIDENCE.

If it be necessary to produce the written agreement for seamen's wages under stat. 5 & 6 Will. 4. c. 19., the master or owners must produce, for the seaman is not bound to do so, and may recover his wages without its production, and without giving the captain or owner a notice to produce it.

Written agreement for seamen's wages.

It is not incumbent on seamen in an action for their wages to prove that the vessel has earned freight; that proof is cast upon the captain or owners. (2)

Vessel earning freight.

In an action on a charter-party, a person who is a partner with the plaintiffs in the ship, though not one of the registered owners, is not a competent witness for the plaintiff, unless cross-releases are executed between him and them. (3)

Incompetency of the partner of one of the registered owners.

On issues joined in an action on a charter-party, "that the defendant did furnish sufficient cargo," and "that plaintiff refused, after notice, to receive the cargo offered," the plaintiff is entitled to begin. (4)

Right to begin.

6. STAT. 3 & 4 WILL. 4. C. 55. (SHIP REGISTRY STATUTE).

It does not seem that it is absolutely requisite a ship should be registered, but the register is essential to acquire the privileges of a British ship.

STAT. 3 & 4 WILL. 4. C. 55. (SHIP REGISTRY STATUTE).

The policy of the British legislature is to confine the privileges of our trade to ships built within the queen's dominions. (5)

SECT. 5.

WHAT SHIPS ARE ENTITLED TO BE REGISTERED.

By stat. 3 & 4 Will. 4. c. 55. s. 5. no ship or vessel shall be registered, or having been registered shall be deemed to be duly registered by virtue of this act, except such as are wholly of the build of the said United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to his majesty at the time of the building of such vessels, or such vessels as shall have been condemned in any court of admiralty as prize, or in any competent court as forfeited for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong to his majesty's subjects duly entitled to be owners of ships or vessels registered by virtue of this act. (6)

SECT. 7.

FOREIGN REPAIRS NOT TO EXCEED 20s. PER TON.

The master on arrival to report such repairs.

By sect. 7. no vessel can enjoy the privileges of a British ship after the same shall have been repaired in a foreign country, if such repairs shall exceed the sum of 20s. for every ton of the burthen of such vessel, unless such repairs shall have been necessary by reason of extraordinary damage sustained by such vessel during her absence from his majesty's dominions, to enable her to perform the voyage in which she shall have been engaged, and to return to some place in the said dominions; and whenever any vessel which has been so repaired in a foreign country shall arrive at any port in his majesty's dominions, the person having the command of the same shall, upon the first entry thereof, report to the collector and controller of his majesty's customs at such port that such vessel has been so repaired, under penalty of 20s. for every ton of the

(1) *Nicholl v. Hickson*, 2 Jebb & Symes (Irish), 442.

(2) *Brown v. Milner*, 7 Taunt. 919.

(3) *Jackson v. Galloway*, 8 C. & P. 480.

(4) *Ridgway v. Ewbank*, 2 M. & Rob. 217.

(5) Respecting ships trading and built within the boundaries of the East India Company's charter, *vide* stat. 3 & 4 Vict. c. 56.

(6) Stat. 5 & 6 Will. 4. c. 56. applies to the tonnage of British vessels.

STAT. 3 & 4
WILL. 4. c. 55.
(SHIP REGIS-
TRY STATUTE).

SECT. 8.

SHIPS DE-
CLARED UNSEA-
WORTHY TO BE
DEEMED SHIPS
LOST OR BROKEN
UP.

SECT. 9.

BRITISH SHIPS
CAPTURED.

SECT. 12.

WHO MAY BE
REGISTERED
OWNERS.

SECT. 32.

MODE IN
WHICH THE
PROPERTY IN
SHIPS IS TO BE
DIVIDED.

Property in
ships to be
divided into
sixty-four parts
or shares.

SECT. 33.

Not to affect
the equitable
title of heirs,
&c.

Joint stock
companies.

Trustees may
apply to have
registry made.

SECTS. 10, 11,
& 30.

PLACE AT
WHICH SHIPS
MUST BE REGIS-
TERED.

burthen of such vessel; and if it be proved, that such vessel was seaworthy at the time when she last departed from any place in his majesty's dominions, and that no greater quantity of such repairs have been done to the said vessel than was necessary, the commissioners of customs can direct the collector or controller to certify on the certificate of the registry of such vessel that her privileges have not been forfeited.

By sect. 8. if any registered vessel shall be declared to be stranded or unseaworthy, and incapable of being recovered or repaired to the advantage of the owners thereof, and shall for such reasons be sold by decree of any competent court for the owners, the same shall be deemed to be a vessel lost or broken up to all intents and purposes, and shall not be entitled to the privileges of a British built ship for any purpose of trade or navigation.

By sect. 9. no British vessel captured by and become prize to an enemy or sold to foreigners shall again be entitled to the privileges of a British ship: provided, that nothing contained in this act shall extend to prevent the registering of any vessel whatever which shall afterwards be condemned in any court of admiralty as prize of war, or in any competent court, for breach of laws made for the prevention of the slave trade.

By sect. 12. no person who has taken the oath of allegiance to any foreign state, except under the terms of some capitulation, unless he shall after words become a denizen or naturalised subject of the United Kingdom, nor any person usually residing in any country not under the dominion of his majesty, unless he be a member of some British factory, or agent for or partner in any house or co-partnership actually carrying on trade in Great Britain or Ireland, can be the owners in whole or in part of any registered vessel.

By sect. 32. the property in every vessel of which there are more than one owner, shall be considered to be divided into sixty-four equal parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares; and that no person shall be entitled to be registered as an owner in respect of any proportion of such vessel, which shall not be an integral sixty-fourth part or share of the same; and upon the first registry, the owners who take and subscribe the declaration are to declare the number of shares then held by each owner, which are to be registered accordingly.

But if the property of any owners in any vessel cannot be reduced by division into any number of integral sixty-fourth parts or shares, the owners of such fractional parts as shall be over and above such number of integral sixty-fourth parts or shares into which such property can be reduced, may transfer the same one to another, or jointly to any new owner, by memorandum upon their bills of sale, or by fresh bill of sale, without being liable to any stamp duty; and the right of the owners of such fractional parts will not be affected by not having been registered.

But any number of owners described in the registry being partners, actually carrying on trade in any part of his majesty's dominions, can hold any vessel, or any shares of any vessel, in the name of such co-partnership, as joint owners thereof, without distinguishing the proportionate interest of each, and that such vessel, or the shares thereof, shall be taken to be partnership property, and be governed by the same rules, both in law and equity, as govern all other partnership property.

By sect. 33. no greater number than thirty-two persons will be entitled to be legal owners at the same time of any vessel as tenants in common, or to be registered as such: but nothing herein contained is to affect the equitable title of minors, heirs, legatees, creditors, or others exceeding that number, duly represented by or bolding from any of the persons within the said number, registered as legal owners of any shares of such vessel.

If it shall be proved to the satisfaction of the commissioners of his majesty's customs, that any number of persons have associated themselves as a joint stock company for the purpose of owning any vessel as the joint property of such company, and who have duly elected or appointed any number, not less than three of the members of the same to be trustees of the property in such vessel, such trustees, or any three of them, with the permission of such commissioners, can make and subscribe the declaration required by this act before registry be made, except that instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such vessel shall belong. (1)

By sects. 10, 11, & 30. ships are to be registered at the port to which they belong, but commissioners of customs can permit registry at other ports. But vessels must be deemed to belong to some port at or near which some or one of the owners who shall make and subscribe the declaration required before registry shall reside; and vessels taken and condemned as prize or forfeiture shall be registered either at Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven, by the collector and controller at such ports respectively.

(1) Vide *Curtis v. Perry*, 6 Ves. 739. *Bat- v. Leake*, 1 ibid. 39. *The Frances*, 2 Dodg. 423.
tersby v. Smith, 4 Madd. 110, vide *Thompson*

Sect. 2. No vessel can enjoy the privileges of a British ship until registered, and in which certificate must be stated the title of the foregoing statute; 2dly, the names, occupation, and residence of the subscribing owners; names, occupation, and residence of non-subscribing owners, ship's name, place to which the vessel belongs, number of tons, master's name, when and where built, or condemned as prize, referring to builder's certificate, judge's certificate, or certificate of last registry then delivered up to be cancelled, name and employment of surveying officer, number of decks and masts, her length from the fore part of the main stem to the after part of the stern post aloft, her breadth at the broadest part, stating whether that be above or below the main wales, height between decks if more than one deck, or depth in the hold if only one deck, how rigged, description of stern, carvel or clincher, whether any or no gallery, and kind of head, if any, that the subscribing owners have consented to the description, and caused sufficient security to be given, and that the vessel has been duly registered at the port of—. The collector and controller then affix their signatures, and on the back there is an account of shares held by each of the owners mentioned and described in the certificate, and which is also signed by the collector or controller.

Sect. 13 & 14. No registry can be made or certificate granted until the following declaration be made and subscribed before the persons authorised to make such registry and grant such certificate respectively by the owner of such vessel, if such vessel belongs to one person only; or in case there shall be two joint owners, then by both if both be resident within twenty miles of the port or place where such registry is required, or by one if one or both shall be resident at a greater distance from such port or place; or if the number of owners exceed two, then by the greater part, if the greater number of them shall be resident within twenty miles of such port or place as aforesaid, not in any case exceeding three of such owners or proprietors, unless a greater number shall be desirous to join in making and subscribing the declaration; or by one of such owners, if all, or all except one, shall be resident at a greater distance: the form of declaration then follows, and by whom to be made.

In case the required number of joint owners or proprietors of any vessel do not personally attend to make and subscribe the declaration, the owners who personally attend can subscribe the declaration, and declare that the part owners of such vessel then absent are not resident within twenty miles of such port or place, and have not, to the best of their knowledge or belief, wilfully absented themselves to avoid the making the declaration, or are prevented by illness from attending.

Sect. 20. At the time of the obtaining of the certificate of registry sufficient security by bond must be given to his majesty by the master and such of the owners as shall personally attend, such security to be approved of and taken by the persons authorised to make such registry and grant such certificate of registry at the port or place in which such certificate shall be granted, in penalties varying from 100*l.* to 1000*l.*, according to the tonnage, with a condition that such certificate shall not be sold, lent, or otherwise disposed of to any person, and shall be solely made use of for the service of the vessel for which it is granted; and that in case such vessel shall be lost, or taken by the enemy, burnt, or broken up, or otherwise prevented from returning to the port to which she belongs, or shall, on any account, have lost and forfeited the privileges of a British ship, or shall have been seized and legally condemned for illicit trading, or shall have been taken in execution for debt and sold by due process of law, or shall have been sold to the crown, or shall under any circumstances have been registered *de novo*, the certificate, if preserved, shall be delivered up, within one month after the arrival of the master in any port or place in his majesty's dominions, to the collector and controller of some port in Great Britain, or of the Isle of Man, or of the British plantations, or to the governor, lieutenant governor, or commander in chief for the time being of the islands of Guernsey or Jersey; and that if any foreigner, or any person or persons for the use and benefit of any foreigner, shall purchase or otherwise become entitled to the whole or to any part or share of or any interest in such ship or vessel, and the same shall be within the limits of any port of Great Britain, or of the islands of Guernsey, Jersey, or Man, or of the British colonies, plantations, islands, or territories aforesaid, then and in such case the certificate of registry shall, within seven days after such purchase or transfer of property in such vessel, be delivered up to the persons authorised to make registry and grant certificate of registry at such port or place respectively as aforesaid; and if such vessel shall be in any foreign port when such purchase or transfer of property shall take place, then that the certificate shall be delivered up to the British consul or other chief British officer resident at or nearest to such foreign port; or if such vessel shall be at sea when such purchase or transfer of property shall take place, then that the certificate shall be delivered up to the British consul or other chief British officer at the foreign port or place in or at which the master or other person having or taking the charge or command of such vessel shall first arrive after such purchase or transfer of property at sea immediately after his arrival at such foreign port; but if such master or other person who had the command thereof at the time of such purchase or transfer of property at sea shall not arrive at a foreign port, but shall arrive at some port of Great Britain, or of the islands of Guernsey, Jersey, or Man, or of his majesty's said colonies, plantations, islands, or territories, then that the certificate shall be delivered up, in manner

STAT. 3 & 4
WILL. 4. c. 55.
(SHIP REGIS-
TRY STATUTE).

SECT. 2.
REQUISITES OF
CERTIFICATE
OF REGISTRY.

SECT. 13 & 14.
WHAT IS RE-
QUIRED ON THE
PART OF THE
OWNERS TO
OBTAIN REGIS-
TRY.

Declaration to
be made by
subscribing
owners pre-
vious to regis-
try.

SECT. 20.
Addition to
declaration in
case the re-
quired number
of owners do
not attend.

Bond to be
given at the
time of regis-
try, with con-
ditions, that the
certificate shall
be solely made
use of for the
service of the
vessel, or given
up to be can-
celled in certain
cases.

STAT. 3 & 4.
WILL. 4. C. 55.
(SHIP REGIS-
TRY STATUTE).

If ship at the time of registry be at any other port than that of registry, the master may there give bond.

SECT. 25.

Builder's certificate of particulars of ship.

Declaration to be made there-to.

SECT. 31.

THE TRANS-
FER.

SECT. 34.

Bill of sale not void by unimportant error of recital, &c.

Bills of sale not effectual until produced to officers of customs, and entered in the book of registry or of intended registry.

Form of in-
dorsement.

Notice to com-
missioners.

SECT. 35.

Entry of bill of sale to be valid, except in certain cases.

SECT. 36.

When a bill of sale has been entered for any

aforesaid, within fourteen days after the arrival of such ship or vessel, or of the person who had the command thereof, in any port of Great Britain, or of the islands of Guernsey, Jersey, or Man, or of any of his majesty's said colonies, plantations, islands, or territories: provided, that if it shall happen that at the time of registry of any ship or vessel the same shall be at any other port than the port to which she belongs, so that the master of such vessel cannot attend at the port of registry to join with the owners in such bond, it shall be lawful for him to give a separate bond to the like effect at the port where such vessel may then be, and the collector and controller of such other port shall transmit such bond to the collector and controller of the port where such vessel is to be registered, and such bond, and the bond also given by the owner or owners, shall together be of the same effect against the master and owner or owners, or either of them, as if they had bound themselves jointly and severally in one bond.

Sect. 25. Every person who shall apply for a certificate of the registry of any ship or vessel is required to produce to the persons authorised to grant such certificate a true and full account, under the hand of the builder of such vessel, of the proper denomination, and of the time when and the place where such vessel was built, and also an exact account of the tonnage of such vessel, together with the name of the first purchaser or purchasers thereof (which account such builder is hereby directed and required to give under his hand on the same being demanded by such person or persons so applying for a certificate as aforesaid), and shall also make and subscribe a declaration before the person or persons authorised to grant such certificate, that the vessel for which such certificate is required is the same with that which is so described by the builder as aforesaid.

Sect. 31. When and so often as the property in any vessel, or any part thereof, belonging to any of his majesty's subjects, shall, after the registry thereof, be sold to any other of his majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing containing a recital of the certificate of registry of such vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity: provided, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby.

Sect. 34. No bill of sale or other instrument in writing shall be valid to pass property in any vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and controller of the port at which such ship or vessel is registered, or to the collector and controller of any other port at which she is about to be registered *de novo*, as the case may be, nor until such collector and controller respectively shall have entered in the book of registry, or in the book of intended registry of such vessel, as the case may be (and which they are respectively hereby required to do upon the production of the bill of sale or other instrument for that purpose), the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and further, if such vessel is not about to be registered *de novo*, the collector and controller of the port where such ship is registered shall and they are hereby required to indorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said vessel, when the same shall be produced to them for that purpose in manner and to the effect following; *videlicet*,

" Custom House [port and date; name, residence, and description of vendor or mortgagor]
" has transferred by [bill of sale or other instrument] dated [date, number of shares] to
" [name, residence, and description of purchaser, or mortgagee].

" A. B. Collector.

" C. D. Controller."

and forthwith to give notice thereof to the commissioners of customs; and in case the collector and controller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the collector and controller are hereby required to certify, by indorsement upon the bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry.

Sect. 35. When the particulars of any bill of sale or other instrument by which any vessel, or any share thereof, shall be transferred, shall have been so entered in the book of registry, the bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred as against all and every person whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel in manner herein-after mentioned.

Sect. 36. When and after the particulars of any bill of sale or other instrument by which any vessel, or any share thereof, shall be transferred, shall have been so entered in the book of registry, the collector and controller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or

mortgagor of the same vessel, or share thereof, to any other person, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry; or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the vessel arrived at the port to which the same belonged; and in case the particulars of two or more such bills of sale or other instruments as aforesaid shall at any time have been entered in the book of registry of the said vessel, the collector and controller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bill of sale or other instrument were entered in the books of registry, or from the day on which the vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner of the same property in any vessel entered in the book of registry, the collector and controller are hereby required to indorse upon the certificate of registry of such vessel the particulars of that bill of sale or other instrument under which the person claims property, who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and controller, and they are hereby required, to indorse upon the certificate of registry the particulars of the bill of sale or other instrument to such person as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act, that the several purchasers and mortgagees of such vessel, or share thereof, when more than one appear to claim the same property, or to claim security on the same property, in the same rank and degree, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry, but according to the time when the indorsement is made upon the certificate of registry: provided, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of his majesty's customs, the commissioners may grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said vessel under the provisions of this act, and thereupon the collector and controller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same vessel, or the share thereof.

Sect. 37. If the certificate of registry of such vessel shall be produced to the collector and controller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and controller of such port as before directed, the collector and controller of such other port may indorse on such certificate of registry (being required so to do) the transfer mentioned in such bill of sale, and such collector and controller shall give notice thereof to the collector and controller of the port to which such vessel belongs, who shall record the same in like manner, as if they had made such indorsement themselves, but inserting the name of the port at which such indorsement was made: provided, that the collector and controller of such other port shall first give notice to the collector and controller of the port to which such vessel belongs of such requisition made to them to indorse the certificate of registry, and the collector and controller of the port to which such vessel belongs shall thereupon send information to the collector and controller of such other port, whether any and what other bill or bills of sale have been recorded in the book of the registry of such vessel; and the collector and controller of such other port, having such information, shall proceed in manner directed by this act in all respects to the indorsing of the certificate of registry as they would do if such port were the port to which such vessel belonged.

Sect. 41. If the vessel, or the share of any owner thereof, who may be out of the kingdom, shall be sold in his absence by his known agent or correspondent, under his directions either expressed or implied, and acting for his interest, and such agent who shall have executed a bill of sale to the purchaser of the whole of such vessel, or of any share thereof, shall not have received a legal power to execute the same, the commissioners of his majesty's customs may, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as if such legal power had been produced; and if any bill of sale cannot be produced, or if by time, absence, or death of parties concerned, it cannot be proved that a bill of sale for any share or shares in any ship or vessel had been executed, and registry *de novo* of such ship or vessel shall have become necessary, the commissioners may, upon proof to their satisfaction of the fair dealings of the parties, permit such ship or vessel to be registered *de novo* in like manner as if a bill of sale for the transfer of such share

STAT. 3 & 4.
WILL. 4. c. 55.
(SHIP REGISTRY STATUTE).

shares, thirty days shall be allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered.

Provision in case certificate be mislaid.

SECT. 37.
Bills of sale may be produced after entry at other ports than those to which vessels belong, and transfers indorsed on certificate of registry.

SECT. 41.
Vessels or shares sold in the absence of owners without formal powers.

STAT. 3 & 4
WILL. 4, c. 55.
(SHIP REGIS-
TRY STATUTE).

SECT. 42.

Transfer by
way of mort-
gage.

Mortgagee not
to be deemed
an owner.

or shares had been produced: provided that good and sufficient security be given to produce a legal power or bill of sale within a reasonable time, or to abide the future claims of the absent owner; and such bond shall be available for the protection of his interest, in addition to any powers or rights which he may have in law or equity against the vessel, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained by him.

Sect. 42. When any transfer of any vessel, or of any share thereof, shall be made, either by way of mortgage, or of assignment to a trustee for the purpose of selling the same for the payment of any debt, the collector and controller of the port where the vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate, state that such transfer was made only as a security for the payment of debts, or by way of mortgage, or to that effect (1); and the person to whom such transfer shall be made, or any other person claiming under him as a mortgagee, or a trustee only, shall not by reason thereof be deemed to be the owner of such vessel, or share thereof, nor shall the person making such transfer be deemed by reason thereof to have ceased to be an owner of such vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the vessel or share so transferred available by sale or otherwise for the payment of the debt.

SECT. 43.

Transfers of
ships for se-
curity of debts
being regis-
tered, rights of
mortgagee not
affected by any
act of bank-
ruptcy of mort-
gagor, &c.

Sect. 43. When any transfer of any vessel, or of any share thereof, shall have been made as a security for the payment of any debt, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered, the interest of the mortgagee or other assignee shall not be affected by any act of bankruptcy committed by such mortgagor or assignor after the time when such mortgage or assignment shall have been so registered, notwithstanding such mortgagor or assignor at the time he shall so become bankrupt shall have in his possession, order, and disposition, and shall be the reputed owner of the vessel, or share thereof, but that such mortgage or assignment shall be preferred to any right, claim, or interest which may belong to the assignee of such bankrupt.

SECT. 11.

WHEN AND
HOW REGISTRY
DE NOVO IS TO
BE MADE.

Port to which
vessels shall be
deemed to be-
long.

Change of sub-
scribing owners
to require
registry *de novo*.

If registry *de novo* cannot be made, ship may go one voyage with permission indorsed on certificate of registry.

Sect. 11. Every vessel shall be deemed to belong to some port at or near to which some or one of the owners, who shall make and subscribe the declaration required by this act before registry be made, shall reside; and whenever such owner shall have transferred his share in such vessel, the same shall have been registered *de novo* before such vessel shall depart from the port to which she shall then belong, or from any other port which shall be in the same part of the United Kingdom, or the same colony, plantation, island, or territory as the said port shall be in: provided, that if the owner cannot in sufficient time comply with the requisites of this act, so that registry may be made before it shall be necessary for such vessel to depart upon another voyage, the collector and controller of the port where such vessel may then be, may certify upon the back of the existing certificate of registry, that the same is to remain in force for the voyage upon which the vessel is then about to depart: provided, that if any vessel shall be built in any of the colonies, plantations, islands, or territories in Asia, Africa, or America, to his majesty belonging, for owners residing in the United Kingdom, and the master of such vessel, or the agent for the owner thereof, shall have produced to the collector and controller of the port at or near to which such ship or vessel was built, the certificate of the builder required by this act, and shall have made and subscribed a declaration before such collector and controller of the names and descriptions of the principal owners of such vessel, and that she is the identical vessel mentioned in such certificate of the builder, and that no foreigner, to the best of his knowledge and belief, has any interest therein, the collector and controller of such port shall cause such vessel to be surveyed and measured in like manner as is directed for the purpose of registering any vessel, and shall give the master of such vessel a certificate under their hands and seals, purporting to be under the authority of this act, and stating when and where and by whom such ship or vessel was built, the description, tonnage, and other particulars required on registry of any vessel, and such certificate shall have all the force and virtue of a certificate of registry under this act during the term of two years, unless such ship shall sooner arrive at some place in the United Kingdom; and such collector and controller shall transmit a copy of such certificate to the commissioners of his majesty's customs.

SECT. 26.

Certificate of
registry lost or
misaid, com-
missioners may
permit regis-
try *de novo*.

Sect. 26. If the certificate of registry of any vessel shall be lost or misaid, so that the same cannot be found or obtained for the use of such vessel when needful, and proof thereof shall be made to the satisfaction of the commissioners of his majesty's customs, such commissioners shall and may permit such vessel to be registered *de novo*, and a certificate thereof to be granted: provided, that if such vessel be absent and far distant from the port to which she belongs, or by reason of the absence of the owner or of any other impediment, registry of the same cannot then be made in sufficient time, such commissioners shall and may grant a license for the present use of such vessel, which license shall, for the time and to the extent specified therein and no longer, be of the same force and virtue as a certificate

(1) The mortgagor does not cease to be owner, and the mortgagee has a distinct interest to the extent, *prima facie*, of the value

mortgaged. *Irving v. Richardson*, 2 B. & Ad. 193.

of registry granted under this act: provided, that before such registry *de novo* be made, the owner and master shall give bond to the commissioners in such sum as to them shall seem fit, with a condition that if the certificate of registry shall at any time afterwards be found, the same shall forthwith be delivered to the proper officers of his majesty's customs to be cancelled, and that no illegal use has been or shall be made thereof with his or their privity or knowledge; and further, that before any such license shall be granted, the master of such vessel shall also make and subscribe a declaration that the same has been registered as a British ship, naming the port where and the time when such registry was made, and all the particulars contained in the certificate thereof, to the best of his knowledge and belief, and shall also give such bond, and with the same condition as is before mentioned: provided, that before any such license shall be granted, such vessel shall be surveyed in like manner as if a registry *de novo* were about to be made thereof; and the certificate of such survey shall be preserved by the collector and controller of the port to which such vessel shall belong; and in virtue thereof the commissioners are required to permit such vessel to be registered after her departure, whenever the owner shall personally attend to take and subscribe the declaration required by this act before registry be made, and shall also comply with all other requisites of this act, except so far as relates to the bond to be given by the master of such vessel; which certificate of registry the said commissioners shall and may transmit to the collector and controller of any other port, to be by them given to the master of such vessel upon his giving such bond, and delivering up the license which had been granted for the then present use of such vessel.

Sect. 28. If any vessel, after she shall have been registered, shall be altered so as not to correspond with all the particulars contained in the certificate of her registry, in such case such vessel shall be registered *de novo* as soon as she returns to the port to which she belongs, or to any other port which shall be in the same part of the United Kingdom, island, or territory, as the said port shall be in, on failure whereof such vessel shall to all intents and purposes be considered and deemed and taken to be a vessel not duly registered.

Sect. 38. If it become necessary to register any vessel *de novo*, and any share of such vessel shall have been sold since she was last registered, and the transfer of such share shall not have been recorded and indorsed in manner herein-before directed, the bill of sale thereof shall be produced to the collector and controller of his majesty's customs, who are to make registry of such vessel, otherwise such sale shall not be noticed in such registry *de novo* except as herein-after excepted: provided, that upon the future production of such bill of sale and of the existing certificate of registry, such transfer shall and may be recorded and indorsed as well after such registry *de novo* as before.

Sect. 39. If upon any change of property in any vessel, the owner shall desire to have the same registered *de novo*, although not required by this act, and the owner or proper number of owners shall attend at the custom-house at the port to which such ship or vessel belongs for that purpose, it shall be lawful for the collector and controller of his majesty's customs at such port to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof, the several requisites herein-before in this act mentioned and directed being first duly observed and complied with.

Sect. 21. When the master or other person having or taking the charge or command of any vessel registered shall be changed, the master or owner of such vessel shall deliver to the person authorised to make such registry, and grant such certificates of registry at the port where such change shall take place, the certificate of registry belonging to such vessel, who shall thereupon indorse and subscribe a memorandum of such change, and shall forthwith give notice of the same to the proper officer of the port or place where such vessel was last registered, who shall likewise make a memorandum of the same in the book of registers, and shall forthwith give notice thereof to the commissioners of customs: provided, that before the name of such new master shall be indorsed on the certificate of registry, he shall give a bond in the like penalties and under the same conditions as are contained in the bond herein-before required to be given at the time of registry.

STAT. 3 & 4
WILL. 4. C. 55.
(SHIP REGIS-
TRY STATUTE).

Declaration to be made before license be granted.

SECT. 28.
Ship altered in certain manner to be registered *de novo*.

SECT. 38.

SECT. 39.
Upon change of property registry *de novo* may be granted if desired, although not required by law.

SECT. 21.
WHAT IS REQUIRED UPON THE CHANGE OF A MASTER.

SLANDER.

1. GENERALLY, pp. 2551—2553.

Defined—When words are actionable—Malice requisite to ground an action for words — Rules as laid down by Chief Justice De Grey, by which the courts determine whether words spoken of another be actionable — Malice in fact and malice in law — CONSTRUCTION OF SLANDEROUS WORDS — The court will construe slanderous words by the ordinary rules — Words should be construed in reference to the subject-matter — Judgment of Lord Deunman in Read v. Ambridge — Words not imputing crime — Words conveying a charge either of felony or fraud.

2. WORDS ACTIONABLE FROM THEIR BRINGING THE PERSON OF WHOM THEY ARE SPOKEN INTO DANGER OF LEGAL PUNISHMENT, pp. 2554, 2555.

3. WORDS SPOKEN IN DEROGATION OF A PERSON IN ANY OFFICE OF DIGNITY, TRUST, OR PROFIT, pp. 2555—2557.

4. WORDS WHICH OPERATE TO EXCLUDE A PERSON FROM SOCIETY, pp. 2557, 2558.

5. WORDS WHICH INJURE ANOTHER IN HIS PROFESSION, TRADE, OR SERVITUDE, pp. 2558—2560.

6. SLANDER OF TITLE, pp. 2560, 2561.

7. WORDS NOT IN THEMSELVES ACTIONABLE, BUT WHICH BECOME SO, BY REASON OF SPECIAL DAMAGE, pp. 2561—2563.

8. REPUBLICATION OF ANOTHER'S SLANDER, pp. 2563, 2564.

Judgments of Mr. Baron Alderson in Bennett v. Bennett, and of Lord Kenyon in Davis v. Lewis.

9. PRIVILEGED COMMUNICATIONS, pp. 2564—2566.

Confidential communications — Words spoken from a motive of friendship or caution — Repetition of confidential communications to a third party — Unsolicited communications — Language used in a court of justice — Charging another upon reasonable grounds with theft — Information to an inquest — Communications rather to compromise a felony, than to promote inquiry.

10. DECLARATION AND PLEADINGS, pp. 2566—2572.

FORM OF ACTION — VENUE — PARTIES — Partners — Husband and wife — INDUCEMENT — STATEMENT OF THE SLANDEROUS WORDS — INNUENDOS — Generally — After verdict malice will be presumed — If a good innuendo be not supported by evidence, resort cannot be had to another meaning — Where innuendo not borne out by the other parts of the count — Innuendo not warranted by the words of the colloquium — Where innuendo may be rejected as surplusage — When innuendo cannot without aid enlarge the sense of the words — Where it does not appear whether the words were spoken of legal or illegal transactions — When it does not appear, that words were spoken of plaintiff in the way of his trade — Innuendo enlarging the natural meaning of the words used — When innuendo bad as introducing new facts — Statement of damages — AMENDMENT OF DECLARATION — PLEADINGS — General issue — Pleas in bar — Replication.

11. EVIDENCE, pp. 2572—2580.

Words used must be proved — Proofs by plaintiff under the plea of "not guilty" — When material part of the words declared upon is proved, the verdict must be for the plaintiff — Distinctions between the law of evidence and the law of slander — Judgment of Chief Justice Bushe in Black v. Holmes — When the jury ought to be directed either to find or negative malice in law, or malice in fact — Where the judge not bound to tell the jury upon a certain state of facts, that they should find for the plaintiff — Jury can consider the whole of the conversation to ascertain whether particular words are qualified — WHAT IS A VARIANCE — Not sufficient to prove equivalent words of slander — Words spoken in the second person will not support words in the third person — Proof exceeding statement no variance — Words laid concerning a thing present, proof of a thing not present — Words expressing opinion — Allegation of an assertion of fact not supported by proof of the speaker's belief — Allegation of words spoken affirmatively not maintained by proof of interrogatories — Allegation of felony not established by proof of a tortious conversion — WHAT IS NOT A VARIANCE — Allegation only partially proven — MALICE OF THE DEFENDANT — Words spoken at different times — Writ of inquiry issued in a former suit for slander — Indictment preferred by defendant against plaintiff — Evidence of words spoken to third parties — Physician must shew he is authorised to practise — Medical books — General evidence of good and bad character — Public reports — SPECIAL DAMAGE — Evidence of special damage cannot be given unless expressly alleged — The plaintiff can only give the evidence of persons who heard the slander from the defendant — In an action by B. against C. for slander uttered by C. to A., A. is a competent witness — MITIGATION OF DAMAGES — When truth of defamatory matter can and cannot be given in evidence under the plea of not guilty — Words given in evidence by plaintiff, but not mentioned in the declaration — Waiver of action.

12. LIMITATION OF ACTION — RULE TO INSPECT AN ALLEGED SLANDEROUS LETTER — NEW TRIAL — AMENDMENT OF RECORD UNDER STAT. 3 & 4 WILL. 4. c. 42. s. 24. — DAMAGES — PAYMENT OF MONEY INTO COURT — COSTS, pp. 2580—2582.

1. GENERALLY.

GENERALLY.

Slander is the defaming a man in his reputation by speaking, or the rendering him an object of ridicule, from whence any injury in character, or property, or feeling arises, or may arise, to him. (1)

Defined.

An action for slander may be maintained for such words as are in themselves actionable, or such as become so by reason of some special damage arising from them. (2) And words imputing a crime are actionable, though they describe it in vulgar language, and not in technical terms. (3)

When words are actionable.

Malice is necessary to ground an action for words; and if it be proved that they were spoken *bona fide*, and without malice, no action can be supported for the speaking of them, though they be false and actionable in themselves, and that consequential injury has resulted to the party therefrom. (4)

Malice requisite to ground an action for words.

In *Onslow v. Horne (Clerk)* (5) Chief Justice De Grey said, "As far as I can collect from determinations in actions for words, there seems to be two general rules, whereby courts of justice have governed themselves, in order to determine words spoken of another to be actionable.

Rules as laid down by Chief Justice De Grey, by which the courts determine, whether words spoken of another be actionable.

"The first rule is, that the words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous

(1), *Vide ante*, 2221—2224. tit. LIBEL.(4) *Bromage v. Prosser*, 4 B. & C. 247. 1(2) *Holt v. Scholefield*, 6 T. R. 691.C. & P. 475. *Penfold v. Westcote*, 2 N. R.(3) *Colman v. Godwin*, 3 Doug. 90. 2 335.

B. & C. 285. n.

(5) 3 Wils. 186.

GENERALLY.

crime or misdemeanour; and the charge upon the person spoken of, must be precise."

"The second general rule is, that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage."

In *Lumby v. Allday* (1) Mr. Baron Bayley seems to have qualified the above rules, when he observed, "Every authority which I have been enabled to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

Malice in fact, and malice in law.

The law recognises in actions of slander two descriptions of malice, viz. malice in fact, and malice in law.

Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.

In an ordinary action for words, it is sufficient to charge, that the defendant spoke them falsely; it is not necessary to state, that they were spoken maliciously. (2)

But in actions for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff. (3)

CONSTRUCTION OF SLANDEROUS WORDS.

The court will construe slanderous words by the ordinary rules.

Slanderous words are construed by their ordinary meaning and common acceptation. (4)

And where slanderous words are capable of two senses or meanings, the one least defamatory will be preferred. (5)

In *Woolnoth v. Meadows* (6) Mr. Justice Le Blanc said, "It is not sufficient to shew by argument, that the words will admit of some other meaning; but the court must understand them as all mankind would understand them; and we cannot understand them differently in court from what they would do out of court."

Words should be construed in reference to the subject-matter.

When words are spoken which bear an imputation of slander, or with an intention to defame, the court will not strain to find an innocent meaning for them (7); so on the other hand they will not put a forced construction of guilt on words which may bear an innocent meaning (8): in fact, the words will be taken with reference to the subject-matter in allusion to which they were spoken, because words actionable *prima facie* in themselves may, by reference to that of which they were spoken, not be actionable. (9) Words may import a charge of felony, yet if it appear, that the fact charged could not have happened, an action cannot be maintained (10): thus, in *Jackson v. Adams* (11) the plaintiff brought an action for slander, and the words spoken were, "who stole the parish bell ropes?" Innuendo, that the

(1) 1 C. & J. 301. 1 Tyrw. 217.

(2) *Anon.* Styles, 392. *Mercer v. Sparks*, Owen, 51. Noy, 35.

(3) *Edmondson v. Stevenson*, Bull. N. P.

7. (a.) *Weatherston v. Hawkins*, 1 T. R. 110. 4.

(4) *Carlake v. Mapledoram*, 2 T. R. 473.

Roberts v. Campden, 9 East, 93.

(5) *Holt v. Scholefield*, 6 T. R. 691.

(6) 5 East, 473.

(7) *Ward v. Reynolds*, Gilb. 243.

(8) *Box v. Barnaby*, Hob. 117.

(9) *Cristie v. Cowell*, Peake's N. P. C.

(10) *Snagg v. Gee*, 4 Co. 16. (a.)

(11) 2 Bing. N. C. 402. 2 Scott, 599.

plaintiff, whilst churchwarden, had stolen the parish bell ropes:—It was held, that the churchwarden had the possession of the bell ropes belonging to the church, and that he could not be guilty of stealing them; and therefore, no action would lie for the words spoken, as they did not impute an indictable offence. (1)

GENERALLY.

Lord Hobart says, the slander and damage consist in the apprehension of the hearers; and in Gilbert's cases on law and equity (2), the rule laid down is, that the words shall be taken in the sense in which the hearers understood them. (3)

In *Read v. Ambridge* (4) the declaration stated that the defendant, in conversation with one Collins, said to him of the plaintiff, "Do you know that you are extremely wrong for putting that damned thief's name, Bill Read, into your window; he is the most blasted thief in the world, and ought to have been hung with his aunt years ago. You may tell him from me, that he is a bloody thief, and I can prove it; and he ought to be hung. He robbed Mrs. Read, and I can prove it; and he ought to be hung." Lord Denman, after having stated to the jury, that the first question for their consideration was, whether they thought the words shewed an intention to impute felony, observed, "It is said that the words evidently meant, that the plaintiff had robbed Mrs. Read by injuring her in trade. But if the defendant meant to convey that meaning, it seems to me he should have used very different words. It is not enough that he had some reservation in his own mind. The question is, what he meant to make other people believe? whether he meant to have it understood by others, that the plaintiff had committed felony? It is said, that the defendant did not mean to charge any specific act of theft, nor is it necessary that it should. A man may call another 'thief,' without meaning to state any specific charge, for which he might be indicted and tried. It is said also, that the defendant could not intend to charge the plaintiff with stealing, because he said that he ought to be hanged with his aunt, who was not hanged for theft but for murder. I am of opinion, that persons are not bound to draw such nice distinctions. Persons are not bound to carry the Newgate calendar in their heads, and to know what particular crimes particular individuals were guilty of:"—the jury found a nominal verdict for the plaintiff.

The question in an action for words, is not what the party using them considered their meaning, by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them.

Judgment of Lord Denman in *Read v. Ambridge*.

If one call another "thief," together with many other names of general abuse not imputing crime, and that on no other evidence being given to explain the sense in which the word thief was used, the jury find for the plaintiff, the court of Common Pleas will not set the verdict aside, for the action may be maintained for the word thief. (5)

Words not imputing crime.

In an action for words which may be understood to convey a charge either of felony or fraud, although they would be actionable in the latter sense as well as the former, if the declaration contain an innuendo, that the defendant thereby meant to impute felony to the plaintiff, this is material and must be supported by evidence. (6)

Words conveying a charge either of felony or fraud.

(1) The words so laid in the declaration were held not to be proved by evidence of a conversation in which the defendant charged the plaintiff with fraudulently selling the ropes for a smaller sum than he had given for them. *Jackson v. Adams*, 2 Bing. N. C. 402.

(2) p. 117.

(3) *Vide* 1 Vin. Abr. Actions for Words, 507. [A. b.]. *Fleetwood v. Curley*, Hob. 268.

(4) 6 C. & P. 308.

(5) *Penfold v. Westcote*, 2 N. R. 335.

(6) *Smith v. Carey*, 3 Camp. 461.

2. WORDS ACTIONABLE FROM THEIR BRINGING THE PERSON OF WHOM THEY ARE SPOKEN INTO DANGER OF LEGAL PUNISHMENT.

WORDS ACTIONABLE FROM THEIR BRINGING THE PERSON OF WHOM THEY ARE SPOKEN INTO DANGER OF LEGAL PUNISHMENT. Words must charge a fact to have been committed.

An action lies if a man maliciously and untruly charge another with any heinous act, the commission of which would subject the offender to legal punishment—as treason, perjury, larceny, forgery, or other infamous crime or misdemeanour.

Words such as those which are now under consideration must charge a fact to have been committed, for to charge a man with bad or evil intentions is not sufficient (1), because the words must import some degree of guilt.

The words “you are guilty” (innuendo of the murder of D. D.) were held, after the verdict, a sufficient charge of murder, though the *colloquium* were only of the death. (2) The words “I am thoroughly convinced that you are guilty (innuendo of the death of D. D.), and rather than you should go without a hangman, I will hang you,”—were also held actionable. (3)

The words, “I think the present business ought to have the most rigid inquiry, for he, the plaintiff, murdered his first wife; that is, he administered improper medicines to her for a certain complaint, which was the cause of her death,” are actionable, and, if doubtful, the doubt is cured by the verdict. (4)

It is not necessary to make words actionable, that they endanger the person's life, or charge him with felony; for to charge him with any lesser crime, for which he is liable to prosecution, is actionable: thus, the words “you are a rogue, and I will prove you a rogue, for you forged my name” (5); “he was put in the roundhouse for stealing ducks at Crowland” (6); “he robbed J. W.” (7); “you have done an act, for which I can transport you” (8); and “he is a thief, and robbed me of my bricks” (9), are respectively actionable; but evidence is admissible on the part of the defendant, to shew the sense in which the words were used.

The defendant saying of the plaintiff, that “he was under a charge of a prosecution for perjury, and that G. W. (an attorney of that name) had the attorney general's directions to prosecute the plaintiff for perjury” is actionable; for after verdict (by which the jury who are to judge of the intent of the speaker must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had not committed) the words, not having been justified, must be taken to be false; and being unqualified by any context, and unexplained by any occasion to warrant them, the law infers malice from the falsehood of an accusation which, in the common acceptance of the words, imputes perjury to the plaintiff. (10)

(1) 2 Esp. N. P. 1. *Eaton v. Allen*, 4 Co. 16. (b.) *Bland's case*, Hutt. 18.

(2) *Peake v. Oldham* (in error), Cowp. 275. 2 W. Black. 960.

(3) *Ibid.*

(4) *Ford v. Primrose*, 5 D. & R. 287.

(5) *Jones v. Herne*, 2 Wils. 87.

(6) *Beavor v. Hider*, *ibid.* 300.

(7) *Tomlinson v. Brittlebank*, 4 B. & Ad. 630. 1 N. & M. 455.

(8) *Curtis v. Curtis*, 4 M. & Sc. 337. 10 Bing. 477.

(9) *Slowman v. Dutton*, 10 Bing. 402. 4 M. & Sc. 174.

(10) *Roberts v. Camden*, 9 East. 93. To print of any person that he is a “swindler,” is a libel, and actionable. *J. Anson v. Smart*, 1 T. R. 748.

A letter written to a third person, calling plaintiff “a villain,” held actionable without

If words which, by themselves, expressly charge a felony, be accompanied by an express allusion to a transaction which merely amounts to a breach of trust (1); or, if the transaction be a mere breach of contract (2), no action will lie; and it seems, that words imputing evil inclinations to a man which were never brought into action, are also not actionable. (3)

Adjective words are actionable or not, according as they presume an act committed or not. (4) The words, "his oath ought not to be taken, for he has been a foresworn man, and I can bring people to prove it; and that they who know him will not sit in the jury-box with him" (5); "you are a swindler" (6); "he has defrauded a mealman of a roan horse" (7); "I will take him to Bow Street on a charge of forgery" (8); "you are a regular prover under bankruptcies" (9);—are not *per se* actionable.

WORDS ACTION-
ABLE, &c.

WORDS NOT
IMPUTING AN
INDICTABLE
OFFENCE.

Adjective
words.

3. WORDS SPOKEN IN DEROGATION OF A PERSON IN ANY OFFICE OF DIGNITY, TRUST, OR PROFIT.

Words may be actionable with regard to peers, public officers, and magistrates, which would not be so in the case of private or ordinary individuals.

Respecting *scandalum magnatum*, it is enacted by stat. 3 Edw. 1. c. 34. (Westm. 1.) that if any one slander a peer or other great person, he shall be punished by imprisonment; and by stat. 2 Rich. 2. c. 5. the person injured may in a *qui tam* action recover damages for the offence. (10)

Stating of the Marquis of Dorchester, "my lord is no more to be valued than the dog that lies there," was held to be actionable (11); and in *Townsend (Lord) v. Hughes* (12), where the defendant said of the plaintiff, "he is an unworthy person, and does things against law and reason," it was held, that an action might be supported.

Although words importing merely bad inclinations are not actionable when private individuals are concerned, it is otherwise in the case of public officers or magistrates.

Thus, saying of a justice of the peace and deputy lieutenant, "he is a Jacobite, and for bringing in the prince of Wales and popery to the destroying of our nation" (13), were held to be actionable, although they only charged inclinations and principles. So, where the words were spoken of the plaintiff who was a justice of the peace, "You are a rascal, a villain, and a liar," they were held to be actionable when applied to a person in an office of trust or dignity. (14)

And where the words were spoken of Stucley, who was a justice of the

WORDS SPOKEN
IN DEROGATION
OF A PERSON
IN ANY OFFICE
OF DIGNITY,
TRUST, OR
PROFIT.

*Scandalum
magnatum.*

Magistrates.

proof of special damage. *Ball v. Stone*, 1 B. & P. 331.

(1) *Thompson v. Bernard*, 1 Camp. 48.

(2) *Cristie v. Cowell*, Peake's N. P. C. 4.

(3) *Harrison v. Stratton*, 4 Esp. N. P. C. 218.

(4) *Brittridge's case*, 4 Co. 18. (b.)

(5) *Hall v. Weeden*, 8 D. & R. 140. *Holt v. Scholefield*, 6 T. R. 691.

(6) *Savile v. Jardine*, 2 Hen. Black. 531.

(7) *Richardson v. Allen* (*in error*), 2 Chitt. 657.

(8) *Harrison v. King*, 4 Price, 46. 7 Taunt. 431. 1 B. & A. 161.

(9) *Alexander v. Angle*, 4 M. & P. 870.

S. C. nom. *Angle v. Alexander*, 7 Bing. 119.

(10) *Vide etiam* stat. 12 Rich. 2. c. 11.

(11) *Probee v. Dorchester (Marquis of)*, 1 Sid. 239.

(12) 1 Mod. 232. 2 *ibid.* 150.

(13) *Prince v. Howe* (*in error*), 1 Bro. P. C. 64.

(14) *Aston v. Blagrave*, Str. 617. 2 Ld. Raym. 1369.

WORDS SPOKEN
IN DEROGATION
OF A PERSON
IN ANY OFFICE
OF DIGNITY,
TRUST, OR
PROFIT.

Words spoken
as matter of
opinion.

Judgment of
Chief Justice
De Grey in
*Onslow v.
Horne (Clerk)*.

peace of Devonshire, "Stucley covereth and hideth felonies, and is not worthy to be a justice of peace," the plaintiff recovered, for it was against his oath of office, and a good cause to put him out of the commission, and to indict and fine him. (1)

But where the words do not charge the person in such trust or office with any breach of his duty on oath, or with any crime or misdemeanour, whereby he has suffered any temporal loss in fortune, office, or any way whatsoever, but are spoken as matter of opinion respecting such person's conduct, an action cannot be maintained.

Thus, in *Onslow v. Horne (Clerk)* (2) it appeared, that the plaintiff was knight of the shire for the county of Surrey, and the defendant, at a meeting of the freeholders of the county, used the following words, "As to instructing Mr. Onslow we might as well instruct the winds, and should he even promise his assistance, I should not expect him to give it us;" these words were adjudged not to be actionable, as charging no crime, but being merely matter of opinion, Chief Justice De Grey observing (3), "Mr. Horne's declaring his opinion of Mr. Onslow's promises, cannot be any possible damage to Mr. Onslow: to be sure, the words cannot be understood to be spoken in honour of Mr. Onslow; but I will suppose them to be spoken most maliciously, yet we are all of opinion, they are not actionable, let the malice of the defendant have been ever so great on that occasion. In the case of a malicious prosecution, let the malice, on that occasion, be ever so great, yet if there was a reasonable and probable cause for the prosecution, no action lies. The arresting the judgment, in this case, doth not contradict the jury; they thought this a popular, ungentlemanlike reflection upon the plaintiff, but every popular reflection upon a gentleman, is not such a scandal, for which the law will give him an action. The words do not relate to Mr. Onslow's past conduct in parliament; they do not charge him with a breach of his duty, his oath, or any crime or misdemeanour, whereby he has suffered any temporal loss in fortune, office, or in any way whatsoever. There is no occasion to say any thing concerning any future presumptive contingent damages, which Mr. Onslow may possibly sustain at some future time (nobody knows when) by reason of Mr. Horne's reflections upon him. I know of no case wherever an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation, notwithstanding what the chief justice throws out in 2 Vent. 266., where he is made to say, 'that where a man had been in an office of trust, to say that he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that, or the like office again, and therefore was actionable,' I think the chief justice went too far, and I think my brother Leigh at the bar, went a little too far, when he said, that the words in the last count imported that Mr. Onslow would betray his trust—would, as member for Surrey, betray his constituents—we think they mean no more, than that Mr. Horne was of opinion, Mr. Onslow would break his word; but to say 'he has broke his word,' is not actionable; *a fortiori*, the words in this count are not actionable."

Defamatory words, which are actionable in themselves, are not the less so

(1) *Stucley v. Bulhead*, 4 Co. 16. (a.)

(3) *Ibid.* 187, 188.

(2) 3 Wils. 177.

because they are alleged to have been spoken of one as a candidate to serve in parliament. (1)

A distinction is to be observed when the words are used to a person in an office of profit, and when in one of credit only; "in offices of profit, words that impute either want of understanding, of ability, or integrity, are actionable; but in those of credit, words that impute want only of ability are not actionable, as of a justice of the peace, 'he is an ass, and a beetle-headed justice,' is not actionable; and the reason is, because a man cannot help his want of ability, as he may his want of honesty; otherwise, where words impute dishonesty or corruption, as in this case where the office is an office of credit." (2)

In an action for words of and concerning the plaintiff, as "treasurer and collector" of certain tolls and rates, it appearing, that the words were spoken of him in his character of collector only:—It was held, that without due proof of his appointment as collector, pursuant to a private act of parliament, the action was not maintainable, even though he had acted as such collector at the time the words were spoken. (3)

In an action of slander for accusing the plaintiff of felonious embezzlement, it appeared, that the plaintiff had been chosen and sworn in at a court leet, held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain (who received no remuneration) were to collect moneys from the commoners and other persons using the commonable lands; to employ the moneys so received in keeping the lands in order; to account at the end of the year to two aldermen of the corporation, and to pay over any balance in his hands to his successors in office:—It was held, that the plaintiff was not "a servant, or person employed in the capacity of a servant" within stat. 7 & 8 Geo. 4. c. 29. s. 47. as to embezzlement. (4)

WORDS SPOKEN
IN DEROGATION
OF A PERSON
IN ANY OFFICE
OF DIGNITY,
TRUST, OR
PROFIT.

DISTINCTION
BETWEEN AN
OFFICE OF
PROFIT, AND
AN OFFICE OF
CREDIT.

4. WORDS WHICH OPERATE TO EXCLUDE A PERSON FROM SOCIETY.

An action lies for charging an innkeeper with having an infectious disease, by which she loses her guests (5), for saying one has the French pox (6), calling another a "pocky whore" (7), or "leprous knave." (8)

In *Fowler v. Dowdney* (9) it was held, that an action will lie for saying of the plaintiff, "he is a returned convict," though the words import that the punishment has been suffered, Lord Denman observing, "My opinion

WORDS WHICH
OPERATE TO
EXCLUDE A
PERSON FROM
SOCIETY.

Accusing a
person of being
a returned con-
vict.

(1) *Harwood v. Astley (Bart.)* (in error), 1 N. R. 47.

(2) Per cur. in *How v. Prins*, 2 Salk. 695. *Onslow v. Horne (Clerk)*, 3 Wils. 187. 2 W. Black. 750. *Lumby v. Allday*, 1 C. & J. 301. If a clerk to a gas-light company be charged with immoral conduct with a woman, that imputation having no reference to his office, the words not being laid to have been spoken of him in his office as clerk, nor proved to have occasioned him any special damage—no action can be maintained. Ibid.

(3) *Sellers v. Till*, 4 B. & C. 655. 7 D. & R. 121.

(4) *Williams v. Stott*, 1 C. & M. 675. 3 Tyrw. 688. It seems, that a verbal imputation of fraudulent embezzlement in an office of the above description would not be actionable. Ibid.

(5) *Levet's case*, Cro. Eliz. 289.

(6) *Crittall v. Horner*, Hob. 219.

(7) *Clifton v. Wells*, 1 Ld. Raym. 710. 12 Mod. 633. 1 Sid. 50. 324.

(8) *Taylor v. Perkins*, Cro. Jac. 144. 1 Rol. Abr. Action sur Case (H.), 44.

(9) 2 M. & Rob. 119.

WORDS WHICH
OPERATE TO
EXCLUDE A
PERSON FROM
SOCIETY.

Judgment of
Lord Denman
in *Fowler v.*
Dowdney.

Calling a
woman a prostitute.

is, that these words are actionable, because they impute to the plaintiff, that he has been guilty of some offence for which the parties are liable to be transported; that is, I think, the plain meaning of the words, as set out in the declaration; they import, to be sure, that the punishment has been suffered, — but still the obloquy remains."

Calling a woman a whore is not actionable, except in the cities of London and in Bristol, where such language is actionable by custom; but it must be uttered in such cities respectively (1): — and if an action be brought in any of the superior courts, the foregoing custom must be proved, as the court cannot take judicial knowledge of it.

Charging a person with having had a contagious disorder is not actionable, because it is no reason why the company of a person so accused should be avoided. (2)

Thus, words spoken of a woman, "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen besides," are not actionable, because they may refer to time past. (3)

No prohibition will be granted to a spiritual court in which a sentence has been pronounced on a libel for indelicate aspersions on a female. (4)

5. WORDS WHICH INJURE ANOTHER IN HIS PROFESSION, TRADE, OR
SERVITUDE.

WORDS WHICH
INJURE AN-
OTHER IN HIS
PROFESSION,
TRADE, OR
SERVITUDE.

Slandorous words as to the professional character of a man are actionable. (5)

And when words are used to any person which are applicable to his profession or calling, and tend to scandalise it, they are taken as applying to it, and are actionable. (6)

The words, "he is more a lawyer than the devil," are actionable when spoken of an attorney (7); and so are the expressions, "he deserves to be struck off the roll." (8)

But the words, "I have taken out a judge's order to tax A's bill; I will bring him to book, and shall have him struck off the roll," are not. (9)

If the language be mere general abuse, and not of and concerning a person in his professional character, it will not be actionable. (10)

Thus, in *Doyley v. Roberts* (11), the words in allusion to an attorney, "he has defrauded his creditors, and has been horsewhipped off the course at Doncaster," were held not to be actionable, unless spoken of him in his pro-

(1) *Robertson v. Powell*, 2 Selw. N. P. 1224., vide etiam *Brand v. Roberts*, 4 Burr. 2418. *Theyer v. Eastwick*, ibid. 2032.

Power v. Shaw, 1 Wils. 62.
(2) *Carslake v. Mapledoram*, 2 T. R. 473.
Taylor v. Hall, Str. 1189. *Clerk v. Dier*, 8 Mod. 290. *Jackson v. Hall*, Show, 285. *James v. Rudledge*, Sir F. Moore, 573.

(3) *Carslake v. Mapledoram*, 2 T. R. 473.

(4) Ibid.

(5) *Day v. Buller*, 3 Wils. 177. *Onslow*

v. Horne (Clerk), ibid. 187. 2 Black. 750. *Arne v. Johnson*, 10 Mod. 111. *Terry v. Hooper*, 1 Lev. 115.

(6) *Byrchley's case*, 4 Co. 16.

(7) *Day v. Buller*, 3 Wils. 59.

(8) *Phillips v. Jansen*, 2 Esp. N. P. C. 624.

(9) Ibid.

(10) *Tomlinson v. Brittlebank*, 1 H. & W. 573.

(11) 3 Bing. N. C. 839.

fession; Chief Justice Tindal observing, "The plaintiff is an attorney, and carries on business as such, but appears to have had creditors in certain sporting transactions; the defendant says of him generally, that he has defrauded his creditors, and the jury find that these words were not spoken of him in his business of attorney. Now in Comyn's Digest (Action on the Case for Defamation) it is laid down (1), that 'words, not actionable in themselves, are not actionable when spoken of one in an office, profession, or trade, unless they touch him in his office:' and these words, though spoken of an attorney, do not touch him in his profession any more than they would touch a person in any other trade or profession. It is found, indeed, that the words have a tendency to injure him morally and professionally and that is true; but it applies equally to all other professions, for a person cannot say any thing disparagingly of another that has not that tendency: upon that subject the authority of *Ayre v. Craven* (2) is conclusive; and a rule for arresting judgment in this case must therefore be made absolute."

WORDS WHICH INJURE ANOTHER IN HIS PROFESSION, TRADE, OR SERVITUDE.

Judgment of Chief Justice Tindal in *Doyley v. Roberts*.

The saying of a commission agent that he is an unprincipled man, and borrowed money without repaying it, is not actionable, unless there be special damage; but if this were said to a person who was going to deal with him, and did not do so in consequence of the accusation, that is special damage. Although if the person had dealt with him, the dealing might have turned out unprofitable. (3)

Calling a commission agent an unprincipled man.

To say of a midwife, "many have perished for her want of skill," is actionable. (4)

Midwife.

Slanderous words spoken of another in the way of his trade is actionable.

WORDS SPOKEN OF A MAN IN HIS TRADE.

To say of one who carries on the business of a corn vendor, "you are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage. (5)

Imputing dishonesty to a corn vendor.

Saying of an innkeeper, "he is a bankrupt; he will be in the Gazette in a twelvemonth; he is a pauper," is actionable, though he was not liable to the bankrupt laws. (6)

Allegation of bankruptcy.

The words, "he is not worth a penny, and will run away," were held actionable when spoken of a woolcomber, which, without an averment of trading, were intended to mean one who bought wool to work with. (7)

An action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons (without naming them), was held not to be maintainable, and the judgment was accordingly arrested, because the words did not of themselves impute any crime. (8)

Accusing a merchant of bringing a false bill of lading.

Words spoken of a tradesman, imputing to him that his trade is maintained by the prostitution of a female employed by him, were held not to be actionable (although laid to be spoken of him in his trade), unless they

Imputing to a tradesman, that his trade is maintained by

(1) (D.), 27.

(2) 2 A. & E. 2.

(3) *Storey v. Challands*, 8 C. & P. 234.

(4) *Flower's case*, Cro. Car. 211.

(5) *Thomas v. Jackson*, 3 Bing. 104. 10

Moore, 425.

(6) *Whitaker v. Bradley*, 7 D. & R. 649.

S. C. nom. *Whittington v. Gladwin*, 5 B. & C. 180. 2 C. & P. 146.

(7) *Anon. Lofft*, 322.

(8) *Feise v. Linder*, 3 B. & P. 372.

**WORDS WHICH
INJURE AN-
OTHER IN HIS
PROFESSION,
TRADE, OR
SERVITUDE.**

the prostitution
of a female.

SERVITUDE.

Master impu-
ting felony to
his servant.

Bona fide cha-
racter given to
a servant.

Master will be
liable for a ma-
licious cha-
racter.

could be construed as imputing to him that he kept a bawdy house (1), Lord Abinger observing, "We cannot consider the words as used in any other sense than as a general imputation on his moral conduct."

In *Jones v. Little* (2) the following language was uttered of a brewer, "I will bet 5*l.* to 1*l.* that Mr. J. (the plaintiff) was in a sponging house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself;" and in answer to the following question from a bystander, "Do you mean to say that Mr. J., brewer of Rose Hill, has been to a sponging house within this last fortnight for debt?" the defendant said, "Yes, I do." The jury having found, that the words were spoken of the plaintiff in the way of his trade:—It was holden, that the action was maintainable, and that the verdict was right, as it was plain from the conversation, that the words were spoken of the plaintiff in his character of brewer.

Slandorous words maliciously spoken of a servant are actionable.

If a servant summon his master before a court of conscience for wages, and the latter in his necessary defence utter words imputing felony to the former, no action will lie. (3)

A *bona fide* character given of a servant, that she was saucy (4); or guilty of fraud (5), &c., if there be no malice (which must be directly proved), will not support an action of slander, though the servant be prevented from getting a place thereby.

But if a master, without being applied to, volunteer to give an unfavourable character of a discarded servant, it is *prima facie* malicious, and not a privileged communication. (6)

A master, in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge, stated, that she had borrowed money when she came into his service, and repaid it before she had received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted, that the time when he paid the wages was entered in a book, which he produced, but refused to state, what the time was; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone on the town, he answered, "What is that to us?—It was held, that this conduct was evidence to go to the jury (though slight), that the communication to the intended master was made maliciously. (7)

**S' ANDER OF
TITL.**

There must be
malice either
express or im-
plied.

When no ex-

6. SLANDER OF TITLE.

There must be malice, either express or implied, to maintain an action for slander of title (8), which the plaintiff must prove. (9)

The plaintiff having advertised for sale a bond executed to him by the defendant as a surety, the payment of which had been resisted in a long

(1) *Brayne v. Cooper*, 5 M. & W. 249.

(2) 7 *Ibid.* 423. *Semble*, also, that the words were actionable independently of that, because they must necessarily affect the plaintiff in his trade and credit.

(3) *Trotman v. Dunn*, 4 Camp. 211.

(4) *Edmondson v. Stevenson*, Bull. N. P.

7. (a.)

(5) *Weatherston v. Hawkins*, 1 T. R. 110.

(6) *Rogers v. Clifton (Bart.)*, 3 B. & P.

587., *ante*, 2350. tit. MASTER AND SERVANT. *Pattison v. Jones*, 3 M. & R. 101. 8 B. & C. 578., overruling S. C. 3 C. & P. 383.

(7) *Kelly v. Partington*, 4 B. & Ad. 700. 2 N. & M. 460.

(8) *Hargrave v. Le Breton*, 4 Burr. 2422.

(9) *Smith v. Spooner*, 3 Taunt. 246.

course of litigation, in which the validity of the bond had been disputed; the defendant, pending a suit in error, published among the persons assembled to bid for the bond at an auction, a statement of all the circumstances under which the bond was given, and alluding to the plaintiff, concluded, "His object is either to extract money from the pocket of an unwary purchaser, or what is more likely, by this threat of publication, to extort money from me:"—It was held, that this exceeded the latitude allowed for privileged communications, or observations on titles by a party interested, and that it was a libel, although no express malice was proved. (1)

SLANDER OF
TITLE.
press malice
proved.

The attorney of a party claiming title to premises put up for sale is not liable in an action for slander of title, if he *bond fide*, though without authority, make such objections to the seller's title as his principal would have been authorised to make. (2)

When action
not maintain-
able.

In *Smith v. Spooner* (3) it appeared, that a lease, in which was a proviso for re-entry, if the rent were in arrear twenty-eight days, was exposed to sale by the assignee, the rent being then in arrear that period. At the sale, the lessor announced, that the vendors could not make a title, in consequence of which, bidders, who came to buy went away; and he afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment:—It was holden, that no action for slander of title lay against him.

In an action for slander of title conveyed in a letter to a person about to purchase an estate of the plaintiff, imputing insanity to Y. from whom the plaintiff purchased it, and that the title would therefore be disputed, *per quod* the person refused to complete the purchase:—It was held, that the defendant, who had married the sister of Y., who was heir-at-law to her brother in the event of his dying without issue, was not to be considered as a mere stranger; and that the question for the jury was, not whether they were satisfied, as men of good sense and good understanding, that Y. was insane, or that the defendant entertained a persuasion that he was insane, upon such grounds as would have persuaded a man of sound sense and knowledge of business, but whether he acted *bond fide* in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget. (4)

7. WORDS NOT IN THEMSELVES ACTIONABLE, BUT WHICH BECOME SO,
BY REASON OF SPECIAL DAMAGE.

WORDS NOT IN
THEMSELVES
ACTIONABLE,
BUT WHICH BE-
COME SO, BY
REASON OF SPE-
CIAL DAMAGE.

In *Moore v. Meagher* (5) Mr. Justice Heath said, "All words are actionable if a special damage follow."

Where the words are not in themselves actionable, and the object of the suit is for the recovery of some special damage resulting from their having

(1) *Robertson v. M'Dougall*, 4 Bing. 670.
3 C. & P. 259.

(2) *Watson v. Reynolds*, M. & M. 1.

(3) 3 Taunt. 246. It has been held
in an action for slander of title, that the

defendant could give evidence on the general
issue, that he spoke the words claiming title
in himself. *Ibid.*

(4) *Pitt v. Donovan*, 1 M. & S. 639.

(5) 1 Taunt. 44.

WORDS NOT IN
THEMSELVES AC-
TIONABLE, &c.

been uttered, which constitutes the gist of the action, the declaration would be defective if such damage were not correctly stated (1); and it will not be sufficient in that case, merely to prove a wrongful act of a third person, induced by the slander. (2)

But where the words themselves, unconnected with any consequential loss, constitute the right of action, the plaintiff may recover, though no special damage be alleged or proved. (3)

Damages need
not be certain
and immediate.

It does not seem to be requisite, that the damage arising from the words be certain and immediate, for if it be probable and remote, it will maintain the action. (4)

Not requisite
that the person
whose act con-
stitutes the
special damage,
should have
believed the
slander.

In order to support an action for defamatory words actionable only in respect of special damage, it is not necessary, that the person whose act constitutes the special damage should have believed the defamatory charge, provided that he acted in consequence of the words having been spoken. (5)

Words not ac-
tionable with
special damage,
unless they are
of themselves
disparaging.

Words are not actionable, with special damage, unless they are of themselves disparaging. Thus, in *Kelly v. Partington* (6), the second count of the declaration, which was in slander, stated that the defendant, contriving and intending to injure the plaintiff as a shopwoman and servant, maliciously spoke of her in such character the following words:—"She (meaning the plaintiff) secreted 1s. 6d. under the till, stating these are not times to be robbed." The declaration alleged as special damage, that one S., by reason of the words, refused to take the plaintiff into his service. After a general verdict for the plaintiff, it was held, that the words in that count were not defamatory in their nature, and therefore were not actionable, even though followed by special damage. (7)

The special
damage must
be a conse-
quence of the
slander.

Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person, induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander. (8)

Not receiving
the accustomed
hospitality of
friends.

If, in consequence of words spoken, the plaintiff be deprived of substantial benefit arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action. (9)

Loss of pre-
ferment.

If a person to prevent a divine from being presented to a benefice, state to the patron, "that he is a heretic, or a bastard, or that he is excommunicated," in consequence of which the patron refuses to present him, and he loses his preferment, he may have his action for that slander. (10)

Loss of busi-
ness or trade.

Where the plaintiff declared that he was an innkeeper, and the defendant said to him, "thy house is infected with the pox, and thy wife was laid of the pox;" these words were adjudged to be actionable, for it was a discredit to the plaintiff, and guests would not resort thither. (11)

"But in such case it must appear, that the words from whence the injury

(1) Bull. N. P. 5. (a.) *Hartley v. Her-*
ring, 8 T. R. 130.

(2) *Vicars v. Wilcocks*, 8 East, 1.

(3) 1 Saund. 243. n.

(4) *Vaughan v. Ellis*, Cro. Jac. 213.

(5) *Knight v. Gibbs*, 3 N. & M. 467. 1

A. & E. 43.

(6) 5 B. & Ad. 645. 4 ibid. 700.

(7) Ibid.

(8) *Vicars v. Wilcocks*, 8 East, 1., et vide
Rustell v. Macquister, 1 Camp. 49. n.

(9) *Moore v. Meagher* (in error), 1 Taunt.

39. S. C. nom. *Meagher v. Moore*, 3 Smith,

135.

(10) *Davis v. Gardiner*, in arg. 4 Co. 17.

(11) *Levett's case*, Cro. Eliz. 289.

may arise, were used in a conversation concerning the plaintiff's trade or business." (1)

WORDS NOT IN
THEMSELVES AC-
TIONABLE, &C.

Where the plaintiff declared, that she being a virgin of good fame, was going to be married to one Anthony Elcock, and that the defendant said of her, I know Davis's daughter, she dwelt in Cheapside, and "that there was a grocer did get her with child;" by reason of which words the said Elcock refused to marry her; the plaintiff recovered, on account of the special damage. (2)

Loss of mar-
riage.

But in this case a distinction was taken, viz. that in order to make such words actionable, they must be spoken to the person who intended to have married the defamed female, for if spoken generally the action will not lie; for to call a woman "whore," or words tantamount, is a matter of spiritual cognisance, and not actionable at common law, unless under the circumstances above stated. (3)

If a person to prevent a servant from getting a place give him a false character, it is actionable. (4)

Loss of service.

It is however questionable, whether it can be stated as special damage, that divers persons refused to fulfil their contracts with the plaintiff, since he might recover a compensation by action, if the contracts were lawful? (5)

Divers persons
refusing to
fulfil contracts.

8. REPUBLICATION OF ANOTHER'S SLANDER.

The republication of another person's slander is actionable.

REPUBLICATION
OF ANOTHER'S
SLANDER.

In *Bennett v. Bennett* (6), which was an action for words imputing that the plaintiff had been many years ago guilty of embezzlement, and to which the general issue was pleaded:—It appeared, that the plaintiff was the uncle of the defendant, and that the parties had been in partnership as corn dealers, but that in consequence of disputes they had dissolved their partnership. The words were proved, and it appeared, that, on some occasions the defendant had stated, that he had heard the slanderous matter from other persons whose names he mentioned at the time.

It was contended for the defendant, that "if the defendant had at all times named the person from whom he had heard the slander, it might have made a difference in his favour as regarded the verdict:" to which Mr. Baron Alderson observed, "It would have made no difference. A man must not go about repeating slander, and saying of whom he heard it. It is no justification for him, that he at the time he repeats the slander gives up the name of the person from whom he heard it. If the defendant had said, at the time he spoke the words, that he heard the slanderous matter from another person, and named that person, and now at the trial had proved that he in fact did hear the slander from that person, it would be matter of mitigation." (7)

Judgment of
Mr. Baron Al-
derson in *Ben-
nett v. Bennett*.

This judgment has seemingly overruled that of Lord Kenyon's in *Davis v.* Judgment of

(1) *Savage v. Robery*, 2 Salk. 694. *Harrison v. Stratton*, 4 Esp. N. P. C. 218. *Reeve v. Holgate*, 2 Lev. 62.

(4) Bull. N. P. 7. (a.)

(2) *Davies v. Gardiner*, Poph. 36. 2 Esp. N. P. 6.

(5) *Morris v. Langdale*, 2 B. & P. 284., post, 2570.

(6) 6 C. & P. 588.

(3) *Holwood v. Hopkins*, Cro. Eliz. 787. *Regina v. Wrightson*, 2 Salk. 698. *Anon. ibid.* 694.

(7) Vide etiam *De Crespigny v. Wellesley*, 2 M. & P. 695. *Saunders v. Mills*, 3 ibid. 520. *Charlton v. Watton*, 6 C. & P. 385.

REPUBLICATION
OF ANOTHER'S
SLANDER.

Lord Kenyon
in *Davis v.*
Lewis.

Lewis (1), where his lordship stated, "If a person say, that such a particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but if he assert the slander generally, without adding who told it to him, it is actionable. Then it is said, that it is sufficient to repel such action to disclose by the defendant's plea the person who told him the slander; but that is clearly no justification, after putting the plaintiff to the expense of bringing the action. The plaintiff can only impute the slander to the man who utters it, if the latter do not mention the person from whom he heard it. The justice of the case also falls in with the decisions on this subject. It is just, that when a person repeats any slander against another, he should at the same time declare from whom he heard it, in order that the party injured may sue the author of the slander. I am therefore clearly of opinion, both on authority and the reason of the case, that the plaintiff is entitled to our judgment." (2)

9. PRIVILEGED COMMUNICATIONS. (3)

PRIVILEGED
COMMUNICA-
TIONS.

Confidential
communica-
tions.

Words which would otherwise of themselves be actionable, may nevertheless not be actionable, from the particular circumstances under which they are spoken and used. (4)

Verbal communications, when confidential, are not actionable; and if A. be surety for B. to C., A., if acting *bona fide*, may lawfully state to C., in an unreserved manner, his opinion of B.'s conduct and character, whatever the charges may be, which he thus imputes to him. (5)

A defamatory communication from A. to B. respecting the inmates of the house occupied by B. as his tenant is privileged, if such communication be made *bona fide* in consequence of the relation of landlord and tenant, and without malice in fact. (6)

Words spoken
from a motive
of friendship or
caution.

Words spoken of a tradesman, that he would soon be a bankrupt, when communicated in confidence and friendship as a caution, will not be actionable, unless the jury find malice. (7)

Where the plaintiff, a dissenting minister, accompanied by a friend to the defendant, who in answer to questions put by plaintiff and his friend, stated that his (the defendant's) wife had been cautioned against the plaintiff as a drunkard, &c.:—It was held, that this was a privileged communication, and that slanderous expressions used in it were not actionable, if the defendant spoke *bona fide*, and was not actuated by malice, and that it was incumbent on the plaintiff to prove, that the defendant was actuated by malicious motives. (8)

Repetition of
confidential
communica-
tions to a third
party.

Where a person originates false reports prejudicial to a tradesman, and being called on by the employers of the tradesman to examine the matters complained of, repeats to them the false statement, such statements are not privileged communications. (9)

(1) 7 T. R. 19.

(2) Vide etiam *Woolnoth v. Meadows*, 5 East, 46. *Maitland v. Goldney*, 2 ibid. 426. *M'Pherson v. Daniels*, 10 B. & C. 263.

(3) *Vide ante*, 2225—2228. tit. LIBEL. 2

(4) Bull. N. P. 8.

(5) *Dunman v. Bigg*, 1 Camp. 269. n.

(6) *Knight v. Gibbs*, 3 N. & M. 467. 1 A. & E. 43.

(7) *Hervey v. Dowson*, Bull. N. P. 8.

(8) *Warr v. Jolly*, 6 C. & P. 497.

(9) *Smith v. Mathews*, 1 M. & Rob. 151.

If A. have sold goods to B. a tradesman, and before the delivery of them, C., without being asked or solicited in any way to do so, speak words injurious to the credit of B. as a tradesman, this is not a privileged communication; but if he had been asked by A. as to the credit of B., it would have been otherwise. (1)

PRIVILEGED
COMMUNICATIONS.

Unsolicited
communications.

Neither party, witness, counsel, jury, or judge, can be made to answer for words spoken in office, although, if they be opprobrious and irrelevant to the case, the court will notice them as a contempt, and examine on an information, and punish accordingly. (2)

Language used
in a court of
justice.

Justices are not liable to answer for words spoken in their office, although, if improper, it may be a ground of application to the great seal to remove them. (3)

But though the communications of a suitor may be protected, yet, if he do not confine himself to legal forms, but charge crimes not properly cognisable by that jurisdiction to which he applies, an action will lie for such irrelevant charges. (4) It was likewise held in the foregoing case, that if a witness exceed the point in issue, and slander a third person, an action will lie against him.

Where a man upon reasonable grounds of suspicion charges an innocent person with a theft (5), or erroneously presents a complaint to a magistrate (6), such conduct is not actionable.

Charging another upon
reasonable
grounds with
theft.

Where the defendant, in the presence of a third person not an officer of justice, charged the plaintiff with having stolen his property, and afterwards repeated the charge to another person also not an officer of justice, who was called in to search the plaintiff with the consent of the latter: — It was held, that the charge was privileged, if the defendant believed in its truth, acted *bond fide*, and did not make the charge before more persons, nor in stronger language than was necessary; and that it was a question for the jury, and not for the judge, whether the facts brought the case within this rule. (7)

In *Toogood v. Spyring* (8) it appeared, that A., the tenant of a farm, required some repairs to be done at the farm-house, and B., the agent of the landlord, directed C. to do the work. C. did it, but in a negligent manner, and during the progress of it got drunk; and some circumstances occurred, which induced A. to believe that C. had broken open his cellar door and obtained access to his cyder. A., two days afterwards, met C. in the presence of D., and charged him with having broken open his cellar door, and with having got drunk and spoiled the work. A. afterwards told D., in the absence of C., that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar: — It was held, that the complaint to B. was a privileged communication, if made *bond fide*, and without any malicious intention to injure C.; that the state-

Where charging
another
with theft will
not be privileged.

(1) *King v. Watts*, 8 C. & P. 614.

(5) *Fowler v. Homer*, 3 Camp. 294., et

(2) *Rez v. Skinner*, Loft, 55. *Hodgson* vide *Wood v. Brown*, 1 Marsh. 522. 6

v. Searlett, 1 B. & A. 232. *Flint v. Pike*, 4 Taunt. 169.

B. & C. 473. *Astley (Bart.) v. Younge*, 2 N. P. C. 32.

(3) *Rez v. Skinner*, Loft, 55. (7) *Padmore v. Lawrence*, 11 A. & E. 380.

(4) *Buckley (Sir Richard) v. Wood*, 4 Co. 14. (b.) Cro. Eliz. 230. (8) 1 C. M. & R. 181. 4 Tyrw. 582.

PRIVILEGED
COMMUNICA-
TIONS.

ment made to C. in the presence of D. was also privileged, if done honestly and *bona fide*; that the circumstance of its being made in the presence of a third person did not of itself make it unauthorised; that it was a question to be left to the jury to determine from the circumstances, including the style and character of the language used, whether A. acted *bona fide*, or was influenced by malicious motives; but that the statement to D. in the absence of C. was unauthorised and officious, and therefore not protected, although made in the belief of its truth, if it were in point of fact false.

Information to
an inquest.

But where A. obtained a warrant to search the house of B. for goods suspected to be stolen, and in accompanying the officer to execute the warrant tells him that B. has robbed him: — It was held not to be a privileged communication. (1)

If a person have a communication to make to an inquest for their information not on oath, he is bound to do it in such a way as to satisfy a jury, if he be afterwards charged with slander.

Communica-
tions rather to
compromise a
felony than to
promote in-
quiry.

In *Hooper v. Truscott* (2) the defendant, having some cause for suspicion, went to the plaintiff's relations, and charged him with theft; it appearing, however, that his object in making the communication was rather to compromise the felony than to promote inquiry, or to enable the relations to redeem the plaintiff's character: — It was held, that this was not a privileged communication, that malice must be implied, and that the existence of it, was not a fact to be left for the consideration of a jury.

DECLARATION
AND PLEAD-
INGS.
FORM OF AC-
TION.

10. DECLARATION AND PLEADINGS.

An action on the case is the remedy for injuries affecting a man's reputation by malicious, false, and scandalous words, tending to his derogation, and diminishing his respectability and estimation in society. (3)

VENUE.

The venue is transitory. (4)

PARTIES.
Partners.

Generally speaking, two cannot join in an action for slander (5); but if defamatory words be spoken of partners in trade, whereby they are injured in their trade, a joint action will lie at the suit of the partners, although the words be not actionable of themselves. (6)

Where words imputing insolvency in trade are spoken of one of the partners in a firm, such individual partner may maintain an action of slander, and recover damages for the injury done to him; and it is not necessarily to be considered as an injury to the partnership, for which a joint action only can be maintained. (7)

Husband and
wife.

If slander be spoken by husband and wife, there must be separate actions, one against the husband only for the slander spoken by him, and one against both for the slander by the wife; and the court will not order the actions to be consolidated. (8) So for words spoken of husband and wife, one by him for the words spoken of himself, and another by both for the words spoken of the wife. (9)

(1) *Danaster v. Hewson*, 2 M. & R. 176.

(2) 2 Bing. N. C. 457.

(3) *Vide ante*, 1003—1019. tit. CASE.

(4) *Ibid*.

(5) *Swithin v. Vincent*, 2 Wils. 227.

(6) *Cook v. Batchelor*, 3 B. & P. 150.

(7) *Harrison v. Bevington*, 8 C. & P. 708.

(8) Selw. N. P. 298.

(9) *Errington v. Gardiner*, *ibid*. 302.
Smith v. Warner, Gould, 76.

An action does not lie at the suit of husband and wife for words slandering the wife in a trade carried on by her, it not being alleged, that she was divorced *a mens et thoro*, or had a separate maintenance. (1)

The declaration usually commences with prefatory inducements of the plaintiff's antecedent good character, and of his innocence of the particular crime imputed to him by the defendant; but this may be omitted, and the declaration commence with a statement of the defendant's malicious intention to injure the plaintiff (2), unless it be for a defamation affecting a person in the way of his office, profession, or trade; the particular employment in such case must be stated by way of inducement, accompanied by an allegation, that the words spoken were in reference to it. (5)

In a declaration for slanderous words, the stating an immaterial fact in the inducement does not render it necessary to be proved, if the words themselves support the imputation complained of. (4)

The declaration should state the words as they were uttered; equivalent expressions will not do. (5)

In all actions of slander it is necessary to set out the words in the declaration, whether they be actionable in themselves, or only so by reason of special damage. (6)

Upon a declaration for the following words, alleged to have been spoken by the defendant's wife of the plaintiff, "you robbed me, for I found the thing you have done it with:"—It was holden, that the words were actionable *per se*, without any *colloquium* or *innuendo* to explain the sense in which they were used. (7)

Where, in an action for slander, the declaration contained several counts, stating the words constituting such slander, and the fifth alleged, that "the defendant had wrongfully, and without any reasonable or probable cause, imposed the crime of felony upon the plaintiff:"—It was held, on a motion in arrest for judgment, that such count was sufficient after verdict. (8)

In slander the declaration stated, that the plaintiff was an auctioneer and appraiser, that the defendant had employed him as an appraiser to value certain goods, and that he spoke of him and of his valuation—"he is a damned rascal; he has cheated me out of 100*l*. on the valuation:"—which was held sufficient after verdict. (9)

Where, in an action for slandering a dissenting minister, the declaration stated that he was such, without averring or shewing him to be duly qualified, it was held to be sufficient (10); and that it was enough to allege, that the persons who frequented his chapel refused to permit him to preach, by reason whereof he had lost the emoluments, which he would otherwise have acquired. (11)

In an action for words spoken of a person, who was a candidate to serve in parliament, it is not requisite to set forth the writ in the declaration. (12)

DECLARATION
AND PLEAD-
INGS.

INDUCEMENT.

STATEMENT OF
THE SLAN-
DEROUS WORDS.
The slanderous
words must be
set out in the
declaration.

(1) *Saville v. Sweeny*, 1 N. & M. 354. 4 B. & Ad. 514.

(2) Corn. Dig. Action upon the Case for Defamation (G. 5.). *Powell v. Jones*, 1 Lev. 297.

(3) *Morris v. Langdale*, 2 B. & P. 284.

(4) *Cox v. Thomason*, 2 Tyrw. 411. 2 C. & J. 362.

(5) *Maitland v. Goldney*, 2 East, 434. *Cook v. Cox*, 3 M. & S. 110.

(6) *Gulsole v. Mathers*, 5 Dowl. P. C. 69. *Cook v. Cox*, 3 M. & S. 110.

(7) *Rowcliffe v. Edmonds*, 7 M. & W. 12. *Tomlinson v. Brittlebank*, 4 B. & Ad. 630.

(8) *Blizard v. Kelly*, 3 D. & R. 519. 2 B. & C. 283.

(9) *Bryant v. Loxton*, 11 Moore, 344.

(10) *Hartley v. Herring*, 8 T. R. 130.

(11) *Ibid*.

(12) *Harwood v. Astley (Bart.)*, 1 N. R. 47.

**DECLARATION
AND PLEAD-
INGS.**

Charging a
physician with
adultery.

Statement of
title.

In an action on the case for defamation, for words charging a physician with adultery, it is not sufficient (unless special damage be alleged) to state, that the misconduct was imputed to the plaintiff in his profession. (1)

The declaration ought also to set forth in what manner such misconduct was connected by the speaker with that profession.

Where, in an action on the case for slander of title, it appeared by the declaration, that the plaintiff had a certain interest in a leasehold house and premises, viz. the remainder of a term of ninety-nine years, commencing in 1791, which he had purchased of the defendant, subject to an agreement, reserving to the latter a right of re-purchasing upon certain conditions, which were not performed; and the plaintiff averred, that "the said interest of him the plaintiff, of and in the said premises, to wit, all the rest, residue, and remainder of the said term of ninety-nine years then to come and unexpired, was put up to sale by auction, but that by means of the said slander, divers persons, who were desirous of purchasing the plaintiff's said interest in the said premises, were deterred from so doing;" and it appeared in evidence, that the interest actually put up to sale, was an under-lease for twenty-two years, to be granted by the plaintiff to the purchaser:—It was held, that this was a fatal variance. (2)

Where charge
did not specify
to whom bribe
money was
given.

INNUENDOS.
Generally.

In an action for defamatory words respecting a bribe, judgment was arrested, because the charge did not specify to whom the money was given. (3)

That part of the declaration which states the slander, must be accompanied by an innuendo, as "he" (meaning the said plaintiff), the object of which is to explain and shew the applicability of some matter already expressed; it seems to point out where there is a precedent matter, but never for a new charge; it applies to what is already expressed. (4)

Where words can be understood in an actionable sense only by reference to certain facts, such facts must be distinctly stated in the body of the declaration, for the mere introduction of those facts, under an innuendo, will not be deemed a sufficient averment of them (5), for that which comes after the innuendo is not issuable (6); and it must be averred, that the words were spoken in a conversation about those facts; in fact, the words must be sufficient to maintain the action without the innuendo (7): thus, an action will not lie for these words, "I will take him to Bow Street on a charge of forgery" without an innuendo. (8)

After verdict
malice will be
presumed.

Where, in an action for slander, the declaration alleged, that the defendant had said of the plaintiff, that he had set fire to his own premises; innuendo, that the plaintiff had been guilty of wilfully setting fire to the premises, which, whilst in his occupation, had been destroyed by fire:—It was held on motion in arrest of judgment, that the court could not after verdict presume that the jury had found, that the defendant meant to impute to the plaintiff that he had done it unlawfully or feloniously, as well as wilfully. (9)

(1) *Ayre v. Craven*, 4 N. & M. 220. 2

(2) *Milman v. Pratt*, 3 D. & R. 728. 2

(3) *Purdy v. Stacey*, 5 Burr. 2698.

(4) Vide *Rex v. Horne*, Cowp. 684., vide in *Black v. Holmes*, 1 Fox & Smith (Irish), 31—48., the elaborate judgment of Chief Justice Bushe respecting innuendoes.

(5) 1 Rol. Abr. Action sur Case (I.), 83.

(6) *Slocumb's case*, Cro. Car. 443.

(7) *Lovet v. Hawthorn*, Cro. Eliz. 834.

(8) *Harrison v. King (in error)*, 7 Taunt. 431.

(9) *Sweetapple v. Jesse*, 2 N. & M. 36. 5 B. & Ad. 27.

If a good innuendo in a declaration, ascribing a particular meaning to alleged slanderous words, be not supported in evidence, the plaintiff cannot reject it at the trial, and resort to another meaning. (1)

In *Wheeler v. Haynes* (2) the declaration, which stated, that, at the time of the speaking, &c., the plaintiff worked for and was employed by one B. Glass in his barn, in and about thrashing Glass's corn, and that the defendant, intending to cause it to be believed that the plaintiff had been guilty of felony, falsely and maliciously spoke of and concerning the plaintiff the words, "I saw J. G. coming across Mr. Glass's barton with some barley, and my son said, 'What art going to do with that?' J. G. said he was going to feed pheasants with it, and said, where he had that, he could have more, and that he had it at farmer Glass's barn" (meaning the said barn belonging to the said B. Glass, wherein the plaintiff was so at work and employed as aforesaid, and that the barley so alleged by the defendant to have been in the possession of J. G. was the property of the said B. Glass, and that the plaintiff had stolen the same from the said B. Glass, and given the same to the said J. G.); and concluded with an averment of special damage:—was held bad, the innuendo not being borne out by the other parts of the count; and that a demurrer to such count did not apply to any omission by which the defect could be aided.

And in *Gainsford v. Blachford* (3) the court of Exchequer arrested judgment after a second verdict given for the plaintiff in the same cause (an action for misrepresenting the circumstances of a party, on which the plaintiff gave him credit for goods), upon a new trial granted, on the same objection, viz. that the innuendo was not warranted by the words of the *colloquium*, as the action could not be maintained unless it were.

New matter introduced by an innuendo, without any antecedent *colloquium* to which it can refer to support it, is not necessary to sustain the action, but may be rejected as surplusage; and therefore, an innuendo, that the attorney general spoken of meant the attorney general for the county palatine of Chester, was so rejected. (4)

A declaration in slander, which stated that the plaintiff had been and was clerk to a certain mining company; that the defendant, intending to cause it to be believed that he had been guilty in the course of his employment of grave crimes and felonies, heretofore, to wit, on the 1st of July, 1836, in a discourse of and concerning the plaintiff, of and concerning his having acted as such clerk, spoke of and concerning the plaintiff these words, &c. "You have done things with the company for which you ought to be hanged, and I will have you hanged before the first of August" (thereby meaning that the plaintiff had been guilty of felonies punishable by law with death by hanging):—was held good on motion in arrest of judgment (5), Mr. Baron Parke observing, "We may either reject the innuendo at the end of the words, and the declaration is good, the words being actionable of themselves; or, if it be said, that the innuendo must be proved, we must intend that it was proved."

In slander the plaintiff averred, that he had in due manner put in his answer on oath to a bill filed against him in the court of Exchequer by the defendant (but did not proceed to aver any *colloquium* respecting that

DECLARATION AND PLEAD- INGS.

If a good innuendo be not supported in evidence, resort cannot be had to another meaning.

Where innuendo not borne out by the other parts of the count.

Innuendo not warranted by the words of the *colloquium*.

Where innuendo may be rejected as surplusage.

When innuendo cannot without aid enlarge the sense of the words.

(1) *Williams v. Stott*, 1 C. & M. 675. 3 Tyrw. 698.

(2) 9 A. & E. 286.

(3) 7 Price, 544.

(4) *Roberts v. Camden*, 9 East, 93.

(5) *Francis v. Roose*, 3 M. & W. 191.

DECLARATION
AND PLEAD-
INGS.

answer, with reference to which the words were spoken); and then alleged that the defendant said to him, that he was foresworn: innuendo, that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the bill so filed against him:—It was held, that this innuendo could not, without the aid of such a *colloquium*, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. (1)

Where it does
not appear
whether the
words were
spoken of legal
or illegal trans-
actions.

In a declaration for slander, the plaintiff stated, that he was a jobber or dealer in the funds, and as such had been accustomed lawfully to contract; that the defendant said of him as such jobber or dealer, "he is a lame duck," meaning, that he had not fulfilled his contracts in respect of the said stocks or funds; in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts), and he was prevented from fulfilling his contracts with other persons:—It was held, that it did not sufficiently appear, either that the words were spoken of lawful contracts, or that the plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. (2)

When it does
not appear, that
words were
spoken of
plaintiff in the
way of his
trade.

A declaration for slander stated by way of inducement, that the plaintiff was a pork-butcher, and then charged the defendant with publishing to the plaintiff, in the presence of other persons, these words of and concerning the plaintiff,—"You are a bloody thief! Who stole F.'s pigs? You did, you bloody thief, and I can prove it: you poisoned them with mustard and brimstone." Innuendo, that the plaintiff was guilty of pig-stealing. The jury found, that the words were not intended to impute felony, but were spoken of the plaintiff in relation to his trade:—It was held, that the plaintiff was not entitled to recover, as the words used did not shew, that they were spoken of him in relation to his trade, and no *colloquium* concerning his trade was laid in the declaration. (3)

Where a declaration in case for words, "that the plaintiff had set fire to his own barley stack," averred, that the stack was insured, and was burnt without his own default, and that the defendant spoke the words of and concerning the plaintiff and the fire:—It was held bad on demurrer. (4)

Innuendo en-
larging the
natural mean-
ing of the
words used.

In an action of slander, the count stated as inducement, that the plaintiff was livery-stable-keeper, and by that trade and business acquired profit; that one T. P. had become a bankrupt, and that he was about to prove a debt justly due under his commission, and then stated, that the defendant spoke these words of and concerning him in his said trade—"you (meaning the said plaintiff) are a regular prover under bankruptcies" (meaning that the plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy):—It was held on error brought, the verdict being for the plaintiff, first, that the words did not impute a charge against the plaintiff in the way of his trade and business; and, secondly, that the innuendo imputing a crime punishable by law was badly pleaded as enlarging the natural meaning of the words used, without resting on any introductory averment of a *colloquium* respecting the proof of fictitious debts; and a *verdict de novo* was awarded. (5)

(1) *Hawkes v. Haxhey*, 8 East, 427., et
vide *Holt v. Scholefield*, 6 T. R. 691.

(2) *Morris v. Langdale*, 2 B. & P. 284.

(3) *Sibley v. Tomlins*, 4 Tyrw. 90.

(4) *West v. Smith*, 4 Dowl. P. C. 703.

(5) *Alexander v. Angle*, 1 Tyrw. 9. 1 C.
& J. 143. S. C. nom. *Angle v. Alexander*, 7
Bing. 119. 4 M. & P. 870.

A count in a declaration for slander laid the words as follows:—"you have robbed me of one shilling tan money;" and the innuendo explained the meaning to be, that the plaintiff had fraudulently taken and applied to his own use one shilling received by him for the defendant, being the produce of the sale of some tan sold by the plaintiff for and as servant to the defendant; but the facts stated in this innuendo were not alleged by any independent averment in the declaration:—It was held, that the innuendo was bad, as introducing new facts; and that, without the innuendo, the count did not charge words actionable in themselves. (1)

DECLARATION
AND PLEAD-
INGS.

When innu-
endo bad as
introducing
new facts.

When the words are actionable in themselves, it is unnecessary to lay special damage in the declaration. But where special damage is the gist of the action, it must be stated with particularity, as if the injury consist of the loss of customers, the names of the customers should be specified. (2)

Statement of
damages.

In *Scott v. Jacob* (3) the plaintiff was allowed in an action of slander, after the cause was at issue, to amend his declaration, or file a new one, on payment of costs, although there had been a term's delay.

AMENDMENT
OF DECLAR-
ATION.

The general issue is "not guilty."

PLEADINGS.

By Reg. Gen. Hilary Term, 4 Will. 4., "in actions on the case the plea of 'not guilty' shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." "In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged." "All matters in confession and allowance shall be pleaded specially as in *assumpsit*."

GENERAL IS-
SUE.

Reg. Gen. H.
T. 4 Will. 4.

The plea of justification, on the ground of the truth of the slander, must in general confess the imputation as laid in the declaration, otherwise it will be bad on demurrer. (4)

JUSTIFICATION.

Plea of justifi-
cation should
confess the
truth of the
language.

A plea of justification, on the ground that the imputation was a privileged communication, must expressly deny malice, or state, that the communication was made honestly and *bonâ fide*, which might imply the absence of malice. (5)

If the imputation be substantially justified it is sufficient. (6)

It is no objection to the plea, that it does not justify the whole charge; if the charge be divisible, a justification of part will be good *pro tanto*. (7)

Justification of
part.

A defendant may justify the truth of words of felony spoken by him of the plaintiff after the acquittal of the plaintiff on a charge of felony. (8)

Charge of
felony.

To an action for slander of title, a plea of justification under authority of adventurers must state their names and relation to the property. (9)

Slander of title.

(1) *Day v. Robinson (in error)*, 4 N. & M. 884. 1 A. & E. 554. Where one of several counts in a declaration for slander was bad, and some of the defamatory words in it were proved at the trial, and the jury found a general verdict with damages for the plaintiff, the court set aside an order of the judge who tried the cause to confine the verdict and damages to one of the good counts, and awarded a *verdict de novo*. *Empson v. Griffin*, 11 A. & E. 186.

(2) Bull. N. P. 7. *Barnes v. Prudlin*, 1 Sid. 396. *Lowe v. Harewood*, Sir W. Jones, 196.

(3) 1 Smythe (Irish), 192.

(4) *Johns v. Gittens*, Cro. Eliz. 239.

McPherson v. Daniels, 10 B. & C. 266.

(5) *Smith v. Thomas*, 2 Bing. N. C. 372.

(6) *Edwards v. Bell*, 1 Bing. 403.

(7) *Clarkson v. Lawson*, 6 ibid. 587.

(8) *England v. Bourke*, 3 Esp. N. P. C. 80.

(9) *Howe v. Roach* and *Same v. Hoare*, 1 M. & S. 304.

DECLARATION
AND PLEAD-
INGS.Malicious
charge before a
magistrate.When plea in
bar bad.

A plea to an action for a malicious charge before a magistrate, justifying the charge on the ground, that the plaintiff had committed the offence imputed to him, is not sufficient, unless it allege, that at the time of the charge the defendant had been informed of, or knew the facts on which the charge was made. (1)

A plea in bar, which merely denies, that the plaintiff has sustained special damage, is bad, where the words are actionable in themselves. (2)

In an action of slander, where a plea stated, that the defendant, in pursuance of an agreement to that effect, did write and deliver to the plaintiff a certain letter of apology and retraction, which letter the plaintiff accepted in full satisfaction, &c.; to which it was replied, that after the delivery of the said letter the defendant did write a certain other letter of and concerning the first letter, *et sic* the defendant did not give the said letter of apology, &c. in pursuance of the said agreement, &c.: — It was held, 1st, that the plea (supposing it to be a good plea by way of accord and satisfaction) was no bar to the action, there being evidence of the defendant's intention, that the letter in question was not to be considered as a letter of apology, but merely of retraction; 2dly, that the facts stated in the plea might have been given in evidence under the general issue. (3)

Replication.

The general replication *de injuria* is sufficient, if the justification be false and unfounded (4); but if, on the other hand, it be true, the plaintiff may reply, admitting the commission of the alleged crime, if it be of a criminal nature, but stating, that before the slander he was pardoned. (5)

EVIDENCE.

11. EVIDENCE.

Words used
must be proved

In an action of slander the witnesses must prove the words used, and cannot be allowed to state the impression produced upon their minds by the whole of the conversation. (6)

Proof of collo-
quium and in-
nuendoes.

The *colloquium*, and other averments, which connect the words with the plaintiff or subject-matter must be proved. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who state their opinion and judgment as to the intention of the defendant, to apply his words or libel to the parties or circumstances as alleged. It seems to be sufficient, if the witness in the first instance state his general belief and opinion as to the defendant's meaning, without disclosing his reasons, leaving it to the defendant, if he think proper, to inquire as to the grounds and reasons which support that conclusion. The truth of an innuendo is a question of fact for the jury (7); and, in general, if the meaning of the terms be ambiguous, it is for the jury to say in what sense they were used. (8)

(1) *Delegat v. Highley*, 3 Bing. N. C. 950. 8 C. & P. 444.

(2) *Smith v. Thomas*, 2 Scott, 546. 4 Dowl. P. C. 333. 2 Bing. N. C. 372.

(3) *Eiffe v. Jacob*, 1 Jebb & Symes (Irish), 257. It seems, such a plea is open to demur as a plea of accord and satisfaction.

(4) 1 Saund. 244.

(5) *Cuddington v. Wilkins*, Sir. F. Moore, 863.

(6) *Harrison v. Bevington*, 8 C. & P. 706.

(7) *Roberts v. Cambden*, 9 East, 96. *Oldham v. Peake*, 2 W. Black. 961. Cowp. 278. *Penfold v. Westcote*, 2 N. R. 335.

(8) 2 Stark. Ev. 3d ed. 628.

Wherever a specific meaning is given to the terms of a libel or oral slander by connecting it with previous matter, the whole must be proved as being essential to the nature and identity of the charge. (1) Where the innuendo does not refer to any preceding averment, but unnecessarily introduces new matter, it may be rejected. (2)

In an action of slander, under the plea of not guilty the plaintiff must prove, the speaking of the words complained of, that they were spoken maliciously, and in the sense imputed; and if spoken and published of the plaintiff in his office, profession, or trade, that they were so spoken with reference thereto.

It may be here observed, that Reg. Gen. H. T. 4 Will. 4. appears to leave to the plea of not guilty in an action of slander, nearly the same effect that it possessed before, with the exception that, under the new rule, it is an admission of the inducement. In other respects, a justification must still be pleaded, in cases in which it was formerly necessary to plead it; and the defendant may still, under the plea of not guilty, give the like evidence as formerly to shew, that the words were not spoken in malice. (3) In short, not only the sense and application of the words, as that they related to the plaintiff, but also the malicious sense, as that they were spoken in a defamatory spirit, may still be controverted under the general issue. But any facts stated as matter of inducement, and necessary to be proved in order to render words actionable, as being spoken with reference to those facts, must now be directly denied, and will not be put in issue by the general plea of not guilty. (4)

When the material part of the words declared on is proved to a jury, the verdict must be for the plaintiff; and a nonsuit will not be entered, though on demurrer or motion in arrest of judgment it might be held, that an action could not be maintained on the words proved. (5)

The plaintiff cannot object at the trial, that the plea of justification is insufficient, as he should have demurred. The defendant is, therefore, entitled to the verdict, if the plea be proved. (6) Where there is a plea of not guilty and justifications, and the jury find for the defendant on the former, they should be discharged from finding on the special pleas. (7)

In *Black v. Holmes* (8) Chief Justice Bushe observed, "Some confusion attaches to the argument of this point, from the same expression being applicable to two things totally distinct; that expression is, *privileged communications*. In the sense belonging to this argument, it means communications *privileged from being given in evidence*; and the only question raised, is one upon the *law of evidence*, which may in many cases, as it might in this, be decided without the judge having any knowledge of, or reference to, the contents of the communication itself, and is in its nature a previous and preliminary inquiry, whether the communication, be it what it may, can be disclosed at all, and merely depending upon this fact, whether

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Proofs by plaintiff under the plea of not guilty.

When material part of the words declared on is proved, the verdict must be for the plaintiff.

Distinctions between the law of evidence and the law of slander.

Judgment of Chief Justice Bushe in *Black v. Holmes*.

(1) *May v. Brown*, 3 B. & C. 128. *Sellers v. Tull*, 4 ibid. 656. *Harvey v. French*, 4 C. & M. 11. *Williams v. Gardiner*, 1 M. & W. 245.

(2) *Roberts v. Camden*, 9 East, 99. *Day v. Robinson*, 1 A. & E. 558. *Harvey v. French*, 1 C. & M. 11. *Williams v. Gardner*, 1 M. & W. 245.

(3) *Roscoe's Law Tracts*, 49, 50.

(4) *Tidd's N. P.* 371.

(5) *Lumby v. Allday*, 1 Tyrw. 217. 1 C. & J. 301.

(6) *Smith v. Thomas*, 2 Bing. N. C. 372.

(7) *Leigh's N. P.* 1392. cit. *Robertson v. McDougall*, 4 Bing. 670.

(8) 1 Fox & Smith (Irish), 35.

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Judgment of
Chief Justice
Bushe in *Black*
v. Holmes.

the introductory evidence shews it to have been the official correspondence or intercourse of a public department in the state. But the other sense of the expression *privileged communications*, means communications *privileged from being considered as slanderous*; for instance, where the circumstances under which the words were spoken or written are such as that the utterance of them cannot be considered as a publication, or as libellous; as in the well known case of giving the character of a servant, or of preferring a charge in the regular course of proceedings, before a legitimate and competent tribunal, as in the case of *Lake v. King* (1), and several other cases since determined, some of which are collected in Serjeant Williams's notes to that case. Now, to decide the question that arises in every such case, it is necessary, that the alleged libel should be given in evidence; because upon the contents of it will mainly depend the question, whether the communication was *bond fide* and purely confidential, whether the charge preferred was *bond fide* and exclusively confined to the subject-matter, which a prosecutor, before a competent tribunal, might bring forward; or whether, under the pretence of a confidential communication, or a fair accusation, a malicious slander was conveyed. From the nature of that inquiry, the proof must be first made, and the question to be decided turns upon the *law of slander*; whereas, in the other case, the inquiry is not what the contents of the communications are, but whether it can be proved at all; and the question to be decided turns not on the *law of slander*, but the *law of evidence*. The learned judge admitted the evidence, reserving for the consideration of the court the question, whether it ought to be admitted; and afterwards left to the jury this question, 'whether, under the circumstances, the defendant had acted *bond fide*,' adding, that if he had, 'he was protected, though every word he had written was false; if not, otherwise.' Now this was exactly the proper way of leaving the case to the jury, if the question had been, whether the communication was privileged from being considered a libel, but is not *ad idem* to that previous question, whether it was privileged from being disclosed at all; if it has (as we think it has) that privilege, it is entitled to it, not from any merits or *bond fide* conduct of the defendant, but for the sake of the public, to whom it is prejudicial, that such communications should be disclosed; and, upon that ground, we think the evidence ought to have been rejected."

When the jury
ought to be directed
either to find or negative
malice in law
or malice in
fact.

In actions of slander there are two sorts of malice, one in law, the other in fact; and when they occur, the opinion of the jury should be taken upon both. (2)

In *Kine v. Sewell* (3) it appeared, that A. having undertaken to build a house for B., employed C. a carpenter to do some of the woodwork, for which A. had given an estimate. The bill sent in having exceeded the estimate, B. applied to D. to recommend him a surveyor to measure the work; upon which D. told B. that he had seen C. take away some of the quarterings; B. informed A. of it, who came to D., and asked him did he say so; to which D. answered, "yes, I saw the man employed by you take from B.'s house two long pieces of quartering; I hallooed to the man." In an action of slander, brought by C. against D. the judge left it to the jury

(1) 1 Saund. 132.

(3) 3 M. & W. 297.

(2) *Bromage v. Prosser*, 4 B. & C. 247.
1 C. & P. 475.

EVIDENCE.

to say, whether the words imputed felony; and if they thought they did, told them that still the plaintiff was not entitled to recover unless he shewed express malice, or the jury believed from the circumstances, that the defendant was actuated by malicious motives:—It was held, that the direction was right.

In an action of slander, where three witnesses were called for the plaintiff, the evidence of two of whom was quite inconsistent with the notion of a confidential communication, it was held, that it was not a misdirection in the judge to leave it to the jury to say, whether or no they believed the communication to be confidential; and that it was not necessary in such a case for him to tell them in distinct terms that, if they believed the evidence, they must find their verdict for the plaintiff. (1)

In an action of slander for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to shew, that they were not intended to convey the idea which their primary and ordinary meaning would give. (2)

In an action of slander *per quod*, it is not sufficient to prove equivalent words of slander, though explained in the same sense by the defendant himself (3); and evidence of words spoken in the second person will not support a count alleging them to have been spoken in the third person. (4) But if a letter, set out as inducement, be alleged to contain "the words and matter following," and when the letter is read in evidence it is found to contain all that is stated in the declaration and something more, this is no variance. (5)

A defendant told J. P. that certain oranges of J. P.'s would not have sold so ill, if the plaintiff had not, before the sale, propagated a report, that there were three or four cargoes of oranges then coming into market; whereupon J. P. discontinued employing the plaintiff as he had before been used; the plaintiff thereupon sued the defendant, but having alleged in his declaration that the plaintiff had caused the loss on J. P.'s oranges, by propagating the report that he (plaintiff) had three or four cargoes of oranges coming into market:—it was holden to be a fatal variance. (6)

In a count for slander, the words were, "this is my umbrella; he stole it from my back-door." The words proved were, "it is my umbrella," &c.; and it appeared that these words were not spoken in the house where the umbrella then was:—It was held, that the evidence did not support the declaration, inasmuch as the words laid imported to be spoken concerning a thing then present, and the words given in evidence were actually spoken concerning a thing not present at the time. (7)

In an action for defamation of the plaintiff's wife, the words alleged in the declaration were, "the plaintiff's wife is a great thief, and ought to have been transported seven years ago;" the words proved were, "she is a bad one, and ought to have been transported seven years ago:"—It was

Where the judge not bound to tell the jury, upon a certain state of facts, that they should find for the plaintiff.

Jury can consider the whole of a conversation, to ascertain, whether particular words are qualified.

WHAT IS A VARIANCE.

Not sufficient to prove equivalent words of slander.

Words spoken in the second person, will not support words in the third person.

Proof exceeding statement no variance.

Words laid concerning a thing present, proof of a thing not present.

Words expressing opinion.

(1) *Picton v. Jackman*, 4 C. & P. 257.

(2) *Shipley v. Tothunter*, 7 ibid. 680.

(3) *Armitage v. Dunster*, 4 Doug. 291.

(4) *Avarillo v. Rogers*, Bull. N. P. 5.
Stannard v. Harper, 5 M. & R. 295.

(5) *Bourke v. Warren*, 2 C. & P. 307.

(6) *Wood v. Adam*, 6 Bing. 481. 4 M. & P. 208. 4 C. & P. 269.

(7) *Walters v. Mace*, 2 B. & A. 756. 1 Chitt. 507.

EVIDENCE.

held, that the words proved did not support the declaration. (1) The words "she ought to have been transported," expressing only the opinion of the speaker, are not of themselves actionable, at least unless connected by an innuendo with a *colloquium* of felony. (2)

Allegation of an assertion of fact not supported by proof of the speaker's belief.

An allegation of slanderous words, accompanied with an assertion of a fact as the foundation of the words, is not supported by evidence of the words, accompanied with an assertion of the speaker's belief only of the fact (3); and a count for slanderous words spoken affirmatively is not supported by proof, that they were spoken by way of interrogatory. (4)

Allegation of words spoken affirmatively not maintained by proof of interrogatories.

Words laid as spoken in English, cannot be supported by evidence of words spoken in a foreign language. (5)

Allegation of felony not established by proof of a tortious conversion.

Where the averment was, that A., before a magistrate, maliciously charged B. with felony; but the information contained a mere charge of tortious conversion, upon which a warrant for felony was improperly founded: — the variance was held to be fatal. (6)

WHAT IS NOT A VARIANCE.

Where, in an action of slander, the whole of the words laid in any one count constitute the slanderous charge, the whole must be proved; but, where there are distinct slanderous allegations in any count, proof of any of them is sufficient. (7)

The allegation only partially proven.

It is sufficient to prove part only of a sentence laid in a count in slander, if that part be of itself intelligible and actionable, and that the remainder be not a qualification of the part proved. (8)

Proof of part of a sentence.

"Ware hawk there, mind what you are about," will sustain a declaration alleging the words spoken to have been "ware hawk, you must take care of yourself there; mind what you are about." (9)

"I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while," will be supported by proof, "he has worked for me some time, and has been continually robbing me." (10) "You stole one of my sheep," will be maintained by evidence, "you stole my sheep and killed it." (11)

Where the plaintiff declared, that he had been a woolstapler at Cirencester, and was a brewer at Oxford, and that the defendant spoke of him as such trader these words: — "Mr. H. (the plaintiff) and B. have both been bankrupts, Mr. H. at Cirencester," and gave no evidence of his having been a woolstapler, but only that he was a brewer at Oxford, and proved the words spoken to have been these, "he was a bankrupt at Cirencester, &c.": — It was held, that this proof sustained the allegation, that the words were spoken of him in his trade of a brewer, for a trader at Oxford may be a bankrupt at Cirencester. (12)

In slander, the declaration alleged, that the plaintiff at the time of speaking, &c. was of two trades, and that the defendant, intending to injure him in his several trades as aforesaid, and to prevent persons from employing him

(1) *Hancock v. Winter*, 2 Marsh. 502. 7 Taunt. 205.

(2) *Ibid.*

(3) *Cook v. Stokes*, 1 M. & Rob. 237.

(4) *Barnes v. Holloway*, 8 T. R. 150.

(5) *Zenobio v. Axtell*, 6 *ibid.* 162., *sed vide post*, 2581. *Jenkins v. Phillips*.

(6) *Tempest v. Chambers*, 1 Stark. 67.

(7) *Flower v. Pedley*, 2 Esp. N. P. C.

491. *Compagnon v. Martin*, 2 W. Black. 790. *Tindal v. Moore*, 2 Wils. 114.

(8) *Orpwood v. Barker*, 4 Bing. 261. S. C. *nom. Orpwood v. Parkes*, 12 Moore, 492.

(9) *Ibid.*

(10) *Dancaster v. Hewson*, 2 M. & R. 176.

(11) *Robinson v. Willis*, 2 Stark. 194.

(12) *Hall v. Smith*, 1 M. & S. 287.

in the way of his said several trades, in a certain discourse which he had of and concerning the plaintiff in one of his trades spoke, &c.: — It was held, that though the plaintiff failed to prove he was of both trades, yet he might recover upon proof that he was of that trade concerning which, the defendant was charged to have spoken the words. (1)

Where a plaintiff, having proved the words laid in the declaration, offered evidence of other actionable words spoken by the defendant afterwards: — It was held, that although special damage not laid in the declaration cannot be given in evidence, yet evidence may be given of any words, as well as of any act of the defendant, to shew the *quo animo* he spoke the words, which are the subject of the action. But the judge should direct the jury to give damages only for the words, which are the subject of the action. (2)

In an action for slander, the plaintiff may give evidence of any thing that the defendant afterwards said, that goes to shew malice in the defendant, provided that it cannot be the subject of another action; therefore, the plaintiff may give evidence, that the defendant repeated the same words at a subsequent time, or spoke on the subject of this action, but cannot go into evidence of other words subsequently spoken, if those words can be made the subject of another action. (3)

On the trial of an action for slander, the plaintiff may go into evidence to shew, that he had recovered in a previous action for slander against the defendant's son, and that after the trial of that action he sent to the defendant's attorney to compromise the present action. (4)

In slander, where the words proved are unambiguous, evidence of subsequent words of the same import is admissible, and previous slander, for which damages have been recovered, may likewise be given in evidence. (5)

Words spoken at different times may be given in evidence on one count. (6)

In an action for slander, a writ of inquiry issued in a former suit against the defendant for speaking similar slanderous words, may be received in evidence to prove malice. (7) And in an action for words imputing perjury, to shew the *quo animo*, the plaintiff may give in evidence an indictment subsequently preferred by the defendant against him, and which was ignored. (8)

In an action for words spoken to A. concerning the plaintiff, evidence of words (not in themselves actionable) spoken to B. may be received to shew the malice of the defendant. (9)

In an action of slander for words spoken of the plaintiff as a physician, importing a denial, that the plaintiff is duly qualified to practise as a physician, the plaintiff must, under the general issue, prove the inducement in the declaration, alleging that the plaintiff had exercised the profession of and was a physician, and shew not only, that he practised as a physician, but also that he practised lawfully. (10)

Where slanderous words imputed the prescribing of medicines in im-

EVIDENCE.

MALICE OF THE DEFENDANT.

Evidence to shew the *quo animo* of the defendant.

Evidence may be given of any thing defendant afterwards said, to prove malice.

Words spoken at different times.

Writ of inquiry issued in a former suit for slander.

Indictment preferred by defendant against plaintiff.

Evidence of words spoken to third parties. Physician must shew he is authorised to practise.

Medical books.

(1) *Figgins v. Cogswell*, 3 M. & S. 369.

(2) *Rustell v. Macquister*, 1 Camp. 49. n.

(3) *Defries v. Davis*, 7 C. & P. 112.

(4) *Ibid.*

(5) *Symmons v. Blake*, 1 M. & Rob. 477.

Peares v. Ormsby, *ibid.* 455.

(6) *Charlter v. Barret*, Peake's N.P.C. 32.

(7) *Jackson v. Adams*, 1 Hodges, 78.

(8) *Tate v. Humphrey*, 2 Camp. 73. n.

(9) *Mead v. Daubigny*, Peake's N. P. C.

168.

(10) *Collins v. Carnegie*, 3 N. & M. 703.

1 A. & E. 695., vide *Smith v. Taylor*, 1

N. R. 196.

EVIDENCE.

proper doses, and the defendant justified:—It was held, that medical books, which were stated by medical witnesses to be works of medical authority, could not be put in to shew, that such doses were sanctioned, but that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books, as a part of their general knowledge. (1)

In an action for words imputing dishonesty and bad conduct to a servant by which she had lost a place, evidence of antecedent good conduct is admissible. (2)

General evidence of good and bad character.

In *Jones v. Stevens* (3) it was holden, that general evidence of the plaintiff's bad character and ill repute in his business as a practising attorney could not be admitted either to contradict an allegation in the declaration, that he, during &c., exercised and carried on the business of an attorney with great credit and reputation, with a view to mitigating damages on the general issue; nor in support of averments in the defendant's pleas, pleaded by way of justification, that the plaintiff was a disreputable professor and practitioner in the law:—but such evidence has been since admitted. (4)

When evidence of good character not admissible.

In an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue, and also a plea of justification of the slander, averring that the charge of felony was true:—It was held, that evidence of general good character was not admissible for the plaintiff. (5)

Public reports.

In an action of slander, imputing a specific charge of unnatural practices to the plaintiff, where the declaration contains the usual allegation of good fame, &c., the defendant may upon cross-examination ask the plaintiff's witness whether he had not heard reports in the neighbourhood, that the plaintiff had been guilty of similar practices, in order to diminish the damages. (6)

Where one of the defendants in a cause informed a third person of the partnership of the defendants, reports of such information by that person are admissible in evidence though not made to the plaintiff, or in the presence of the defendant. (7)

SPECIAL DAMAGE.

Evidence of special damage cannot be given unless expressly allowed.

Where the words are actionable in themselves, it is not requisite on the execution of a writ of inquiry to give evidence of damage (8); but if special damage be the gist of the action, though the words are in themselves actionable, yet the plaintiff cannot give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration. (9)

It seems that the special damage should be the legal and natural result of the slander, and not the tortious act of a third party. (10)

The plaintiff can only give evidence of the persons who heard the slander from the defendant.

In an action of slander, in shewing special damage, must confine his proof to the evidence of persons who received the slanderous statements from the defendant himself. (11)

Where the plaintiff alleged special damage from words spoken by the

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| (1) <i>Collier v. Simpson</i> , 5 C. & P. 73. | (6) — <i>v. Moor</i> , 1 M. & S. 284. |
| (2) <i>King v. Waring</i> , 5 Esp. N. P. C. 14. | (7) <i>Shott v. Streatfield</i> , 1 M. & Rob. 8. |
| (3) 11 Price, 235. | (8) <i>Tripp v. Thomas</i> , 3 B. & C. 437. |
| (4) Roscoe's Ev. 398. <i>Mawby v. Barber</i> , | (9) <i>Gears v. Britton</i> , Bull. N. P. 7. |
| 2 Stark. Ev. 3d ed. 642. <i>Moore v. Oastler</i> , | (10) <i>Vicars v. Wilcocks</i> , 8 East, 1. <i>Ward</i> |
| York Spring Assizes, 1836. <i>Hardy v. Alexander</i> , Liverpool Summer Assizes, 1837. | <i>Weeks</i> , 7 Bing. 215., sed vide <i>Green v. Button</i> , 2 C. M. & R. 713. |
| (5) <i>Cornwall v. Richardson</i> , R. & M. 305. | (11) <i>Rutherford v. Evans (Clerk)</i> , 4 M. & P. 163. 6 Bing. 451. 4 C. & P. 74. |
| <i>Stuart v. Lovell</i> , 2 Stark. 93. | |

EVIDENCE.

defendant, it was held, that this allegation could not be supported by proof, that the defendant had spoken the words to B., and that damage ensued in consequence of B.'s repeating them as the words of the defendant. (1)

An allegation in a declaration for slander, which states, that, "by reason of the premises, divers persons, to wit," &c., "who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do," is not supported by evidence which shews, that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation. (2)

In an action for slanderous words, charging a baker with using adulterated flour, if the declaration allege a special damage that several persons (naming them) discontinued to take his bread, the person of whom they used to buy it, cannot be asked what reason they gave for ceasing to take it any longer; but the persons themselves must be called to prove their motives. (3)

If A. sell goods to B., but will not deliver them without payment, and it be alleged in a declaration for words by B. against C. that this non delivery was special damage resulting from words spoken by C. to A., the counsel of C. may ask A. on the trial of the action for words, whether he did not refuse to deliver the goods from what other persons said of B., and what those persons did say. (4)

In an action by B. against C. for slander uttered by C. to A., A. is a competent witness.

The jury are not bound to confine the damages to those sustained between the publication and the action. (5)

The defendant under the general issue may give in evidence any matter which tends to disprove either the speaking of the words, or the publication of the libel, or to bar the action, or rebut the evidence of malice, or of special damage. (6)

MITIGATION OF DAMAGES.

In an action of slander, the truth of the defamatory matter cannot be given in evidence under the plea of not guilty, even in mitigation of damages, but must be pleaded specially (7), in order that the plaintiff may come prepared to defend himself, as well as to prove the speaking of the words or the publication of the libel complained of; and this rule extends to all cases, whether the words or libel do or do not import a charge of felony. (8)

When truth of defamatory matter can or cannot be given in evidence under the plea of not guilty.

In an action for slander of title, the truth of the words or libel complained of, may be given in evidence under the plea of not guilty to disprove malice (9); and although in an action for slander of the person, the defendant is not allowed to give in evidence the truth of the defamatory matter without a special plea of justification, yet he may prove on the plea, of not guilty in mitigation of damages, such facts and circumstances, as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff. (10)

(1) *Ward v. Weeks*, 7 Bing. 211. 4 M. & P. 796.

(2) *Sterry v. Foreman*, 2 C. & P. 592.

(3) *Tilk v. Parsons*, *ibid.* 201., vide *etiam Hartley v. Herring*, 8 T. R. 130. *Ashley v. Harrison*, 1 Esp. N. P. C. 48. *Delegall v. Hingley*, 8 C. & P. 444.

(4) *King v. Watts*, 8 C. & P. 614.

(5) *Ingram v. Lawson*, 9 *ibid.* 326. 6 Bing. N. C. 212.

(6) 2 Stark. Ev. 3d ed. 638.

(7) *Smith v. Richardson*, Willes, 20. Barnes, 195. Com. 551. *Underwood v. Parks*, Str. 1200.

(8) *Ibid.* As to the effect of not guilty under the new rules, vide *ante*, 2571. tit. PLEADINGS.

(9) *Manning v. Clement*, 7 Bing. 362. *Watson v. Reynolds*, M. & M. 1. *Smith v. Spooner*, 3 Taunt. 246. *Robertson v. McDougall*, 4 Bing. 670. *Malachy v. Soper*, 3 Bing. N. C. 371.

(10) — *v. Moor*, 1 M. & S. 284. *Wyatt v. Gore*, Holt's N. P. C. 306, 307. *Sims v. Kinder*, 1 C. & P. 279. *Jones v. Stevens*, 11 Price, 235. *Smith v. Richardson*, Willes,

EVIDENCE.

Words given in evidence by plaintiff, but not mentioned in the declaration.

Where words were given in evidence by the plaintiff, in order to prove a malicious intent by the defendant, which were not stated in the declaration, it was held, that the defendant might prove the truth of such words. (1)

Matter which cannot be pleaded in justification, such as the proceedings at a coroner's inquest, may be given in evidence in mitigation of damages. (2)

Privileged communications.

Privileged communications may be given in evidence under the general issue. (3)

Where the words are *prima facie* actionable, on which the law infers malice, but there are, in fact, circumstances attending the publication which rebut the inference of law, evidence of such circumstances will constitute a good defence under the general issue. (4)

Communications by a third person.

The defendant cannot, in mitigation of damages, give in evidence under the general issue, that the specific facts in which the slander consists, and for which the action was brought, were communicated by him by a third person. (5)

Waiver of action.

In an action for words imputing a crime, an agreement on the part of the plaintiff to waive his action for words spoken, in consideration that the defendant will destroy certain documents in his possession, or which might afterwards come into his possession, imputing the same crime to the plaintiff, is (when executed by the burning of the papers in his possession) a bar to the action, and may be given in evidence under the general issue. (6)

On the trial of an action for slander, the plaintiff may go into evidence to shew, that he had recovered in a previous action against the defendant's son, and that after the trial of that action he sent to the defendant's attorney to compromise the present action. (7)

No defence, that the words were spoken carelessly.

It seems to be no defence, that the words were spoken carelessly, wantonly, or in jest. (8)

LIMITATION OF ACTION — RULE TO INSPECT AN ALLEGED SLANDEROUS LETTER — NEW TRIAL — AMENDMENT OF RECORD UNDER STAT. 3 & 4 WILL. 4. c. 42. s. 24. — DAMAGES — PAYMENT OF MONEY INTO COURT — COSTS.

12. LIMITATION OF ACTION — RULE TO INSPECT AN ALLEGED SLANDEROUS LETTER — NEW TRIAL — AMENDMENT OF RECORD UNDER STAT. 3 & 4 WILL. 4. c. 42. s. 24. — DAMAGES — PAYMENT OF MONEY INTO COURT — COSTS.

The Statute of Limitations (9) may be pleaded in bar, which enacts, that actions on the case for words must be commenced within two years

(1) *Warne v. Shadwell*, 2 Stark. 457.

(2) *East v. Chapman*, M. & M. 46. 2 C. & P. 571.

(3) *Lillie (Sir John) v. Price*, 5 A. & E. 645. *Stockdale v. Hansard*, 7 C. & P. 731.

(4) *Fairman v. Ives*, 5 B. & A. 644. *Pattison v. Jones*, 8 B. & C. 578. *Blake v. Filford*, 1 M. & Rob. 198. *Rex v. Creevey*, 1 M. & S. 273.

(5) *Mills v. Spencer*, Holt's N. P. C. 533.

(6) *Lane v. Applegate*, 1 Stark. 97.

(7) *Defries v. Davis*, 7 C. & P. 112. In *Talbutt v. Clark* (2 M. & Rob. 312.) it was holden in an action against the editors of a newspaper for libel, that the fact of the libel

being published on the communication of a correspondent, was not admissible in mitigation of damages; Lord Denman observing "The evidence certainly does not go to prove any of the issues; and I do not think it admissible. The justification depends upon the facts, not on the statement of them by a third party. I know that in a case in the Common Pleas it has been held, that a previous statement in another newspaper is admissible; but even that decision has been very much questioned."

(8) Hawk. P. C. b. i. c. 28. s. 14. Roecoe's Ev. 395.

(9) 21 Jac. 1. c. 16. s. 3.

after the words have been spoken, with the usual exception of infants, feme covert, &c.

In an action of slander, imputing to the plaintiff, that he was the writer of a scandalous letter reflecting on the defendant, the latter in one of his pleas set forth the letter, and justified the words spoken. The court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to shew, that it was not in his handwriting. (1)

In an action for slander after a verdict for the plaintiff, with 100*l.* damages, the court refused to allow the defendant to have a new trial, and to be allowed to plead the truth of the words upon any terms, though it was alleged, that there was ample evidence to support a justification, and the general issue only was pleaded through the mistake of the pleader, which was not discovered till the day before the trial by the counsel, when an application had been made for leave to add a justification; but the defendant did not swear, that he had never used the words, and one of the witnesses had pointed out the want of a special plea a considerable time previously. (2)

Where a verdict has been found with damages in an action of defamation for words imputing felony, the court will not stay the proceedings or grant a new trial, on the ground that, since the trial, the plaintiff has been convicted and attainted of the same felony, *a fortiori* where the defendant has been examined as a witness upon the trial of the indictment. (3)

Where the declaration alleged, that the defendant had spoken the following words of the defendant:—"Smith has got himself into trouble; he is out on bail for 100*l.*, and is to be tried at the Old Bailey next Monday for buying cocks which have been stolen from Messrs. Pontifex and Co. by one of their apprentices, &c.;" and at the trial the evidence was, that the defendant had said, that "he had heard that Smith had got into trouble," &c.:—It was held, that the record was amendable under stat. 3 & 4 Will. 4. c. 42. s. 24 (4); Mr. Justice Maule observing, "The merits of the case are important of consideration, and in this instance the merits were, whether the defendant had done an injury to the plaintiff by using some words imputing to him a felony. If we were to say, that every thing is material to the merits, which may vary the amount of damages, and may so prejudice the opposite party, we should exclude the power of amendment in almost every supposable case; but the judge should take into consideration, not merely what appears on the record, but the facts and circumstances and the conduct of the parties as they appear at the trial. In doing so in this case, one cannot doubt at all, that the defendant meant to say, that he had not used any words imputing these things that the plaintiff complains of."

Where the declaration stated the alleged slanderous words in the English language, but which were proved to have been uttered in the Welch language, the trial was postponed, and the declaration was amended, upon the plaintiff paying the costs of the day. (5)

Where on the execution of a writ of inquiry in an action for slander, the

LIMITATION OF ACTION, &c.

RULE TO INSPECT AN ALLEGED SLANDEROUS LETTER.

NEW TRIAL.

A new trial will not be granted to allow defendant to plead the truth of the words.

When plaintiff has been convicted of the felony for which he had been accused by a defendant in a former action of slander.

AMENDMENT OF RECORD UNDER STAT. 3 & 4 WILL. 4. c. 42. s. 24.

Judgment of Mr. Justice Maule in *Smith v. Knowelden*.

DAMAGES.

(1) *Curtis v. Curtis*, 3 M. & Sc. 819.

(4) *Smith v. Knowelden*, 9 Dowl. P. C.

(2) *Kirby v. Simpson*, 3 Dowl. P. C. 791. 402.

(3) *Symons v. Blake*, 2 C. M. & R. 416.

(5) *Jenkins v. Phillips*, 9 C. & P. 766.

4 Dowl. P. C. 263. 1 Gale, 182.

**LIMITATION OF
ACTION, &c.**

jury are incorrectly informed by the under-sheriff, that any amount of damages will carry costs, and they find for less than 40s., that is no ground for a new writ of inquiry, or for increasing the amount of the verdict. (1)

No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action. (2)

And where a judgment had in fact been given for the plaintiff to recover damages so assessed, a *venire de novo* was awarded. (3)

Where there were two counts in slander, and entire damages, judgment was arrested, because the words in the latter count were not actionable. (4)

**PAYMENT OF
MONEY INTO
COURT.**

COSTS.

Stat. 3 & 4
Vict. c. 24.

Under stat. 3 & 4 Will. 4. c. 42. s. 21. money cannot be paid into court in an action of slander.

By stat. 3 & 4 Vict. c. 24. if, in any action of trespass on the case, the plaintiff recover less damages than 40s., he will not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever. (5)

Stat. 21 Jac. 1.
c. 16. s. 6.

It may perhaps be stated, that by stat. 21 Jac. 1. c. 16. s. 6. it was enacted, that "in all actions upon the case for slanderous words (6), if the jury upon the trial of the issue, or the jury that shall inquire of the damages, assess the damages under 40s., then the plaintiff shall recover only so much costs as the damages so assessed amount unto."

It has been held under this statute, that, when the damages were under 40s., the plaintiff could not have more costs taxed than the damages, notwithstanding the defendant had justified (7); that, if some of the counts in the declaration were for words that were actionable (8), and others for words not actionable, and special damages laid referring to all the counts, and that there was a general verdict for the plaintiff, he was entitled to full costs, though he recovered less than 40s. damages. (9)

Stat. 58 Geo. 3.
c. 30. s. 2.

By stat. 58 Geo. 3. c. 30. s. 2. it was enacted, that in all actions or suits for slanderous words, in courts not holding pleas to the amount of 40s., if the jury assess the damages under 30s., the plaintiff shall recover costs only to the amount of the damages.

When defendant can sign judgment as for want of a plea for non payment of costs.

If after notice of declaration in an action of slander, the defendant sign a paper containing an apology, and a statement, that at his request the plaintiff has consented, on his paying the costs as between attorney and client, and making such apology, to stay the proceedings thereon, and notice of trial is accordingly countermanded, the court will require the defendant to pay such costs, and empower the defendant to sign judgment as for want of a plea in case of non payment thereof. (10)

(1) *Grater v. Collard*, 6 Dowl. P. C. 503. *Meare v. Griffin*, 1 M. & G. 796.

(2) *Day v. Robinson (in error)*, 4 N. & M. 884. 1 A. & E. 554.

(3) *Ibid.*

(4) *Onslow v. Horne (Clerk)*, 3 Wils. 177. 2 W. Black. 750.

(5) *Vide* stat. 3 & 4 Vict. c. 24., *ante*, 228.

(6) *Lowe v. Harewood*, Sir W. Jones, 196. *Topsall v. Edwards*, Cro. Car. 163.

Blizard v. Barnes, *ibid.* 307. *Collier v. Gollard*, 2 W. Black. 1062.

(7) *Halford v. Smith*, 4 East, 567., & *vide Bartlet v. Robbins*, 2 Wils. 258.

(8) *Savile v. Jardine*, 2 Hen. Black. 531.

(9) *Ibid.*, *vide etiam Kelly v. Partington*, 4 B. & Ad. 700. 2 N. & M. 460.

(10) *Yardrew v. Brook*, 2 N. & M. 835. S. C. nom. *Tardrew v. Brook*, 5 B. & Ad. 890.

STOPPAGE IN TRANSITU.

1. DEFINED, p. 2583.

2. BY WHOM THE RIGHT OF STOPPAGE, &C. CAN OR CANNOT BE EXERCISED, pp. 2584—2586.

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3. WHERE RIGHT OF STOPPAGE, &C. EXISTS, pp. 2586—2593.

WHERE ANY ACT REMAINS TO BE PERFORMED BY THE VENDOR — Goods not sorted or weighed — Judgment of Lord Denman in Swanwick v. Sothorn — Where a mere claim has only been made by the consignee, without an actual transfer — Transitu not terminated during the performance of quarantine — When goods continue in the queen's warehouses for the duties — Judgment of Lord Kenyon in Northey v. Field — Judgment of Mr. Baron Alderson in James v. Griffin — Judgment of Chief Justice Tindal in Jackson v. Nichol — Wharfinger considered as a middle man — WHERE ANY ACT IS TO BE DONE BY THE VENDEE — Conditional delivery to a third party — Part payment of goods by consignee — Payment by bills of exchange — Judgment of Mr. Baron Parke in Edwards v. Brewer — Unsettled accounts — Assignment of bill of lading — MODE IN WHICH STOPPAGE, &C. CAN BE MADE.

4. WHERE RIGHT OF STOPPAGE, &C. DOES NOT EXIST, pp. 2593—2598.

Where a special agreement exists to deliver up the property — Delivery on board a vessel chartered by the vendee — Goods delivered according to the bill of lading — Judgment of Lord Kenyon in Richardson v. Goes — Goods in the place of ultimate delivery — Judgment of Lord Lyndhurst in Allan v. Gripper — Part delivery of one entire consignment — Warehouseman agent for both parties — Judgment of Lord Ellenborough in Harman v. Anderson — Payment of warehouse rent — Consignee exercising acts of ownership by opening, examining, and partly selling the goods — Consignee marking the property with his initials.

5. EVIDENCE, p. 2598.

1. DEFINED.

The right of the vendor to stop goods *in transitu* is a kind of equitable DEFINED.
lien adopted by the law, for the purposes of substantial justice, and not proceeding upon the ground of rescinding the contract; and this right continues until the goods have reached either the actual or constructive possession of the consignee, for then he and all who claim under him acquire a complete dominion over them. (1)

(1) *Oppenheim v. Russel*, 3 B. & P. 44. *Loy*, 7 *ibid.* 440. *Feiss v. Wray*, 9 East, 99. *Ellis v. Hunt*, 3 T. R. 464. *Hodgson v. Wiseman v. Vandepatt*, 2 Vern. 203.

BY WHOM THE
RIGHT OF
STOPPAGE, &c.
CAN OR CAN-
NOT BE EXER-
CISED.

Relation of
vendor and
vendee must
exist.

2. BY WHOM THE RIGHT OF STOPPAGE, &c. CAN OR CANNOT BE EXERCISED.

The right of stoppage *in transitu* only exists in contracts for the sale or exchange of personal property, where, though the contract is complete, yet something, however trifling, remains to be done by the seller to complete the delivery to the vendee, and vest in him an absolute property in the goods. The relation of vendor and vendee seems essential to its exercise; but it extends to every case in which the contract is in effect a sale, and the consignor substantially the vendor of the goods. It extends also to contracts of exchange, as to an agreement between consignor and consignee, that the latter shall return another commodity of equal value in payment, and the fulfilment of which engagement is rendered hazardous by his insolvency. No agreement made between the consignee and his assignee, whether direct or implied, can defeat or affect the right of stoppage *in transitu* by the consignor. It is a power tacitly reserved out of the former controul which the consignor had over his property at the time of delivering it to the carrier, and therefore paramount to any agreement between the carrier and the consignee, in respect of any duty, or right of lien, which may arise upon those or other goods; so that, if the consignor would exert this privilege and reclaim the goods, he is only subject to such lien or duty as may have arisen in consideration of that particular bailment, for the labour and diligence bestowed on the goods about which it was employed. (1)

Consignee
must become
bankrupt or
insolvent.

It is necessary, that the consignee should become bankrupt or insolvent for the vendor to exercise this right. (2) If goods be sent by order of the consignee, on his account and at his risk, and the consignor draw bills of exchange on him for the price, and indorses and transmits the bills of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment as the condition of delivery, the consignee being willing to accept the bills, and not having failed in his circumstances. (3)

Carrier cannot
deny the title
of the con-
signor.

When the consignor asserts his right, and demands the goods of the carrier, the latter cannot question the title of a person from whom he received them, nor be permitted to prove the property in another party, so as to oust the consignor of this right. (4)

Right of ven-
dor paramount
to any lien
against pur-
chaser.

It seems, that the right of a vendor to stop *in transitu* is paramount to any lien against the purchaser. (5)

A right of stoppage *in transitu* is not divested by a foreign attachment at the suit of a creditor of the vendee. (6)

Unpaid goods
remaining rent
free in the
vendor's ware-
house, after a

The unpaid vendor of goods remaining in his own warehouse rent free may, as between him and the vendee, stop *in transitu*, although he has given the vendee a delivery order, under which part of the goods have been removed: thus, in *Townley v. Crump* (7) Lord Denman observed, "There

(1) *Oppenheim v. Russell*, 3 B. & P. 49.

(3) *Bohling v. Inglis*, 3 East, 381.

(4) *Dick v. Lumsden*, Peake's N. P. C. 250.

(5) *Morley v. Hay*, 3 M. & R. 396.

(6) *Oppenheim v. Russell*, 3 B. & P. 42.

Smith v. Goss, 1 Camp. 282.

(7) 4 A. & E. 63. 5 N. & M. 606. 1 H. & W. 564.

was a total failure of proof, that where a vendor, who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates by reason of this custom, to prevent a lien from attaching; and I think it is not contended, that there is any general usage which could divest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the original vendor and vendee. As to reputed ownership, it is quite clear that the twenty-second section of stat. 6 Geo. 4. c. 16. would not apply, for it refers to cases where the bankrupt shall 'by the consent and permission of the true owner' have goods in his possession. Here the bankrupt, if he had possession, was himself the true owner under the contract of sale. There will therefore be no rule."

BY WHOM THE RIGHT OF STOPPAGE, &c. CAN OR CANNOT BE EXERCISED.

delivery order from vendor.

Judgment of Lord Denman in *Townley v. Crump*.

A trading license from the crown to British merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalising the purchase by the subject, legalises the sale by the enemy, and impliedly legalises the vendor-enemy's right to stop the goods *in transitu* after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only (which was offered to be refunded), and also to employ an agent here for that purpose; and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover. (1)

Effect of trading license from the crown.

If a trader here give an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit, without naming the trader here, and ships to him at the original price, charging only his commission; the correspondent abroad is so far a vendor as between him and the trader here, that on the bankruptcy of the latter he may stop the goods *in transitu*, by procuring the bill of lading from the bankrupt's brother; notwithstanding the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances, provable under his commission, amounting at most to part payment for the goods, which does not take away the vendor's right to stop *in transitu*. (2)

Correspondent abroad.

An agent expressly authorised for the purpose, or a general agent not particularly authorised, if the act of the latter be afterwards recognised and confirmed by his principal, may effectually stop goods *in transitu*, and he may do it in the same manner as his principal might. (3) But the party must in some degree be an agent of the vendor at the time of his staying the goods; for a mere stranger's stopping the goods, without any degree of authority from the vendor so to do, will not be a legal stoppage, though he subsequently give his assent to such act. (4)

Accredited agent.

Where goods are furnished to the agent of a bankrupt on the agent's credit, he may, to protect himself, stop them *in transitu*, and give them a new direction adverse to his principal; but if he give them a fresh destination, in furtherance of the usual course of business of the principal, they pass to the assignees as in the order and disposition of the bankrupt. (5)

Goods furnished to the agent of a bankrupt on the agent's credit.

(1) *Fenton v. Pearson*, 15 East, 419.

v. Mason, 2 T. R. 63. *Feise v. Wray*, 3 East, 93. 14 Petersdorff's Abr. 746.

(2) *Feise v. Wray*, 3 ibid. 93.

(4) *Siffken v. Wray*, 6 East, 371.

(3) *Hoist v. Pownal*, 1 Esp. N. P. C. 240. *Mills v. Ball*, 2 B. & P. 457. *Lickbarrow*

(5) *Hawkes v. Dunn*, 1 Tyrw. 413. 1 C. & J. 519. 1 Price's P. C. 24.

BY WHOM THE
RIGHT OF
STOPPAGE, &c.
CAN OR CAN-
NOT BE EXER-
CISED.

Court of equity
cannot stop
goods in *transitu*.

Surety for the
price of goods.

It seems, that a court of equity has not jurisdiction in any case to stop goods in *transitu*. (1)

A surety for the price of goods cannot exercise the right of stopping goods in *transitu*: thus, in *Siffken v. Wray* (2) it appeared, that B, a trader in London, ordered goods to be shipped to him by D. and Co., his correspondents at Dantzic, who were to draw for the amount on F. at Hamburg (who had agreed to accept the bills upon receiving commission on the amount), and the bills of lading and invoices were to be transmitted by D. and Co. from Dantzic to F. at Hamburg, who was to forward them to B. in London; and F. accordingly accepted the bills of exchange drawn upon him; and, on the receipt of the bills of lading, transmitted the same (which were made out to the order of the shippers and not indorsed) to B. in London, who received them, together with the invoices and letter of advice, five days after an act of bankruptcy committed by him. F. also became bankrupt, and the bills of exchange drawn on him by D. and Co. were obliged to be taken up and paid by themselves: — Held, 1st, that F. had no right to stop the goods in *transitu*, being no more than a surety for the price, and not vendor or consignor; 2dly, that one who was general agent of F. in London, having obtained the bills of lading from the bankrupt after his bankruptcy, upon an agreement, when the goods arrived, to dispose of them, and to apply the net proceeds to the discharge of such bills as had been drawn against the goods, had no authority to retain the proceeds against the assignees of B. the bankrupt, either in respect of F., or in respect of a stopping in *transitu* on behalf of D. and Co., the shippers, who, after his possession of them, and after trover commenced by B.'s assignees for the value, sent a letter to him, approving of his having obtained possession of the bills of lading and the goods—for at any rate there was no adverse stopping in *transitu*, but the goods were obtained by agreement with the vendee after his bankruptcy, even if the defendant could be considered as agent for the shippers at the time by relation.

WHERE RIGHT
OF STOPPAGE,
&c. EXISTS.

WHERE ANY
ACT REMAINS
TO BE PER-
FORMED BY
THE VENDOR.

Goods not sort-
ed or weighed.

3. WHERE RIGHT OF STOPPAGE, &c. EXISTS.

If any act remain to be performed by the vendor, in order to vest the absolute property and disposition of the goods in the vendee, the right of stoppage in *transitu* exists.

If the subject of the sale be in a mass with other matter not sold, as if it be part of a liquid contained in a vessel, no delivery short of the actual separation will defeat the right of the vendor. (3) So, if goods in a mass previous to delivery are to be sorted, numbered, and weighed, the delivery of part from the mass will not divest the right of stopping the remainder (4), notwithstanding an order to deliver had been given to the wharfingers, and entered in their books. (5)

(1) *Goodhart v. Lowe*, 2 J. & W. 349.

(2) 6 East, 371.

(3) *Withers v. Lys*, Holt's N. P. C. 22.
Wallace v. Breeds, 13 East, 525.

(4) *Hanson v. Meyer*, 6 East, 614.

(5) *Inherwood v. Oldknow*, 3 M. & S. 397.

Withers v. Lys, Holt's N. P. C. 18. *Bush v. Davis*, 2 M. & S. 397. *White v. Wills*, 5 Taunt. 177.

The foregoing cases were recognised in *Swanwick v. Sothorn* (1), when Lord Denman observed, "The cases on this subject establish the principle, that, wherever any thing remains to be done by the seller, which is essential to the completion of the contract, a symbolical delivery by transfer in the wharfinger's books will not defeat the right of stoppage *in transitu* as between buyer and seller. *Hanson v. Meyer* (2), *Shepley v. Davis* (3), *Bush v. Davis* (4) abundantly shew this. Therefore, if part of a bulk be sold, so that weighing or separation is necessary to determine the identity or individuality (as Lord Ellenborough expresses it in *Bush v. Davis* (5)) of the article, or if the whole of a commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing or measuring must precede the delivery, and the symbolical delivery without such weighing will not be sufficient. But where the identity of the goods and the quantity are known, the weighing can only be for the satisfaction of the buyer, as was held in *Hammond v. Anderson* (6), and in such case the transfer in the books of the wharfinger is sufficient."

WHERE RIGHT
OF STOPPAGE,
&c. EXISTS.

Judgment of
Lord Denman
in *Swanwick*,
v. *Sothorn*.

Where a mere claim of the goods has been made by the consignee, without any actual transfer made, or possession given, it is not sufficient to defeat the consignor's right to stop the goods; nor where the goods happen to be in a stage of their transit under the direction of the consignee, and cannot be considered as having reached their final destination: thus, in *Holt v. Pownall* (7) the question was, Whether the voyage was complete at the time of the consignee having first obtained possession of the goods, she being then performing quarantine? — It was held by Lord Kenyon, "that she was to be considered *in transitu*, the voyage not being complete until she had performed quarantine; and as the plaintiff's agents had given notice, and claimed the cargo before the completion of the voyage, he was of opinion, that the plaintiff had stopped the goods time enough to prevent the property from vesting in the assignees." (8)

Where a mere
claim has only
been made by
the consignee,
without an ac-
tual transfer.

Transitus not
terminated
during the per-
formance of
quarantine.

It may be here observed, that this decision is seemingly at variance with *Foster v. Frampton* (9), where it appeared, that goods were ordered from the defendant in London by a person in Birmingham, and on their arrival at the warehouse of the carrier in Birmingham the purchaser removed part to his own premises, and took samples of the rest, desiring they might remain in the warehouse till further directions: — Upon which it was held, that the transitus was determined, Mr. Justice Bayley observing, "It seems to me, that in this case the transitus was at an end. When a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business, for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end."

Judgment of
Mr. Justice
Bayley in *Fos-
ter v. Frampton*.

Neither is the transit complete where the goods continue in the king's warehouses, for they are to be considered as still in the possession and sub-

When goods
continue in the

(1) 9 A. & E. 900.

(2) 6 East, 614.

(3) 5 Taunt. 617.

(4) 2 M. & S. 397.

(5) Ibid.

(6) 1 N. R. 69.

(7) 1 Esp. N. P. C. 240.

(8) See vide *Mills v. Ball*, 2 B. & P. 461.
Oppenheim v. Russel 3 ibid 54.

(9) 6 B. & C. 107.

WHERE RIGHT
OF STOPPAGE,
&C. EXISTS.

queen's ware-
houses for the
duties.

Judgment of
Lord Kenyon
in *Northey v.*
Field.

ject to the carrier's lien: thus in *Northey v. Field* (1) Lord Kenyon observed, "Lord Hardwicke had been of opinion, that in order to stop goods in *transitu*, there must be an actual possession of them obtained by the consignor before they come to the hands of the consignee; but that rule had since been relaxed;" "and now a claim was sufficient." "In the present case, the bankrupt had no title to the actual possession till the duties were paid; until then they were *quasi in custodia legis*; before the sale, the agent for the consignor claimed, and endeavoured to get possession — that was a sufficient stopping in *transitu*, in his opinion, to secure the rights of the consignor."

Where A., residing in Guernsey, employed B. as his agent at Southampton to ship all goods which arrived there directed to A. and B., paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods: — It was held, that the transit of the goods was not ended at Southampton, and that the vendor might stop them after they had been put on board a vessel for Guernsey. (2)

In *James v. Griffin* (3) it appeared, that goods were consigned to A., deliverable in the river Thames: on the arrival of the vessel in the river the captain pressed A. to have them landed immediately; A. in consequence sent B., his son, with directions to land them at a wharf, where he was accustomed to have goods landed for him, and kept until he carted them away to his customers in his own carts; but A. (being then insolvent) at the same time told B. he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, and there stopped in *transitu* by the vendor. In trover for the goods by the assignees in bankruptcy of A. against the wharfinger, it was held, that the declarations so made by A. to B. were admissible in evidence, although they were not communicated to the vendor or to the wharfinger, and that they shewed that A. had not taken possession of the goods as owner, and therefore that the transitus was not determined; Mr. Baron Alderson observing, "I cannot see why this case is not to be governed by the decision of the court on the former occasion. In that case I conceived, that the court were unanimous in thinking, that the question for the jury was, whether the acts done amounted to a taking possession of the lead by the bankrupt as the owner. I find that so stated in the very first sentence of my lord chief baron's judgment, and in the observations which afterwards fell from my brother Parke and myself. I am still of opinion, that that is the true question; and if it be so, then the intention of the bankrupt is, as it seems to me, most material; and it is not material whether it was or was not communicated to the defendants, except as a test for the jury to judge whether such intention was real or not. Here the intention is to be taken as real, and indeed the facts are abundantly clear on that point. Now, the taking possession here is by the bankrupt's agent, and the declared intention of the bankrupt to him, where he directs him to do the act, appears to me to be precisely the same as if the bankrupt had himself done the act, making the same declaration of his intention at the time. The agent has only a qualified authority, and I cannot see how, under such circumstances, his

Judgment of
Mr. Baron
Alderson in
James v. Griffin.

(1) 2 Esp. N. P. C. 613.

(3) 2 M. & W. 623., *et vide* S. C. 1 *ibid*.

(2) *Nicholls v. Le Feuvre*, 2 Bing. N. C. 20.
81. 7 C. & P. 91.

ordering the goods to be landed can be held to be a taking possession of them by the bankrupt as the owner, when the bankrupt at the time declares that the agent is not to do so; that he does not mean thereby to take to the goods, but to relieve the captains from the inconvenience of the delay, leaving however the goods for Stagg, who afterwards stopped them *in transitu*. I place no reliance on the circumstance that, contrary to the usual course, the goods were landed without a written order. The broad ground on which I conceive the court should decide the question is, that here the bankrupt did not take possession of the goods as owner at the wharf of the defendants, and that, therefore, the goods still remained at the defendants' wharf *in transitu*, not having arrived at their ultimate place of destination, and not having been taken possession of by the bankrupt as owner at any intermediate place. For these reasons I think a nonsuit should be entered."

WHERE RIGHT
OF STOPPAGE,
&c. EXISTS.

So long as the goods are in the possession of one who is a mere agent to forward them, in order to give a more complete possession to the vendee, the transitus continues. (1)

In *Jackson v. Nichol* (2) it appeared, that M. purchased lead of the plaintiff at Newcastle, without specifying any place of delivery: after a time M. desired, that it should be forwarded to him in London, and the plaintiff gave M.'s agent at Newcastle an order on the plaintiff's servant for its delivery; the agent indorsed the order to a keelman, who received the lead and put it on board a vessel for London; the vessel arrived in London on the 21st of June, and the defendants, as wharfingers, undertook the delivery of the lead. M. failed on that day. On the 23d and 24th M. demanded the lead of the captain of the vessel, who refused to deliver it, though the freight was tendered, alleging that the defendants had stopped it on account of the failure of M. On the 28th a letter arrived from the plaintiff ordering the lead to be stopped *in transitu*; it was then on board a lighter belonging to the defendants:—It was held, that the transitus was not at an end, and that the plaintiff was in time to stop the lead, Chief Justice Tindal observing, "It was urged on the part of the defendants, on the authority of the *dictum* of Lawrence J. in *Bohtlingk v. Inglis*, that the tortious act of a third person should not prejudice the rights of the parties; and consequently that the demand made by Fishwick, the clerk of Maltby and Co., on the 24th, and the unlawful refusal to deliver, was tantamount to a delivery. But it is to be recollected, in the first place, that the observation of Mr. Justice Lawrence was made in the case of a demand by the consignor for the purpose of revesting his property in the goods, and not in the case of a vendee; and in the second place, that here, the goods had not actually reached the terminus of their delivery when the demand of the vendee took place; and although it might be conceded to be the better opinion, that if the vendee actually receives the possession of his goods on their passage to him, and before the voyage has completely terminated, that the delivery is complete, and the right of stoppage gone, yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee, without any delivery, before the voyage has completely terminated, deprives the consignor of his right of stoppage.

Judgment of
Chief Justice
Tindal in *Jackson v. Nichol*.

(1) Vide *D'Aquila v. Lambert*, 2 Eden, 75.

(2) 5 Bing. N. C. 508.

**WHERE RIGHT
OF STOPPAGE,
&c. EXISTS.**

Wharfinger
considered as a
middle man.

"On the whole, we think the transitus was not at an end when the stoppage took place, and that the verdict must be entered for the plaintiff."

Where the wharfinger is not particularly employed by the vendee, he is considered, until the goods have been actually delivered to the vendee, as a middle man between vendor and vendee. (1)

A transitus was defined by Lord Mansfield as being "every sort of passage the hands of the buyers." (2) Where there is a contract for the sale of goods, and a delivery has been made to the middle man, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. (3) A packer is a middle man between the vendor and the vendee, and the goods in his hands may be stopped. (4)

Where any act
is to be done
by the vendee.

Conditional
delivery to a
third party.

If the consigned property do not come into the consignee's possession by the express or implied consent of the vendor, as if they come into his possession after the vendor has put in his claim, or if the goods have been given to the vendee under an express condition, which has not been performed, as if they be delivered at the packer's of the purchaser, under condition that they were to be paid for in ready money, and the packer knew of this when he received them, the vendor does not thereby lose his right of stoppage *in transitu*. (5)

Part payment
of goods by
consignee.

Though the consignment of the goods must be on credit, at least for some part of the price, to entitle the consignee to stop them *in transitu*, yet such right is not affected by the circumstance of a partial payment; therefore, part payment of the goods by the consignee does not prevent the right of the consignor from attaching, its only operation being to lessen the *lien pro tanto*, which the consignee would otherwise have upon the full value. (6)

Where a party remits money on a particular account for a particular purpose, and the consignee becomes insolvent, it may be stopped *in transitu*; but it is otherwise where it is a general remittance from a debtor to his creditor on account of his debt. (7)

**PAYMENT BY
BILLS OF EX-
CHANGE.**

If, in consideration of goods being consigned to him, a factor accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his actual possession, the consignor can stop them *in transitu*. (8)

Consignor can
stop goods *in
transitu*, with-
out tendering
back an unpaid
bill.

A consignor of goods who has received the acceptance of the consignee for part of the goods, may stop them *in transitu* on the consignee's insolvency, and retain possession of them without tendering back the bill. Thus, in *Edwards v. Brewer* (9) goods were consigned to A. deliverable in the port of London at a certain price per ton. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A.'s place of business, and saw B. his clerk, A. being from home, and pressed him to send a craft for the goods, or he should be under the necessity of landing them. After some days, B. wrote

(1) *James v. Griffin*, 1 M. & W. 20.

(2) *Stokes v. La Riviere*, cit. 3 East, 397.

(3) *Mills v. Ball*, 2 B. & P. 461.

(4) *Hunt v. Ward*, cit. 3 T. R. 467.
Owenson v. Morse, 7 ibid. 84.

(5) *Bohtlingk v. Inglis*, 3 East, 385.

(6) *Hodgson v. Loy*, 7 T. R. 440.

(7) *Smith v. Bowles*, 2 Esp. N. P. C. 378.

(8) *Kinloch v. Craig*, 4 Bra. P. C. 47. 3
T. R. 119.

(9) 2 M. & W. 375., vide etiam *Ferus v. Jewell*, 4 Camp. 31. *Dixon v. Yates*, 5 R. & Ad. 313. *Bunney v. Poyntz*, 4 ibid. 570.

to the captain, stating that A. was from home, but he B. thought he had better land the goods on A.'s account. They were accordingly landed at the wharf, and entered in the wharfinger's book, with "freight and charges" set opposite to them, and not in the name of any party as consignee. While they were lying there A. became insolvent, and they were stopped by the consignor:—It was held, that the transitus was not determined, Mr. Baron Parke observing, "I am of opinion that there ought to be no rule in this case. The assignees have no title to these goods, until they have got into the hands or possession of the consignee. They were landed at Griffin's wharf, where he had not usually had his goods landed; had he then taken possession of them? The consignee is away, and his clerk says, 'you had better land the goods at Griffin's wharf, on my master's account.' It is the same as if the clerk had not acted at all. Then, how does the captain act? He lands them, not in the consignee's name at all, but in blank, with freight and charges set against them. Then the other point is as to the bill. It is settled by the case of *Feise v. Wray* (1), that, by an acceptance of bills, the vendor's right to stop *in transitu* is not taken away. The acceptance would not diminish his right to retain possession until the whole price was paid. Whether the effect of the stoppage *in transitu* be to rescind the contract, or merely to re-vest a lien, does not seem to be quite settled." (2)

WHERE RIGHT
OF STOPPAGE,
&c. EXISTS.

Judgment of
Mr. Baron
Parke in *Ed-
wards v. Brewer*.

A merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold, or the proceeds ascertained, the latter shipped three cargoes of timber to the former to credit in account; two of them arrived; against the third the consignor drew a bill for the amount whilst it was *in transitu*; in the interval the consignee dishonoured the bill and became insolvent:—It was holden, that the consignor had a perfect right of stoppage *in transitu*, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted. (3)

UNSETTLED
ACCOUNTS.

Where a bill of lading was assigned by the vendee to his factor, it was held, that the right of stoppage *in transitu* was not divested, although he may have drawn upon him to the amount of the consignment, it not being intended that the goods in question should be appropriated to the payment of the particular bills, and the goods not having reached the factor's hands, and no specific pledge having been made. (4)

Assignment of
bill of lading.

If, however, the consignee assign the bill of lading to a third person for a valuable consideration, and the latter receive it *bond fide*, without notice of any circumstances which may render the bill of lading not fairly and honestly assignable, the right of the consignor as against such assignee is divested, for a bill of lading so indorsed transfers the property. (5)

W. shipped at Leghorn twenty-three casks of oil, on account, and by the order of L. at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, L. indorsed the bill of lading, and deposited it with H., who advanced money on it, having previously advanced money on other goods (the property of L.) deposited with him. On the arrival of the oil, L. having previously become bankrupt, and W. not having been paid for it, W.'s agents claimed it of the master of the ship; but the latter delivered it

(1) 3 East, 93.

(2) *Clay v. Harrison*, 10 B. & C. 99.

(3) *Wood v. Jones*, 7 D. & R. 126.

(4) *Patten v. Thompson*, 5 M. & S. 350.

(5) *Lickbarrow v. Mason*, 2 T. R. 63. 5
ibid. 683.

**WHERE RIGHT
OF STOPPAGE,
&C. EXISTS.**

to H., who afterwards sold the goods of L. as well as the oil of W. The net proceeds of the goods belonging to L. were sufficient to satisfy the debt due from L. to H.; H. paid himself the debt, and deposited the net proceeds of W.'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between W. and the assignees of L. were referred. The arbitrator having stated the above facts on his award for the opinion of this court:—It was held first, that W., the unpaid vendor of the oil, had at the time when his agents claimed it no right to take possession on the insolvency of L., because the property in, and the right to, the possession was then vested in H., the indorsee of the bill of lading for value; and further, that W. had not, by reason of such claim, any legal right to the possession of the goods after H.'s lien was satisfied; but that, in a court of equity, such transfer to H. would be treated as a pledge or mortgage only, and therefore W. by his attempted stoppage *in transitu* acquired a right to the goods in equity, subject to H.'s lien against the assignees of L.:—and secondly, that W. by means of his goods had become surety to H. for L.'s debt, and had a clear equity to oblige H. to pay his debt out of L.'s own goods, deposited with him in ease of such surety; and all the goods both of W. and L. having been sold, W. might insist on the proceed of L.'s goods being appropriated to the payment of the debt; and therefore, that W. was entitled to have all the proceeds of the oil paid over to him. (1)

Assignee of bill of lading must give a valuable consideration, and otherwise act *bonâ fide*.

Not only must the assignee have given a valuable consideration (2), but he must have acted with fairness and honesty. If he assist in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, he will stand in the same situation with the consignee. If for instance he knew that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price, or that, being accepted, it was not likely to be paid, in that case the interposition of himself between the consignor and the consignee, to assist the latter in disappointing the just hopes and expectations of the former, will be an act done in fraud of the right to stop, and unavailable to the party taking the assignment (3): in fact, the criterion in these cases is, does the purchaser take the assignment fairly and honestly? (4)

Circumstances equivalent to the indorsement and delivery of the bill of lading.

There may be circumstances equivalent to the indorsement and delivery of the bill of lading, so as to enable the consignee to divest the consignor's right to stop the goods. Thompson and Co. sent goods from Ireland to London, to be sold by Eustace and Holland their factors there, and wrote to them to insure the goods, and sent them a bill of lading not indorsed, but having the names of Eustace and Holland on the back; and being applied to by them for an indorsement, answered by letter, that if the bill of lading was not indorsed it was a mistake, and they would send an indorsement, upon which Eustace and Holland sold the goods; and it afterwards happening that they were unable to pay bills drawn upon them by Thompson and Co. on the general account, one Dick paid those bills for the honour of the drawers, and knowing all their transactions, applied to them for an indorse-

- (1) In re *Westzynthius*, 5 B. & Ad. 817. *tue v. Jewell*, 4 Camp. 31. *Salmons v. Nissen*, 2 T. R. 674.
 (2) *Morison v. Gray*, 2 Bing. 260.
 (3) *Cuming v. Brown*, 9 East, 514. *Ver-* vide etiam *Barrow v. Coles*, 3 Camp. 92.
 (4) *Salomons v. Nissen*, 2 T. R. 681.

ment of the bill of lading, which they sent him, and thereupon Dick demanded the goods of the master of the ship, who refused to deliver them to him, but delivered them to the vendees of Eustace and Holland. Upon this Dick brought an action against the master, in which Lord Kenyon ruled, that the plaintiff had, under such circumstances, no right to take the goods out of the possession of the vendees of Eustace and Holland, E. and H. being factors authorised to transfer the property in them, and having actually done so. (1)

WHERE RIGHT
OF STOPPAGE,
&C. EXISTS.

The delivery over by the consignee, to a person who has advanced money to him, of the shipping note of goods, and the giving a delivery order to the wharfinger, are not equivalent to an indorsement of the bill of lading, and will not divest the right of the vendor to stop the goods *in transitu*. (2)

If the bill of lading be signed before the goods be actually on board, it seems, that it will be fraudulent, and that an assignment of it, will not bar the right of the vendor to stop the goods. (3)

Bill of lading
signed before
goods actually
on board.

Where goods are lodged in the West India Docks, the indorsement of the dock warrant for a valuable consideration will divest the vendor's right (4), and without any transfer being made in the books of the dock company, the delivery of the warrant is sufficient. (5)

Goods lodged
in the West
India Docks.

It has been said, that the vendor may effect the stoppage in any manner short of felony or absolute violence, but this is a rule of dangerous extent, and cannot safely be acted upon. (6)

MODE IN
WHICH STOP-
PAGE, &C. CAN
BE MADE.

It is not necessary, that the vendor, to exercise his right of stoppage, should actually take possession of the property by corporeal touch; he may put in his claim or demand of his right to the goods *in transitu*, either verbally or in writing; and it will be equivalent in law to an actual stoppage of the goods, provided it be made before the transit has expired (7), but the consignee must put in his claim, and endeavour to get the property in some shape or other; the mere bankruptcy or insolvency of the consignee is no countermand of the delivery to him. (8)

Vendor need
not possess his
property by
corporeal
touch.

4. WHERE RIGHT OF STOPPAGE, &C. DOES NOT EXIST.

WHERE RIGHT
OF STOPPAGE,
&C. DOES NOT
EXIST.

If a special agreement exist, to deliver up the property, the right of stoppage *in transitu* does not exist.

Where a special
agreement
exists to de-
liver up the
property.

Thus, in *Nichols v. Hart* (9) it appeared, that A. sold to B. a butt of wine, which was not delivered; B. compounded with his creditors, and the amount was by A.'s consent included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine from A., who refused to deliver it:—It was holden, that

(1) *Dick v. Lumden*, Peake's N. P. C. 250., vide *Davis v. Reynolds*, 4 Camp. 267. 1 Stark. 115.

(2) *Aherman v. Humphery*, 1 C. & P. 59.

(3) *Osey v. Gardner*, Holt's N. P. C. 405.

(4) *Spear v. Travers*, 4 Camp. 251. *Zwinger v. Samuda*, 7 Taunt. 265.

(5) *Keyser v. Suse*, Gow's N. P. C. 58.

(6) *Wiseman v. Vandeput*, 2 Vern. 203. *Snee v. Prescott*, 1 Atk. 245. *Salomons v.*

Nissen, 2 T. R. 674. *Barnes v. Freeland*, 6 ibid. 80. *Feise v. Wray*, 3 East, 93. *Vale v. Bayle*, Cowp. 296.

(7) *Mills v. Ball*, 2 B. & P. 457. 462.

Northey v. Field, 2 Esp. N. P. C. 613.

Holst v. Pownal, 1 ibid. 240. *Bohlingk v. Inglis*, 3 East, 394.

(8) *Ellis v. Hunt*, 3 T. R. 464. *Boeht-*

linck v. Schneider, 3 Esp. N. P. C. 59.

(9) 5 C. & P. 179.

WHERE RIGHT
OF STOPPAGE,
&c. DOES NOT
EXIST.

he was bound to deliver it, as he had undertaken to do so; and that the doctrine with respect to stoppage *in transitu* did not apply under the circumstances.

The difficulty is in determining, what shall be such an actual or constructive delivery into the possession of the consignee, as will determine the right of the consignor, for then the state of transit ceases. If the consignee appoint another carrier or agent to receive the goods, this may be a constructive delivery to the consignee for many purposes; but it is said, that only an actual delivery can divest the right of stopping them *in transitu*.

There may be
an actual de-
livery, without
a corporeal
touch.

Delivery on
board a vessel
chartered by
the vendee.

There may however be an actual delivery without the necessity of a corporeal touch, or even that the consignee (1) should see them, as where the goods are put on board a vessel chartered by him. Thus, where tallow was delivered on board of a vessel chartered by the vendee, but before it reached him he became bankrupt, and the plaintiff wrote a letter to his agent to stop it *in transitu*:—It was holden by Lord Kenyon, that the whole question was, "whether there was a delivery to the consignee of the goods before this letter was written, or not. Before the delivery the party may annex any condition to it, but not after. If the ship was then chartered by the consignee, it is a complete delivery of the goods to him, and there can be no stopping *in transitu*;" "and it made no difference, whether the act of bankruptcy was then committed or not." (2)

In *Fowler v. M^cTaggart* (3) it was decided, that a delivery of goods into a ship chartered by the vendee, who afterwards became a bankrupt, was a delivery to him so as to defeat the vendor's right to stop them *in transitu*, more particularly where the ship had been chartered for three years, during which time the bankrupts were to have complete control over her; and the goods were put on board, not for the purpose of being conveyed from the plaintiffs to the bankrupt's, but that they might be sent by the latter on a mercantile adventure.

Where a bank-
rupt has no
control over a
ship, but mere-
ly contracts
with the mas-
ter.

If a bankrupt have no control over a ship, but merely contracts with the master to employ his ship in fetching goods for him, it does not differ from a similar contract entered into by the consignor by the directions of the consignee at the loading port, for the conveyance of the goods from him to the vendee; in each case the freight is to be paid by the latter; in each case the ship would be hired by him; the goods are still to be considered on their passage or transit from the consignor to the consignee. The right of stoppage cannot depend on the contract to consign goods amounting to half the tonnage of the ship, or a complete loading in any quantity. (4) In *Inglis v. Usherwood* (5) it was held, that if the delivery on board of a ship chartered by the bankrupt had happened in a port of this kingdom, it would in effect have been a delivery to him; but that the Russian ordinance, which enables a consignor to repossess himself of the goods, even after such a delivery, took it out of the rule, and the plaintiffs recovered the amount.

Goods de-

In *Wright v. Lawes* (6), which was in case against a warehouseman for

(1) *Ellis v. Hunt*, 3 T. R. 468.

(2) *Boehltinck v. Schneider*, 3 Esp. N. P. C. 58.

(3) Cit. 7 T. R. 442.

(4) *Bohthingh v. Inglis*, 3 East, 381.

(5) 1 *ibid.* 515.

(6) 4 Esp. N. P. C. 82.

non delivery of goods, delivered by plaintiff's agents to him to be kept, appeared, that the plaintiff had agreed with one Shevill for four pipes of wine, to be paid for partly in money, partly in goods. Shevill obtained the wine from Bamford and Co. by means of an agent in London, who turned out to be a swindler; and Bamford and Co. stopped the wine in the defendant's cellar, where it had been deposited by the plaintiff's agent, who had, with the plaintiff, exercised an act of ownership over the wine by taking samples, &c.; and it was held by Lord Kenyon, that, as the plaintiff had made out a good title to the wine under a *bonâ fide* agreement, it was too much to say, that a corporeal touch was necessary to infer a property in the consignee; and though they had not reached the plaintiff's own abode, where they were to be ultimately delivered, yet as they had been delivered according to the bill of lading, the carrier's responsibility was at an end and the delivery was complete; and that there was no right in Bamford and Co. to stop them *in transitu*.

WHERE RIGHT OF STOPPAGE, &c. DOES NOT EXIST.

livered according to the bill of lading.

In *Scott v. Pettit* (1), which was trover for goods by the assignees of the consignor against the packer of the consignee, to whom they had been delivered under a general order, as the consignee had no warehouse of his own, it was holden, that there being no other place of delivery, the goods when arrived there, were in the place of ultimate delivery, and consequently were no longer liable to the right of stoppage *in transitu*.

In *Dixon v. Baldwin* (2), which was an action of trover for eighteen bales of cotton twist by the assignees of the consignee against the consignor, who it appeared had seized the goods whilst in the hands of a person describing himself to be merely an expeditor of goods according to the directions of the consignee—a stage, and mere instrument between buyer and seller:—It was held, upon the same reasoning as in *Hunter v. Beale* (3), that the transit of the goods was completely at an end in their direct course from the vendor to the vendee on arriving at the expeditor's; from which time they were under the immediate orders of the vendee; and that from thence they were actually launched again in a course of conveyance in a new direction, prescribed and communicated by himself. In fact, if the transit be once at an end, the delivery is complete; and the transitus for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination.

Goods in the place of ultimate delivery.

In *Allan v. Gripper* (4) Lord Lyndhurst observed, "The facts of the case are shortly these: Pestall had been in the habit of employing these defendants for several years; and the course of dealing appeared to be, that the oil cakes were carried to Hertford in the defendant's barge, and deposited in the defendant's warehouse, generally for many months; and evidence was given in the cause, that if Pestall had sent his carts for oil cakes to the warehouse at the time in question, these oil cakes would not have been sent, but those which had been a longer period in the warehouse. There was also evidence to shew, that they were so deposited for the convenience of Pestall, that they might be distributed to his customers, many of whom resided in the neighbourhood. I left it to the jury to say, whether this was

Judgment of Lord Lyndhurst in *Allan v. Gripper*.

(1) 3 B. & P. 469.

(2) 5 East, 175.

(3) Cit. in *Ellis v. Hunt*, 3 T. R. 466.

(4) 2 C. & J. 220.

WHERE RIGHT
OF STOPPAGE,
&c. DOES NOT
EXIST.

the place of final destination. They said, they thought that these oil cakes were to be deposited like the rest, and that the warehouse was the place of final destination and deposit. On this state of facts it appears to me, that the transitus was at an end, and that the plaintiff's right of stoppage *in transitu* was gone."

Part delivery
of one entire
consignment.

In *Crawshay v. Eades* (1) Mr. Justice Bayley said, "There can be no doubt, that wherever there is a complete delivery of part of one entire cargo to the consignee, the transitus is ended, and the consignor cannot stop the remainder." Thus, where 800 bushels of wheat, part of an entire cargo, were delivered, it was held, that it must be taken to be a delivery of the whole. (2) But if the act of delivering part be not intended to operate as a delivery of the whole, but as a delivery of a portion only, this will not deprive the vendor of his lien on the goods undelivered. (3)

Warehouseman
agent for both
parties.

The right is gone, if the same warehouseman be agent for both parties, and that the consignor gives an order to him to deliver the goods to the consignee, although the warehouseman does not even make a transfer to his name in the books, for it is an acknowledged parting with the possession and right over them.

Judgment of
Lord Ellen-
borough in
Harman v.
Anderson.

In *Harman v. Anderson* (4), which was in trover for butter, by the assignees of the vendee, who it appeared had received, with the invoice, an order from the defendants (wharfingers) to transfer the goods. The goods were accordingly transferred in the defendant's books, and the vendee debited with warehouse rent; but in consequence of his immediately afterwards becoming insolvent, the sellers gave notice to detain the goods: upon which Lord Ellenborough observed "The goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage *in transitu*. From that moment, the defendants became trustees for the purchaser, and there was an executed delivery, as much as if the goods had been delivered into his hands." Of one parcel of the butters no such transfer had been made in the books by the wharfinger, nor was any act done by him to testify that he held the goods on the vendee's account; yet his lordship held, "that the wharfinger, after the delivery of the order to him, was bound to hold the goods on account of the purchaser, and that the vendor's right to stop *in transitu* was gone. The delivery of the note was sufficient, without any actual transfer being made in the books."

Payment of
warehouse rent.

If the vendor charge the vendee with rent for keeping the goods in his warehouse, after the time that they ought to have been taken away by the terms of the contract, the right of stoppage, &c. will be determined;—thus, in *Hurry v. Mangles* (5), which was in trover for oil by the vendee of J. S. against the vendors (who were also warehousemen), it appeared, that the oil was paid for by J. S. by acceptances, and continued to lie in the vendor's warehouses. J. S. sold it to the plaintiff, who paid him for it, and demanded the oil of the defendants before the acceptances of J. S. were due; but as he had become insolvent, the defendants claimed a right to stop the goods *in transitu*. No transfer had been made in the defendants' books to J. S., but they had received warehouse rent from him for the time it had been

(1) 1 B. & C. 183.

(2) *Slubey v. Heyward*, 2 Hen. Black.
504.

(3) *Dixon v. Yates*, 5 B. & Ad. 313.

Bunney v. Poyntz, 4 *ibid.* 570. *Betts v.*

Gibbins, 2 A. & E. 57.

(4) 2 Camp. 243.

(5) 1 *ibid.* 452.

kept by them, after the period it ought to have been taken away according to the terms of sale:—It was held, that this was an executed delivery; and that the transitus was at an end; because the goods were as much transferred to the person who paid the rent, as if they had been removed to his own warehouse, and there deposited under the lock and key.

WHERE RIGHT
OF STOPPAGE,
&c. DOES NOT
EXIST.

If goods be handed over to the packer of the consignee, or that his agent opens and examines the quality of the goods, the right of stoppage, &c. is gone. Thus, in *Leeds v. Wright* (1), which was an action of trover against a packer, employed by an agent for the purchasers, who had become bankrupts, to recover goods in their possession, upon the ground, that, until the goods got into the possession of the principals, the vendors had a right to stop them *in transitu*:—It was holden, that as the contract was with the agent, and the delivery to his order, he had a discretionary power over the goods, and that the plaintiffs had no right to stop them after they came into his possession—particularly as he had exercised acts of ownership over the goods, by unpacking them, and taking some away, and repacking the remainder.

Consignee exercising acts of ownership by opening, examining, and partly selling the goods.

In *Hawes v. Watson* (2) it appeared, that A. by contract sold to B. a quantity of tallow, then lying at a wharf, at so much *per cent.*, and on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, and rehouse the same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers and gave to C. a written acknowledgment, that they had transferred the tallow to the account of C., and that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order. In trover by C. against the wharfingers, it was held, that after this acknowledgment they had the tallow as the agents of C., and that they could not therefore set up as a defence the right of A. to stop it *in transitu*.

A cargo of eighty quarters of wheat was shipped in London on the 6th December, 1839, on board a vessel bound to Barmouth and Tremadoc, and by the bill of lading, was to be delivered at the port of Barmouth and Tremadoc to L. T., or to his assigns, on his paying freight, &c. The cargo was paid for by L. T., partly in cash, partly by his acceptance at two months. On the 28th January, 1840, L. T. by deed assigned all his estate and effects to the plaintiff and A. B. in trust, for the benefit of themselves and his other creditors. L. T. was at that time insolvent to the plaintiff's knowledge. The bill of lading was indorsed by L. T. to the plaintiff as follows (the indorsement being without date):—"I do hereby order, that captain J. do deliver the possession of the within mentioned quantity of wheat to Mr. R. J. (the plaintiff), being one of my assignees, to be disposed of as he may think proper." On the 4th February the vessel arrived at Barmouth with the wheat on board, and the plaintiff there went on board and took samples, and sold seventy of the eighty quarters, for which he paid the freight, and they were delivered to the purchasers, and he directed the master to take forward the remaining ten quarters to Tremadoc. On the 9th February L. T.'s acceptance became due, and was dishonoured, and on the 10th the

(1) 4 Esp. N. P. C. 243. 3 B. & P. (2) 2 B. & C. 540., et vide *Goeling v. Birnie*, 7 Bing. 339.

WHERE RIGHT
OF STOPPAGE,
&C. DOES NOT
EXIST.

shippers gave notice to the captain at Barmouth, not to deliver the wheat, but to hold it to their use. On the 23d the vessel arrived at Tremadoc, where the plaintiff demanded the remaining ten quarters, tendering the freight, but the master refused to deliver it: — It was held, that under these circumstances (even supposing the plaintiff to be in the same situation as L. T.) the right of stoppage *in transitu* was determined, as the whole of the cargo, by the acts done by the plaintiff at Barmouth. And it seems, that if the composition deed had contained a release to L. T., the plaintiff was an indorsee for value of the bill of lading, and no right of stoppage *in transitu* therefore existed as against him. (1)

Consignee
marking the
property with
his initials.

Where, in trover for timber against vendors by assignee of the original vendee, it appeared, that he had communicated his having purchased it to the defendants, and, with their consent, marked with his initials such part of the timber as still remained in their possession; it was held, that this was such an express assent to the transfer of the property, as made the delivery so far executed, that the defendants could no longer stop it *in transitu*. (2)

EVIDENCE.

Stoppage *in transitu* a question of law.

Requisite to prove on whose risk and account the goods were sent.

5. EVIDENCE.

Whether the stoppage was *in transitu*, or was completely determined, is ordinarily a question of law. (3) In order to raise that question, it is usually material to prove on whose risk and account the goods were sent, the character and situation of the agent in whose actual possession the goods were at the time of stoppage (4), by whom employed, and by whom to be paid, the possession, indorsement, &c. of the bill of lading (5), the place and object of destination (6), and the nature of the acts exercised upon them in their progress (7), with a view to take possession of them; and in order to shew a termination of the *transitus*, it is essential to prove either an actual or constructive delivery to the vendee, or his representative.

(1) *Jones v. Jones*, 8 M. & W. 431.

(2) *Stoveld v. Hughes*, 14 East, 308. *Tansley v. Turner*, 2 Bing. N. C. 151.

(3) *Feise v. Wray*, 3 East, 93. *Mills v. Ball*, 2 B. & P. 457. *Richardson v. Goss*, 3 ibid. 119. *Scott v. Pettit*, ibid. 469. *Dixon v. Baldwin*, 5 East, 175. *Stoveld v. Hughes*, 14 ibid. 308. *Stubey v. Heyward*, 2 Hen. Black. 504. 2 Stark. Ev. 3d ed. 163.

(4) *Core v. Harden*, 4 East, 211. *Walley v. Montgomery*, 3 ibid. 585. *Owenson v. Morse*, 7 T. R. 64. *Bohtlingk v. Inglis*, 3

East, 381. *Inglis v. Usherwood*, 1 ibid. 515. *Mills v. Ball*, 2 B. & P. 457.

(5) *Lickbarrow v. Mason*, 2 T. R. 63. *Bowles v. Langworthy*, 5 ibid. 367. *Fein v. Wray*, 3 East, 93. *Newsom v. Thornton*, 6 ibid. 17.

(6) *Dixon v. Baldwin*, 5 East, 175. *Leah v. Wright*, 3 B. & P. 320. *Scott v. Pettit*, ibid. 469.

(7) *Ellis v. Hunt*, 3 T. R. 464. *Core v. Harden*, 4 East, 211.

TENDER.

1. GENERALLY, pp. 2599—2600.

Defined — When allowed — Tender admits the contract and facts stated in the declaration — When tender not requisite — If the objection be to the medium of the offer to satisfy, and not to the sum offered, the grounds of the rejection must be stated — Plaintiff may be nonsuited under a plea of tender.

2. BY WHOM AND TO WHOM THE TENDER MUST BE MADE, pp. 2600—2602.

By debtor or his agent — Parties in replevin — Justices of the peace and officers of customs and excise — Obligor with condition to perform and award — To the creditor or his authorised agent — To an attorney or his managing clerk — Servants — Executors — Partners — Joint creditors — Tender of one gross sum to several persons.

3. WHEN TENDER MUST BE MADE, p. 2602.

4. MODE IN WHICH THE TENDER MUST BE MADE, pp. 2602—2607.

CONDITIONAL AND UNCONDITIONAL TENDERS — COIN IN WHICH A TENDER SHOULD BE MADE — PRODUCTION OF MONEY — TENDERING A LARGER SUM THAN IS DUE.

5. PLEA OF TENDER, pp. 2607—2609.

Reg. Gen. H. T. 2 Will. 4. s. 45. — Form of plea — When debt or duty arises at subsequent period — When requisite to plead a tender — Where an informal plea will be good after verdict — REPLICATION.

6. EVIDENCE — PAYMENT OF MONEY INTO COURT — JUDGMENT — COSTS, pp. 2609—2611.

1. GENERALLY.

GENERALLY.

A tender is defined to be an offer to pay a debt, or perform a duty (1), and it is either at common law or by statute. Defined.

At common law a tender is allowed in all cases, where a debt is due on specialty or simple contract, which is either certain, or capable of being reduced to a certainty by mere computation, without leaving any sort of discretion to be exercised by a jury. When allowed.

A tender upon which money is paid into court admits the contract and facts stated in the declaration (2): thus, where a defendant pleads a tender generally to a declaration in *assumpsit*, he cannot at the trial contest the terms of a special contract as set out in the declaration. (3) Tender admits the contract and facts stated in the declaration.

When a party has wrongfully possessed himself of goods, no tender of freight is requisite, in order to enable the party to maintain his action. (4) And where a tender on the part of the plaintiff would be nugatory on account of the defendant's inability to accept it, it need not be made. (5) When tender not requisite.

(1) 7 Bac. Abr. Tender, 518.

(2) *Cox v. Brain*, 3 Taunt. 95.

(3) *Jewell v. Wyatt*, 2 Jur. 442.

(4) *Lempriere v. Pasley*, 2 T. R. 485.

(5) *Seaward v. Willock*, 5 East, 202.

GENERALLY.

Where a party admits it would be fruitless to make a tender, it is unnecessary to do so. (1)

If the objection be to the medium of the offer to satisfy, and not to the sum offered, the grounds of the rejection must be stated.

To invalidate a tender, or divest an offer to pay of the legal effect of tender, if the objection be to the medium of the offer to satisfy, and not to the sum offered, the ground of the rejection must be stated, or it is a waiver of the objection of insufficiency in that particular respect, and it cannot afterwards be taken advantage of in court, on the score of not being an effective legal tender; in other words, an objection on a point of fact works a waiver of objections on points of law: — and such waiver may be implied, though not expressed.

Plaintiff may be nonsuited under a plea of tender.

Under a plea of tender the plaintiff may be nonsuited. (2)

BY WHOM AND TO WHOM THE TENDER MUST BE MADE.

By debtor or his agent.

2. BY WHOM AND TO WHOM THE TENDER MUST BE MADE.

The tender must be made by the debtor or his agent. (3) When made by former, it should be made in the presence of a third person, who may be afterwards called, if necessary, as a witness to prove the fact; but any person may make a tender on behalf of an idiot. (4)

Parties in replevin.

In replevin of a distress for rent, the plaintiff may have leave to pay the rent claimed into court (5); or upon application of the defendant, the court or judge will stay the proceedings upon payment of the costs of the action and the costs of replevying, and upon giving up the replevin bond, if no special damage be stated in the declaration (6); or they will allow money to be paid into court under stat. 3 & 4 Will. 4. c. 42. (7)

Justices of the peace and officers of customs and excise.

Justices of the peace (8) and officers of customs and excise (9), and constables and other officers acting under stat. 7 & 8 Geo. 4. c. 29. s. 75, or stat. 7 & 8 Geo. 4. c. 30. s. 41., may tender amends before action brought, and plead such tender, together with the general issue or other plea, with the leave of the court; or if they have neglected to tender amends, or the tender be insufficient, they may pay money into court even after issue joined and notice of trial given (10), and such proceedings are therefore to be had as in ordinary cases. (11)

Obligor with condition to perform an award.

If a man enter into an obligation with condition to perform an award, or to do some other thing for the benefit of the obligee, which it was not incumbent upon the obligor to do at the time of entering into the obligation, a tender by the obligor of performing the award, or of doing the other thing, and a refusal by the obligee to accept thereof, are a perpetual bar, and may be so pleaded to an action on the obligation; for as the condition is satisfied

(1) *Jackson v. Jacob*, 5 Scott, 79.

(2) *Anderson v. Shaw*, 11 Moore, 44. 3 Bing. 290. 2 C. & P. 85., sed vide contra, *Harding v. Spicer*, 1 Camp. 327.

(3) *Read v. Goldring*, 2 M. & S. 86. *Moffat v. Parsons*, 5 Taunt. 307. *Kraus v. Arnold*, 7 Moore, 59., et vide per Abbott C. J. in *Cheminant v. Thornton*, 2 C. & P. 50.

(4) Co. Litt. 206. As to a stranger making a tender without the privity of the debtor, vide Co. Inst. 207. *Watkins v. Ashwicke*, Cro. Eliz. 132.

(5) *Gregg's case*, 2 Salk. 597. *Vernon v.*

Wynne (Bart.), 1 Hen. Black. 24. *Hopkins v. Shrole*, 1 B. & P. 382.

(6) *Banks v. Brand*, 3 M. & S. 525.

(7) Archb. by Chitt. 1033.

(8) Stat. 24 Geo. 2. c. 44. ss. 2, 4, 7 & 8 Geo. 4. c. 29. s. 75., 7 & 8 Geo. 4. c. 30. s. 41.

(9) Stat. 6 Geo. 4. c. 108. ss. 95, 96. 7 & 8 Geo. 4. c. 53. ss. 116, 117.

(10) *Nestor v. Newcome*, 3 B. & C. 159., et vide *Devaynes v. Boys*, 7 Taunt. 33. 3 Marsh. 356.

(11) Ibid. *Castbourn v. Ball*, 2 W. Black. 859. *Stringer v. Martyr*, 6 Esp. N. P. C. 134.

by the tender and refusal, the penalty cannot be recovered; and as the performing of the award could not be parcel of the obligation, no action lies thereupon to compel its performance. (1)

It should be made to the creditor, or his agent authorised to receive payment, a tender of money to such agent being deemed a good tender to the creditor himself. (2) And it seems, that a tender must be taken to be made on the behalf of the person who owes the money. (3)

A tender to the plaintiff's attorney on the record is valid. (4)

If an attorney send a letter to demand payment, and the debtor make a tender to him, that is a good tender, unless the attorney disclaim his authority at the time; and if the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, if after such a letter be sent, a tender be made to the clerk of the attorney at his office (the attorney being absent) is good. (5)

And where a clerk, who was in the ordinary habit of receiving money for his master, was directed by his master not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk on tender made refused to receive the money, assigning the directions of his master as the reason:—It was held to be a good tender to the principal (6); and that it was no objection to a tender, that the creditor had previously put the matter into his attorney's hands.

A tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient. (7)

In *Kirton v. Braithwaite* (8) it appeared, that the plaintiff's attorney, before bringing the action, wrote to the defendant to say, that unless the debt, together with his (the attorney's) charge for that letter, were paid at his office on the Wednesday following at 12 o'clock, proceedings would be commenced. On the Wednesday at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it, unless the charge for the letter were also paid; and the writ was issued at 11 o'clock on that day:—It was held that this was a good tender.

A tender to a person employed by the solicitor under a fiat, to collect the debts due to the bankrupt's estate, was holden not to be a good tender; for that to make it so, the money should have been offered to the assignees or to the solicitors. (9)

Where a debtor sent money to the house of his creditor, and his servant took it in, and returned it with an answer, purporting to be from his master, that he would not receive it, but that the defendant must go to his attorney, this was considered evidence to be left to the jury from which they might infer that a tender was made. (10)

A tender to an executor previously to his proving the will, if he sub-

By whom and to whom the tender must be made.

To the creditor or his authorised agent.

To an attorney or his managing clerk;

or to a person employed by the solicitor under a fiat of bankruptcy.

Servants.

Executors.

(1) 7 Bac. Abr. Tender (F.), 532. Co. Litt. 207. Tidd, Supp. 12.

(2) *Goodland v. Blewith*, 1 Camp. 477.

(3) *Cheminant v. Thornton*, 2 C. & P. 50.

(4) *Crozer v. Pilling*, 4 B. & C. 29.

(5) *Wilmott v. Smith*, 3 C. & P. 453. M. & M. 238., et vide *Barrett v. Deere*, M. & M. 200.

(6) *Moffat v. Parsons*, 5 Taunt. 307.

(7) *Bingham v. Allport*, 1 N. & M. 398.

(8) 1 M. & W. 310.

(9) *Blow v. Russell*, 1 C. & P. 365., et vide *Pimm v. Grevill*, 6 Esp. N. P. C. 95.

(10) *Anon.* 1 Esp. N. P. C. 349., et vide *Hayward v. Hague*, 4 ibid. 93.

BY WHOM AND
TO WHOM THE
TENDER MUST
BE MADE.

Partners.

Joint creditors.

Tender of one
gross sum to
several persons.

sequently does so (1), or to a partner, or to one of several joint creditors, is good. (2)

So, also, if A. be indebted to several persons in different sums of money, and when they are all assembled together tenders them one gross sum, sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender. (3)

WHEN TENDER
MUST BE MADE.

Must be made
before the com-
mencement of
the suit.

3. WHEN TENDER MUST BE MADE.

A tender must be made before the commencement of the suit. The line being drawn at the commencement of the suit, steps taken by the plaintiff in contemplation only of an action before tender made, will not deprive the defendant of the benefit of his tender, if such tender be made before the actual commencement of the plaintiff's suit. Hence it was holden, that it was not any answer to a plea of tender before the exhibition of the plaintiff's bill (4), that the plaintiff had before such tender retained an attorney, and instructed him to sue out a *latitat* against the defendant, and that the attorney had accordingly applied for such writ before the tender, which writ was afterwards sued out.

The tender to be available must have been made before the action was brought. (5) Where the declaration was entitled generally of the term, it was held, that the defendant could not give evidence of a tender made after the first day of the term, although he was able to shew, that the *latitat* was sued out after the tender. (6) This however appears to be doubtful, for as the plaintiff may on proof of a *latitat* issued after the first day of term, give evidence of a cause of action arising after the commencement of the term, but before the suing out the *latitat*, notwithstanding the general memorandum, there seems to be no reason why the defendant should not also resort to the *latitat* to shew, that his tender was in time. (7)

Tender of rent.

In proceedings by landlord against his tenant for rent in arrear, if the tenant or his assignee shall at any time before the trial (8) pay or tender to the landlord, or his executors, &c., or pay into court, all the rent in arrear, together with costs, all further proceedings shall cease. (9)

MODE IN WHICH
THE TENDER
MUST BE MADE.

CONDITIONAL
AND UNCON-
DITIONAL TEN-
DER.

Whether tender
be conditional,
is a question of
fact.

4. MODE IN WHICH THE TENDER MUST BE MADE.

A good tender cannot be made in terms which, by taking the money, would cause the other party to make an admission (10); and whether a tender be conditional, is a question for the jury, and not one of law. (11)

(1) Eq. Ca. Abr. 319. (D.) 7 Bac. Abr. Tender (E.), 531.

(2) *Douglas v. Patrick*, 3 T. R. 683.

(3) *Black v. Smith*, Peake's N. P. C. 121.

(4) *Briggs v. Calverly*, 8 T. R. 629.

(5) *Ibid.*

(6) *Rolfe v. Norden*, 4 Esp. N. P. C. 72., vide *Foster v. Bonner*, Cowp. 454.

(7) 3 Stark. Ev. 3d ed. 1071.

(8) Vide *Roe d. West v. Davis*, 7 East, 363. *Goodtitle v. Holdfast*, Str. 900. *Doed. Harris v. Masters*, 2 B. & C. 490.

(9) Stat. 4 Geo. 2. c. 28. s. 4.

(10) *Hastings (Marquis of) v. Thorpy*, 8 C. & P. 573.

(11) *Eckstein v. Reynolds*, 2 N. & P. 256.

If a person in tendering a sum of money say, "I tender you 21*l.* in payment of the half year's rent due at Lady Day last," this will make the tender bad, because, by accepting the money, the other party would admit that such sum was the amount of half a year's rent. (1)

An offer to pay a sum of money as a boon, accompanied with a protestation against the party's right, is not a legal tender. (2)

If the plaintiff take the money, and there be more due, he may still bring an action for the residue; therefore, where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement," it was held not to be a good tender. (3)

So also the offer of a sum, "as all that is due," is not good (4); for if a plaintiff take a sum properly tendered, he does not thereby compromise his future claim for more, which he would do, if he took a sum offered "as all that was due."

Where a defendant tendered 7 sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "there, take your demand," and at the same time delivered a counter claim upon the plaintiff of 1*l.* 5*s.*, who said, "you must go to my attorney:"—It was held, that this was not sufficient to support a plea of tender to an action brought for 6*l.* 17*s.* 6*d.* (5)

Offering a certain sum in full of all demands (6) is not a legal tender. (7)

Upon the principle, that a tender must be unconditional, and of the precise sum due, a plea of tender will not be supported by evidence, that the defendant took a sum of money out of his pocket, and said to the plaintiff, "if you will give me a stamped receipt, I will pay you the money." (8)

Though a party tendering money demands a receipt for the sum tendered, if no objection be made on that account, the tender is good. (9)

If on a tender being made, the creditor insists on receiving a larger sum of money, he cannot afterwards object to the formality of the tender on account of the debtor having required a receipt. (10)

A tender is not vitiated by the person making it, saying at the time of making it, that "it was all the defendant considered to be due." (11)

Where the attorney of A. put down 18*l.*, and said to the other party, "I tender you 18*l.* for Mr. M.:"—It was held, that this was a good tender;—and it seems, that the proper course for the other party was to have taken the money, saying, that he did not take it in full satisfaction of his debt, but still claimed more; and that the person making the tender should then have

MODE IN WHICH
THE TENDER
MUST BE MADE.

WHAT IS A
CONDITIONAL
TENDER.

Payment under
protestation of
right.

Tender "as a
settlement."

Requiring a
receipt.

(1) *Hastings (Marquis of) v. Thorley*, 8 C. & P. 573. *Peacock v. Dickerson*, 2 *ibid.* 51. *n.*

(2) *Simmons v. Wilmoth*, 3 Esp. N. P. C. 91.

(3) *Mitchell v. King*, 6 C. & P. 237. *Higham v. Baddely*, Gow, N. P. C. 213. *Ryder v. Townsend*, 7 D. & R. 119.

(4) *Sutton v. Hawkins*, 8 C. & P. 259.

(5) *Brady v. Jones*, 2 D. & R. 305., et vide *Holland v. Phillips*, 6 Esp. N. P. C. 46.

(6) *Cheminant v. Thornton*, 2 C. & P. 50. *Strong v. Harvey*, 3 Bing. 304. *Evans v. Judkins*, 4 Camp. 156.

(7) *Ryder v. Townsend (Lord)*, 7 D. & R. 119.

(8) *Laing v. Meader*, 1 C. & P. 257. *Griffith v. Hodges*, *ibid.* 419. *Glasscott v. Day*, 5 Esp. N. P. C. 48.

(9) *Richardson v. Jackson*, 9 Dowl. P. C. 715.

(10) *Cole v. Blake*, Peake's N. P. C. 238.

The most expedient course for a debtor to pursue in a case of a tender, is to take a stamp with him, and require of the creditor to give him a receipt thereon, and pay him the price of the stamp; and if the creditor refuse, he will be liable to a penalty under stat. 43 Geo. 3. c. 126. s. 4. *Laing v. Meader*, 1 C. & P. 257.

(11) *Robinson v. Ferreday*, 8 C. & P. 752.

**MODE IN WHICH
THE TENDER
MUST BE MADE.**

let him take the money, stating that he might take that sum, and get more if a jury found him entitled to it. (1)

A tender of a less sum than is due, accompanied with a statement, "I am instructed by the defendant to say that 15*l*. is more than is due, but that you may have it," is a good tender, the money being produced. (2)

**COIN IN WHICH
A TENDER
SHOULD BE
MADE.**

By stat. 56 Geo. 3. c. 68. ss. 11 & 12. the gold coin of the realm is declared to be the only legal tender, and that no tender of silver coin, beyond the sum of 40*s*., shall be a legal tender.

Stat. 56 Geo. 3.
c. 68. ss. 11 &
12.

By stat. 3 & 4 Will. 4. c. 98. s. 6. "a tender of a note or notes of the governor and company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds, on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: provided, that no such note or notes shall be deemed a legal tender of payment by the governor and company of the Bank of England, or any branch bank of the said governor and company, but the said governor and company are not to become liable, or to be required to pay and satisfy, at any branch bank of the said governor and company, any note or notes of the said governor and company, not made specially payable at such branch bank, but the said governor and company shall be liable to pay and satisfy, at the Bank of England in London, all notes of the said governor and company, or of any branch thereof."

Stat. 3 & 4
Will. 4. c. 98.
s. 6.

Bank notes to
be a legal ten-
der except at
the bank and
branch banks.

An offer in country bank notes of money due may be in effect a good legal tender, if it be exclusively refused on the ground of insufficient amount. (3)

A tender of a Bristol bank bill was held in the Exchequer not to be a good tender, though no objection was made to it on that account. (4) But before and after that case it was held in the Queen's Bench, that such a tender was good. (5)

If a tender be made by a cheque contained in a letter requesting a receipt in return, and the plaintiff send back the cheque, and without objecting to the nature of the tender demands a larger sum, it is a good tender. (6)

**PRODUCTION OF
MONEY.**

To make a legal tender, there must either be an actual offer of the money produced, or the production must be dispensed with by the express declaration of the creditor.

● To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor; therefore, where the defendant, on departing from home, left 10*l*. with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called and demanded a larger sum, and the plaintiff said he would not receive the 10*l*., nor any thing less than his whole demand, but the clerk did not offer the 10*l*.,—this was held to be no tender. (7)

A tender is not good if the money be not actually in sight, otherwise, no positive proof will exist, that if the party were willing to accept the

When money
not in sight.

(1) *Jennings v. Major*, 8 C. & P. 61.

(2) *Thorpe v. Burgess*, 8 Dowl. P. C. 603.

(3) *Polglass v. Oliver*, 2 C. & J. 15.,
vide etiam *Brown v. Saul*, 4 Esp. N. P. C.
267. *Wright v. Reed*, 3 T. R. 554.

(4) *Lockyer v. Jones*, Peake's N. P. C. 239. n.

(5) *Ibid. Tiley v. Courtier*, 2 C. & J. 16. n.

(6) *Jones v. Arthur*, 8 Dowl. P. C. 449.

(7) *Thomas v. Evans*, 10 East, 101.

money, it could be immediately paid;—in fact, the money should be at hand, and capable of immediate delivery (1): and under a plea of tender, where the plaintiff disputes the *quantum*, to prove a tender, some money must be proved to have been produced, though it is not necessary to prove the exact sum (2): thus, where the defendant went to the plaintiff's attorney, stating that he was come to settle the plaintiff's account, and produced a paper containing the statement of the account, with a balance of 5*l.* 5*s.*, which he said he was ready to pay, but produced neither money or notes, upon which the attorney said, he could not take that sum, as his client's demand was above 8*l.*:—It was held to be no tender. (3)

MODE IN WHICH
THE TENDER
MUST BE MADE.

Where the defendant's agent went with the money in his hand to make a tender, and asked the creditor whether he had a receipt stamp, and received an answer in the negative:—It was holden, that this, without an actual offer of the money, would not support a plea of tender. (4)

Money in
hand, without
an actual offer.

Where a person offered a sum of money by way of tender, and stated the precise sum he so offered, which he held in his hand, it was considered a sufficient tender, although it was twisted up in bank notes, and not shewn to the party; but if the amount of the sum had not been mentioned, it seems, that it would not have been a good tender. (5)

If a party acquaint his creditor, that he will pay him so much, and put his hand in his pocket to take out the money, but before he can procure it the creditor leaves the room, and the money consequently is not produced till he is gone, this is no tender. (6) So, also, in a plea of tender of 1*l.* 12*s.* 5*d.*, where the jury found specially, that the defendant's attorney called on the plaintiff and said, "I come to pay you 1*l.* 12*s.* 5*d.*, which the defendant owes you;" and that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it, the matter is now in the hands of my attorney:"—It was held, that upon this finding the defendant was not entitled to judgment (7); the court however seem to have been of opinion, that a dispensation from the production might have been implied. (8)

But where the agent of the defendant met the plaintiff in the street, and told him, that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; that the plaintiff stated, he would not take it; that the witness then said he would give him the other 10*s.* out of his own pocket, and run the risk of being paid, and pulled out his pocket book, acquainting the plaintiff, that if he would go into a public house he would pay him, but the plaintiff said he would not take it:—this tender was held to be good (9)—because the production of the money was dispensed with.

Production of
money dis-
pensed with.

Where the defendant ordered A. to pay the plaintiff 7*l.* 12*s.*, and the clerk of the plaintiff's attorney demanded 8*l.*, on which A. said, that he was only ordered to pay 7*l.* 12*s.*, which sum was in the hands of B., and B. put his hand to his pocket, with a view of pulling out his pocket book to pay

(1) *Glasscott v. Day*, 5 Esp. N. P. C. 48.
Huxham v. Smith, 2 Camp. 21.

(5) *Alexander v. Brown*, 1 C. & P. 288.

(2) *Dickinson v. Shee*, 4 Esp. N. P. C. 342.

(6) *Leatherdale v. Sweepstone*, 3 *ibid.*

(3) *Ibid.*

(7) *Finch v. Brook*, 1 Bing. N. C. 253.
1 Scott, 70. Roscoe's Ev. 350.

(4) *Ryder v. Townsend* (Lord Charles),
7 D. & R. 119.

(8) *Ibid.*

(9) *Read v. Goldring*, 2 M. & S. 86.

**MODE IN WHICH
THE TENDER
MUST BE MADE.**

Sum offered
without pro-
duction, but
refused.

7*l.* 12*s.*, but did not do so by the desire of A.; but B. could not say, whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time: — It was held, that this was not a legal tender, as the money should have been produced to the attorney's clerk. (1)

If the defendant, at an interview with the plaintiff, be willing to pay 10*l.*, and a third person present offer to go up stairs and fetch that sum, but is prevented by the plaintiff's saying "he cannot take it," such an offer is a good tender; and although the defendant did not at the time take notice of what was done, yet his pleading it afterwards will be a sufficient ratification of the act. (2)

A tender of money by a vendor to acquire a purchased article is unnecessary, if the vendor admit, that the tender would be useless. (3)

Money in bags.

On a plea of *non assumpsit* as to part, and tender as to the rest, it is sufficient for the plaintiff to prove a tender of the money in bags or untold, for it is the receiver's business to tell it; but if the defendant say, "here I am, ready to pay you," and yet hold the bags all the while under his arm, it would not be a good tender. (4) But where the creditor insists on more being due, it is not necessary to produce the money tendered. (5)

Creditor insist-
ing on more
being due.

TENDERING A
LARGER SUM
THAN IS DUE.

"I take it to be clear beyond a doubt, that if the debtor tenders a larger sum than is due, and asks for change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum" (6): thus, a plea of tender of 20*l.* is supported by evidence of the tender of 20*l.* 9*s.* 6*d.*, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the 20*l.* (7)

A tender of a bank note in payment of a fractional sum is good, if the creditor object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor be required to return the difference between the bank note and the fractional sum. (8)

So, a tender of 2*l.* to pay 1*l.* 18*s.* is good, if the plaintiff object to receive it because he is entitled to a larger sum, and not on the ground, that he has no change (9); and where the creditor asked how much was due, and laid down a sum exceeding what was due, it was held, that the offer, not being coupled with any condition, the tender was legal. (10)

Whenever a larger sum is tendered than is requisite, it should consist of moneys numbered. (11)

Where a creditor has pecuniary demands for unequal sums against divers persons, a tender of one sum for the debts of such divers persons is not a good tender of one of such debts. (12)

A tender of a larger sum, requiring change, is not a good tender of a

(1) *Kraus v. Arnold*, 7 Moore, 59.

(2) *Harding v. Davies*, 2 C. & P. 77. If the man had said "I have got the money, but must go a mile for it," it would not be a tender. *Per Best C. J.*

(3) *Jackson v. Jacob*, 3 Bing. N. C. 869.

(4) Bull. N. P. 155. (b.)

(5) *Black v. Smith*, Peake's N. P. C. 121.

(6) *Per Kenyon C. J.* *ibid.* *Asley v.*

Reynolds, Str. 916. *Betterbee v. Davis*, 3 Camp. 70. *Wade's case*, 5 Co. 115. (a.)

(7) *Dean v. James*, 1 N. & M. 398. 4 B. & Ad. 547.

(8) *Sawnders v. Graham*, Gow, N. P. C. 121.

(9) *Cudman v. Lubbock*, 5 D. & B. 289.

(10) *Bevan v. Rees*, 7 Dowl. P. C. 510.

(11) *Betterbee v. Davis*, 3 Camp. 70.

(12) *Strong v. Harvey*, 3 Bing. 304.

smaller sum (1): thus, an offer of a 10*l.* note to a collector appointed by the solicitor to a commission of bankruptcy for the payment of 4*l.* 14*s.* 6*d.*, the sum demanded being 11*l.* 4*s.* 6*d.*, is not a good tender in substance, the collector having no discretion on the subject (2); neither is it a good tender of a fractional sum for the debtor to offer the creditor a bank note to a larger amount, and to desire him to take out of that the sum to be paid. (3) But if 20*l.* be tendered to a man, this may be a good tender of 15*l.*, for he has only to select so much and restore him the residue.

MODE IN WHICH
THE TENDER
MUST BE MADE.

A plea of tender of a half year's rent, is not supported by evidence of a tender of the half year's rent requiring the lessor to get change and pay back the property tax (4); and a plea to an avowry of a tender of 16*l.* will not be supported by proof of a tender of 15*l.* 16*s.*, although no more rent was due than the sum proved to have been tendered. (5)

5. PLEA OF TENDER.

By Reg. Gen. H. T. 2 Will. 4. s. 45. "if the declaration be filed or delivered so late, that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction, or in abatement, or a tender, or any other similar plea."

PLEA OF TEN-
DER.

Reg. Gen. H T.
2 Will. 4. s. 45.

In all cases where there has been a tender, but there is some doubt as to its sufficiency, it is safest to pay the money into court without pleading the tender (6); for though the payment of money into court subjects the defendant to costs up to the time of paying it in, if the plaintiff do not proceed further, nevertheless, if the defendant plead a tender, and the plaintiff take issue thereon, and the defendant fail in proving it, he will thereby, at all events, subject himself to the costs of the trial, and the general costs of the cause. (7)

In pleading a tender, it is not sufficient to state, that the defendant is, and always has been, ready to pay, but he must also state, that he tendered and offered to pay (8); and wherever the debt or duty arises at the time of the contract, and is not discharged by a tender and refusal, the plea must state a *tout temps prist* as well as *uncore prist*, or that the defendant has always been, and still is, ready to pay the sum tendered. (9)

Form of plea.

Where the defendant in *indebitatus assumpsit* pleaded payment of a sum of money, parcel of the several sums, &c., and pleaded also a tender of another sum, parcel &c., the court held, that the latter plea was good, without alleging, that the tender was made after payment. (10)

The plea of tender formerly concluded, when it was in bar of the action,

Conclusion of
plea of tender.

(1) *Robinson v. Cook*, 6 Taunt. 336.

(2) *Blow v. Russell*, 1 C. & P. 365.

(3) *Betterbee v. Davis*, 3 Camp. 70.

(4) *Robinson v. Cook*, 6 Taunt. 336. It seems, that proof of a tender of 4*l.* 19*s.* 6*d.* will not be evidence to support a plea of a tender of 4*l.* 9*s.* 6*d.*, as it does not meet the plea in point of fact. *Watkins v. Robb*, 2 Esp. N. P. C. 711.

(5) *John v. Jenkins*, 1 C. & M. 227. 3 Tyrw. 170.

(6) *Vide per* Lord Tenterden in *Leatherdale v. Sweepstone*, 3 C. & P. 342.

(7) Archb. by Chitt. 1015.

(8) *French v. Watson*, 2 Wils. 74., et vide *Horn v. Lewin*, 2 Salk. 584. 1 Saund. 33. n. 2. *Finch v. Brook*, 1 Scott, 70. 1 Bing. N. C. 253.

(9) Tidd's N. P. 396. *Giles v. Hartis*, 1 Ld. Raym. 254. 1 Saund. 33. n. 2.

(10) *Jones v. Owen*, 6 N. & M. 620.

PLEA OF TENDER.

Conclusion of defendant's plea.

When debt or duty arises at a subsequent period.

When requisite to plead a tender.

by praying judgment, if the plaintiff ought to have or maintain his action generally; but where it was only in bar of damages, the defendant, in pleading a tender of debt, ought to have concluded his plea, by praying judgment, if the plaintiff ought to have or maintain his action, to recover any damages against him; for in this action the debt is the principal, and the damages are only accessory: but in *assumpsit*, the damages are the principal; and therefore in pleading a tender in the latter action, the defendant ought to conclude his plea with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any more or greater damages than the sum tendered, or any damages by reason of the non payment thereof." (1)

But when the debt or duty arises at a subsequent period, as in the case of a bond conditioned for the payment of money on a particular day, it is sufficient to state, that the defendant was then, and afterwards, and still is, ready to pay it.

A tender must be pleaded in *assumpsit* and debt on bond, or simple contract, and may be pleaded in covenant for the non payment of rent. (2)

The plea of tender is sometimes pleaded in bar of the action, but more frequently in bar of damages only, or of further damages. In debt upon bond, conditioned to pay money at a certain day, if the defendant plead a tender at the day, and that he has always been ready &c., it is a good plea in bar of the action (3), for a tender and refusal are considered in this case as tantamount to payment (4), and operate as a performance of the condition. (5)

But in debt on single bill, or for rent, &c., a tender can only be pleaded in bar of the damages occasioned by the non payment of the debt, or in covenant or *assumpsit*, of the further damages, beyond the amount of the sum tendered. (6)

When a tender is pleaded in bar of an action, it may be pleaded with the general issue, or other plea, by leave of the court (7); but where it is only pleaded in bar of damages, or further damages, the defendant is not allowed to plead *non assumpsit* (8) or *non est factum* (9) to the whole declaration, and a tender as to part; for one of these pleas goes to deny, that the plaintiff ever had any cause of action, and the other partially admits it. (10)

A tender before action brought is not pleadable to an action for unliquidated damages. (11)

Where an informal plea will be good after verdict.

A plea as to a certain sum, that the plaintiff ought not further to maintain his action in respect thereof, because, when the same became due, he was, and ever since has been, ready to pay the same, and after it became due, offered to tender the same to plaintiff; but that the plaintiff dispensed with

(1) *Giles v. Hartis*, 1 Ld. Raym. 254. 2 Salk. 622. Carth. 413. Tidd's N. P. 399.

(2) *Johnson v. Clay*, 7 Taunt. 486. As to plea of tender generally, vide Com. Dig. Pleader (2 G. 2.); (2 W. 28. 49.)

(3) *Anon.* Dyer, 300. *Broom v. Pine*, Comb. 334. *The Earl of Salisbury's case*, Carth. 133. *Giles v. Hartis*, 1 Ld. Raym. 254.

(4) *Squire v. Grevett*, 2 Ld. Raym. 961. 964., sed vide *Welsh v. Rose*, 6 Bing. 638.

(5) Tidd's N. P. 395.

(6) *Broom v. Pine*, Comb. 334. *Giles v. Hartis*, 1 Ld. Raym. 254. 1 Saund. 33. n. 2.

(7) *Gerring v. Manning*, Barnes, 366. *Martin v. Kesterton*, 2 W. Black. 1093.

(8) *Maclellan v. Howard*, 4 T. R. 194. *Dougal v. Bowman*, 2 W. Black. 723.

(9) *Orgill v. Kemshead*, 4 Taunt. 459. *Jenkins v. Edwards*, 5 T. R. 97. Tidd's N. P. 395.

(10) Tidd's N. P. 395.

(11) *Barrett v. Dearle*, 3 Dowl. P. C. 13.

actual tender, and that the defendant brings the same into court:—it is an informal plea of tender, and good after verdict. (1)

PLEA OF TENDER.

The replication to a plea of tender is general or special. The general replication either denies the fact of the tender, or, admitting the fact, takes issue on the plea of *non assumpsit* or *nunquam indebitatus*, as to the residue of the plaintiff's demand (2); the usual form is, that "after the making of the tender mentioned in the plea, and before the commencement of the action, the plaintiff demanded the said sum (the sum tendered), but that the defendant refused to pay the same," &c.

REPLICATION.

The plaintiff may reply, that, before tender made, he issued a writ (3), and may also, if his case require it, reply to a plea of tender a prior or subsequent demand and refusal (4), to which the defendant may rejoin, that there was no such demand; and if to a plea of tender the plaintiff reply a subsequent demand and refusal, it is incumbent on him to prove, that, after the tender admitted in the pleadings, he demanded of the defendant the exact sum specified as having been before tendered and refused. (5)

6. EVIDENCE—PAYMENT OF MONEY INTO COURT—JUDGMENT—COSTS.

EVIDENCE—
PAYMENT OF
MONEY INTO
COURT—
JUDGMENT—
COSTS.

A tender admits the contract and facts stated in the declaration; therefore, where a count averred, that in consideration that the plaintiff would let to the defendant certain tithes, the defendant agreed to pay 41*l.*, and that the plaintiff did let the said tithes, and did permit the defendant to take them; a tender on all the counts generally, precluded the defendant from shewing a legal interruption to his taking them, if any such interruption had existed. (6)

Tender admits
the contract
and facts stated
in the declaration.

In an action for maliciously and without any reasonable cause refusing to accept a tender of debt and costs, for which the plaintiff was in execution at the defendant's suit, the defendant may give evidence of probable cause under the plea of not guilty. (7)

When "probable cause" may be given in evidence in an action for refusing to accept a tender of debt.

A promise to pay the debt of another need not be proved to be in writing, when the defendant pleads a tender to the count on such promise. (8)

When a promise to pay the debt of another need not be in writing.

Where to a declaration on a bill of exchange for 10*l.* 4*s.* the defendant pleaded *non assumpsit* as to all the said sum, except 4*l.* 7*s.* 6*d.*, and as to that a tender, with an averment, that the defendant was always ready and willing to pay the same; and the plaintiff replied, that the defendant was not always ready and willing to pay the said sum, &c., and a demand thereof after the cause of action accrued, and before the tender, and issue was taken thereon; and on its being proved, that the defendant had paid 7*l.* on account of the bill, and had tendered 3*l.* 4*s.*, a verdict was found for him:—It was held, that the replication to the plea of tender was not supported by proof of a demand of the whole debt due, but could only be supported by proof of the demand of the precise sum tendered. (9)

When the replication is not supported by proof of a demand of the whole debt due.

(1) *Turner v. Crossley*, 2 Jur. 18.

(2) *Tidd's N. P.* 425.

(3) 1 Saund. 53. (b.) n.

(4) *Giles v. Hartis*, 1 Ld. Raym. 254.

(5) *Spybey v. Hide*, 1 Camp. 181.

(6) *Cox v. Brain*, 3 Taunt. 95.

(7) *Hounsfield v. Drury*, 11 A. & E. 98.

(8) *Middleton v. Brewer*, Peake's N. P. C. 20.

(9) *Rivers v. Griffiths*, 1 D. & R. 215.
5 B. & A. 630.

**EVIDENCE —
PAYMENT OF
MONEY INTO
COURT —
JUDGMENT —
COSTS.**

Where the issue is on a subsequent demand.

What is not sufficient evidence of a demand, on the issue of demand and refusal.

Where proof of a tender by the plaintiff of the amount of rent due, is not evidence for the defendant of a holding as stated in the avowry.

**PAYMENT OF
MONEY INTO
COURT.**

Effect of plea of tender.

Where the issue is on a subsequent demand and refusal to a plea of tender, the demand of the debt, to do away the effect of the tender, must be by some one authorised to receive it, and to give the debtor a discharge (1), even in replevin. (2)

After a tender of what is due from two persons on a joint contract, a subsequent application to one of them is sufficient to support a replication to a plea of tender, that the plaintiff subsequently demanded payment from the defendants. (3)

A letter demanding payment of a debt sent to the defendant's house, and to which an answer is returned, that the demand should be settled, is sufficient evidence to go to the jury of a demand, on the issue of a subsequent demand and refusal to a plea of tender. (4)

It seems that a letter, demanding payment of a debt, sent by the plaintiff's attorney, and received by the defendant, is not sufficient evidence of a demand, on the issue of demand and refusal to a plea of tender; and that the demand should be personal, in order that the defendant may have an opportunity at the time of paying the money demanded. (5)

In *Knight v. McDouall* (6) an avowry was made for rent for two years and a half, due on a Michaelmas holding, to which a tender and *non tenuit* were pleaded; on the trial a holding from Michaelmas, old style, and a tender after Old Michaelmas being proved and found, the judge refused to amend the avowry, but directed the finding of the jury upon the second issue to be indorsed on the record (7): — It was holden, that, upon such pleadings, proof of a tender by plaintiff of the amount of rent due in support of the first plea, was not evidence for the defendant of the holding, as stated in the avowry; nothing being said by the plaintiff at the time of tender about the terms of the holding, or the time when the rent had become due. (8)

If there be a plea of tender, and that an order be procured to pay money into court generally, instead of upon the plea of tender, the payment of the money under this order will be an admission of the cause of action stated in the declaration, and the plaintiff will be entitled to a verdict accordingly. (9)

The plaintiff may, as previously observed (10), be nonsuited on a plea of tender; because a nonsuit is merely the plaintiff's declining to appear to hear the verdict. (11)

After payment of money into court on a plea of tender, the defendant can never take it out, notwithstanding he may have a verdict (12); but the plaintiff may take it out, whether he confess or deny the tender in his replication. (13)

Money deposited in court in lieu of bail cannot be transferred to the account of a payment into court on a plea of tender. (14)

(1) *Coles v. Bell*, 1 Camp. 478. n. *Coore v. Callaway*, 1 Esp. N. P. C. 115.

(2) *Pimm v. Grevill*, 6 Esp. N. P. C. 95.

(3) *Peirse v. Bowles*, 1 Stark. 323.

(4) *Hayward v. Hague*, 4 Esp. N. P. C. 93.

(5) *Edwards v. Yates*, R. & M. 360.

(6) 12 A. & E. 439.

(7) The court of Queen's Bench refused to give judgment for the defendant upon the finding so indorsed, under stat. 3 & 4 Will. 4.

c. 42. s. 24., and also refused to expunge the indorsement.

(8) *Knight v. McDouall*, 12 A. & E. 439.

(9) *Butler v. Horne*, 1 N. & M. 117.

(10) *Anté*, 2600.

(11) *Sed vide contra, Harding v. Spicer*, 1 Camp. 327.

(12) *Cox v. Robinson*, Str. 1037.

(13) *Le Grew v. Cooke*, 1 B. & P. 333.

(14) *Stultz v. Hennege*, 10 Bing. 561.

The defendant must in general make a *profert in curiam* (1), or bring the money into court, and the sum tendered must be paid to the signer of the writs in the King's Bench, or prothonotaries in the Common Pleas, or to one of the masters in the Exchequer, who will give a receipt for it in the margin of the plea, and if not so paid, the plaintiff may, if the plea be pleaded to the whole sum in the declaration, consider it as a nullity and sign judgment. (2)

EVIDENCE—
PAYMENT OF
MONEY INTO
COURT—
JUDGMENT—
COSTS.
JUDGMENT.

But where in an action of debt the defendant pleaded the general issue as to part, and as to the other part a tender, but omitted to pay the money into court, judgment having been signed on that account as for want of a plea, the court set aside the judgment for irregularity. (3)

In debt for a sum above 20*l.*, the defendant pleaded a tender as to part, and *numquam indebitatus* as to the residue. The plaintiff confessed the tender, and obtained a verdict for 18*l.*, which, together with the sum tendered, exceeded 20*l.*:—It was held, that the plaintiff was only entitled to costs upon the lower scale. (4)

COSTS.
Where plain-
tiff only en-
titled to costs
on the lower
scale.

- (1) *Russel v. Williams*, 1 Lutw. 281. Archb. by Chitt. 1027. Archb. C. Att. Com. Dig. Pleader (2 W. 28.), *Brownlow* (Sir John) v. *Hewley*, 1 Lutw. 364. Archb. 499.
(2) *Peiher v. Shelton*, Str. 638. *Lane v. Smith*, Barnes, 252. Tidd's N. P. 396.
(3) *Chapman v. Hicks*, 2 Dowl. P. C. 641. 2 C. & M. 633.
(4) *Dixon v. Walker*, 8 Dowl. P. C. 887. 7 M. & W. 214.

TITHES.

GENERALLY — BY WHOM PAYABLE — TO WHOM PAYABLE — REMEDIES FOR THEIR RECOVERY
— LIMITATION OF ACTION — EVIDENCE — TITHES COMMUTATION ACTS, pp. 2612—
2616.

- GENERALLY.** In consequence of the commutation of tithes under stats. 6 & 7 Will. 4. c. 71., 7 Will. 4. & 1 Vict. c. 69., 1 & 2 Vict. c. 64., 2 & 3 Vict. c. 62., and 3 & 4 Vict. c. 15., questions respecting tithes have recently been, and will in future be, of very rare occurrence at Nisi Prius; therefore detailed observations upon that subject will not be requisite.
- Defined.** An estate in tithes is a title to a certain proportion or share of such titheable matters as may happen to arise annually upon the lands over which the right extends.
- Prædial tithes.** Tithes are divided into prædial, mixed, personal, great and small. Prædial tithes are such as arise merely and immediately from the vegetable produce of the land, such as of corn, hay, hemp, flax, grass, fruit, herbs, and wood; and with respect to which it may be observed, that by stat. 5 & 6 Will. 4. c. 75., intituled, "An act for the amendment of the law as to the tithing of turnips in certain cases," turnips severed from the land, for the purpose of being consumed by sheep or cattle thereon, are made subject to tithe as if not so severed. Mixed tithes are those which arise not immediately from the profits of the land, but from the produce and increase of animals nourished by the land; as of cattle, sheep, pigs, wool, milk, and eggs. Personal tithes are the profits which arise from the labour and industry of man in some trade or employment, being the tenth of the clear profits after deducting all expenses; as of mills, fish, &c. It is the nature and not the quality that makes a great or small tithe. (1) When the tithe of any thing is *magnus ecclesie proventus*, it is reckoned among the great tithes; where it is *parvus ecclesie proventus*, it is reckoned among the small tithes. Thus, the tithes of corn, hay, and wood are great tithes, because they are in general of much greater value than any other species of tithes; the prædial tithes of other less valuable vegetables, such as hops, potatoes, madder, woad, together with mixed and personal tithes, are small tithes.
- Great and small tithes.**
- BY WHOM PAYABLE.** The setting out or rendering of the tenth part of the yearly produce of the land and of the animals that are depastured and kept upon the land, for the use of the person who is entitled to the tithes, is an obligation imposed by the law upon the occupier of the land, and upon the occupier of the land only. This obligation is, moreover, wholly personal; and, consequently, the demand of tithes and all the remedies for the subtraction of them are strictly personal.
- Stat. 2 & 3 Edw. 6. c. 13. s. 1.** By stat. 2 & 3 Edw. 6. c. 13. s. 1. "every of the king's subjects shall truly and justly, without fraud or guile, divide, set out, yield, and pay all manner of their prædial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid. And no person shall take or carry away any such or like

(1) *Warton v. Lisle*, 3 Lev. 365. 4 Mod. 183.

tithes which have been yielded or paid within the said forty years, or of right ought to have been paid in the places titheable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the tithes with the parson, vicar, or other owner, proprietary or fermor, of the same tithes, under the pain of forfeiture of treble value of the tithes so taken or carried away."

By stat. 2 & 3 Edw. 6. c. 13. s. 3. "tithe of cattle feeding in any waste whereof the parish is not known, shall be paid to the parson, &c. of the parish in which the owner of the cattle dwelleth."

Stat. 2 & 3
Edw. 6. c. 13.
ss. 3 & 4.

By stat. 2 & 3 Edw. 6. c. 13. s. 4. "no person shall be sued or otherwise compelled to yield or pay tithes for any manors, lands, &c. which either by the laws and statutes of the realm (1), or by any privilege or prescription (2), are not chargeable with the payment of tithes, or that be discharged by any composition real."

By stat. 2 & 3 Edw. 6. c. 13. ss. 5 & 6. "if barren heath or waste ground, other than such as have been discharged from the payment of tithes by act of parliament, which have before this time laid barren and paid no tithes by reason of the same barrenness, be hereafter improved and converted into arable ground or meadow, shall henceforth, after the end of seven years next after such improvements, pay tithes of corn and hay growing upon the same. But if any such barren waste or heath ground hath been charged with the payment of any tithes, and the same be improved or converted into arable ground or meadow, that then the owner shall, during the seven years next following after the improvement, pay such kind of tithes as was paid for the same before the improvement."

Stat. 2 & 3
Edw. 6. c. 13.
ss. 5 & 6.

The great tithes, as of corn and hay, are generally payable to the rector or parson, the small tithes to the vicar. But the parson of one parish may claim by prescription a portion of tithes in the parish of another. (3) In places not within any parish, as in forests and waste lands, the king is entitled to the tithes, because he is not a mere layman, but *persona mixta*. (4) When the monasteries were dissolved by Henry 8., the appropriation of the several benefices which belonged to them would by the rules of the common law have ceased; and they would have become disappropriated, had not a clause been inserted in all the statutes, by which the monasteries were given to the crown, to vest such interests. Such monastic tithes became lay fee, and laymen are capable of them in pernaney, as the derivatives of the ecclesiastical bodies to whom they formerly belonged.

TO WHOM PAY-
ABLE.

The action must be brought for the recovery of tithes by the party grieved, and executors can sue and be sued. (5)

REMEDIES FOR
THEIR RE-
COVERY.

(1) *Vide* stats. 27 Hen. 8. c. 20., 31 Hen. 8. c. 13., 32 Hen. 8. c. 7., 37 Hen. 8. c. 12.

(2) *Vide* stat. 2 & 3 Will. 4. c. 100.

(3) 1 Rol. Abr. Dismes (O.), (P.), 657.

(4) *Bishop of Winchester's case*, 2 Co. 44. (a.) 2 Inst. 647.

(5) In debt for tithe composition, effected under stat. 4 Geo. 4. c. 99., the plaintiff averred in his declaration, that the defendant was an occupier of lands chargeable with the composition, having the first estate therein

greater than a tenancy from year to year; to which it was pleaded, that the composition, to recover which the action was brought, accrued due after the 16th of August, 1832, and that the amount thereof sought to be recovered did not exceed 20*l*. On demurrer to this plea it was holden, that it was bad, and that the declaration was sufficient without an averment, that the defendant did not hold under a lease executed subsequent to the 16th of August, 1832. *Kellett v. Reilly*, 2 Jones (Irish), 1.

REMEDIES FOR
THEIR RE-
COVERY.

The demand must be made upon the person who was the owner of the crop at the time when it was severed from the ground; and therefore, if the occupier sell the crop standing, the purchaser is liable, and not the occupier; because tithes are not in strictness payable in respect of the land, but in respect to the persons of the laity in return for spiritual benefits, they do not belong nor are they appurtenant to the land; they are not a profit issuing out of the land, as a rent is, but are collateral to, and wholly distinct from, the estate in the land. (1)

Stat. 32 Hen. 8.
c. 7.

Before stat. 32 Hen. 8. c. 7. an action for tithes could not have been maintained in the temporal courts; but by sect. 7. of that statute it is enacted, that any person having an estate of inheritance, freehold, term, right, or interest in tithes, and being disseised, or otherwise kept or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same as the case may require, in like manner as they may for lands, tenements, and other hereditaments.

Under this statute tithes have all the incidents appertaining to temporal inheritances: thus, an ejectment may be maintained for tithes. (2)

Stat. 7 & 8
Will. 3. c. 6.

By stat. 7 & 8 Will. 3. c. 6. (made perpetual by stat. 3 & 4 Anne, c. 18. s. 1., and amended by stat. 7 Geo. 4. c. 15.), a summary method of proceeding before two magistrates is given, for recovering small tithes under the value of 40s. (3)

Stats. 53 Geo. 3.
c. 127. s. 4. and
5 & 6 Will. 4.
c. 74.

By stat. 53 Geo. 3. c. 127. s. 4. the jurisdiction of two magistrates was extended to all tithes, oblations, and compositions subtracted or withheld, where the same should not exceed 10*l.* from any one person; and by stat. 5 & 6 Will. 4. c. 74. (amended by stat. 4 & 5 Vict. c. 36. "for the more easy recovery of tithes,") proceedings for the recovery of tithes under the yearly value of 10*l.*, except in the case of quakers, shall be had only under the powers of the two foregoing statutes, with a proviso, that it shall not extend to any case in which actual title to any tithe, &c. shall be *bonâ fide* in question.

Stats. 7 & 8
Will. 3. c. 34.
s. 4. and 53 Geo.
3. c. 127. s. 6.

By stat. 7 & 8 Will. 3. c. 34. s. 4. (4) (made perpetual and extended to all customary payments belonging to any church or chapel by stat. 1 Geo. 1. st. ii. c. 6.) the like remedy is extended to all tithes due from quakers, and two magistrates are empowered to ascertain what is due, and to order payment, so as the sum ordered does not exceed 10*l.*, and which was extended to 50*l.* by stat. 53 Geo. 3. c. 127. s. 6.

Stat. 5 & 6
Will. 4. c. 74.
s. 2.

By stat. 5 & 6 Will. 4. c. 74. s. 2. in the case of quakers no execution, or decree, or order, shall be made against the person, but against the goods or other property of the defendant.

Stat. 2 & 3
Edw. 6. c. 13.
s. 2.

By stat. 2 & 3 Edw. 6. c. 13. s. 2. the rector, &c., or his servants, are empowered to see that the tithe is justly set forth, and to carry away the same; and a remedy is given in the ecclesiastical court for the recovery of the double value of tithe subtracted with costs.

Stat. 8 & 9
Will. 3. c. 11.
s. 3.

By stat. 8 & 9 Will. 3. c. 11. s. 3. "in actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles (6*l.* 13*s.* 4*d.*), the plaintiff obtaining judgment or any award of execution after plea pleaded or de-

(1) Eagle on Tithe Commutation Acts,
3d ed. Introd. ix.

(2) *Baldwin v. Wine*, Cro. Car. 301.

(3) Vide *Rex v. Wakefield*, 1 Burr. 487.

(4) Vide *Rex v. Jeffery*, 2 D. & R. 860.

murrer joined, shall recover his costs;" and "if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs."

REMEDIES FOR
THEIR RE-
COVERY.

By stat. 2 & 3 Will. 4. c. 100. (1) (an act for shortening the time required in claims of *modus decimandi*, or exemptions from or discharge of tithes), "in cases of claim of a *modus decimandi*, the payment or render of such *modus*; and in cases of claim, to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless in the case of a claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity, from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved, that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible."

LIMITATION OF
ACTION.

Stat. 2 & 3
Will. 4. c. 100
What claims of
modus decimandi to be
valid in law.

Stat. 3 & 4 Will. 4. c. 27., for the limitation of actions (2) and suits relating to real property, extends to tithes (except tithes belonging to a spiritual or eleemosynary corporation sole); and by sect. 43. no person claiming any tithes, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity.

Stat. 3 & 4
Will. 4. c. 27.

In an action of debt under stat. 2 & 3 Edw. 6. c. 13., for not setting out tithes, the plaintiff must establish, 1. his title as rector, lay impropriator, &c.; 2. the defendant's liability as an occupier of lands within the parish, &c.; 3. the value of the tithe.

EVIDENCE.

A certificate of tithe composition, which does not state to whom the composition is payable, is *prima facie* valid, and the rector is the person entitled to the composition. (3)

Certificate of
tithe composi-
tion, not
stating to
whom the com-
position was
payable.

The omission of the average price of corn in a certificate of tithe composition does not vitiate the certificate. Where a defendant in a suit for tithe composition is shewn to be in possession of lands in the parish subject to composition, the *onus* of shewing exemption lies upon such defendant. (4)

Omission of
the average
price of corn
does not vitiate
the certificate.

In an action of debt for arrears of tithe composition, if the composition be not appealed from, and the proceedings therein have been regular, the defendant, in Ireland, will not be permitted in that action to set up a title in a stranger to the composition, which, if established, would have the effect of making the composition void *ab initio*. (5)

Where composi-
tion has not
been appealed
against, evi-
dence cannot
be produced to
make the com-
position void
ab initio.

(1) *Vide post*, APPENDIX, tit. STATUTES OF LIMITATION.

(2) *Vide stat.* 2 & 3 Will. 4. c. 100.

(3) *Lodge v. Creagh*, 1 Jones & Carey (Irish), 212. *Semble*, that a certificate of tithe composition under stat. 4 Geo. 4. c. 99., was considered as conclusive evidence, in an

action against a tithe payer, of the title of the person named therein, as the person to whom the composition is due and payable, to that composition. *Ashe v. Locke*, 2 Jones (Irish), 11.

(4) *Anon.* 1 Crawford & Dix (Irish), 12.

(5) *Ashe v. Locke*, *ibid.* 13.

**TITHES COM-
MUTATION
ACTS.**

Stats. 6 & 7 Will. 4. c. 71., 7 Will. 4. & 1 Vict. c. 69., 1 & 2 Vict. c. 64. 2 & 3 Vict. c. 62., and 3 & 4 Vict. c. 15. have given, in lieu of the right to tithes in kind which subsisted under the previously existing law, an annual sum of money in the nature of a rent charge issuing out of the land, and payable half yearly, with powers of distress and entry upon the land in default of payment of the rent charge.

Where writ of
habere facias
possessionem
will be issued.

It is not necessary for the owner of the rent charge to bring an action of ejectment against the party in possession in the regular and ordinary course of law, as the statute gives him a summary remedy grounded upon an affidavit before one of the judges of any of the courts at Westminster, who is authorised to order a writ to be directed to the sheriff, requiring him to summon a jury to assess the arrears of the rent charge; and upon the return of the inquisition, the owner of the rent charge may sue out a writ of *habere facias possessionem* directed to the sheriff, commanding him to cause the owner of the rent charge to have possession of the land until the arrears, and the costs of the writ and inquisition, and the costs of cultivating and keeping possession of the land, shall be fully satisfied. (1)

Where the con-
solidation of
actions will not
be enforced.

In *Ward (Clerk) v. Pomfret* (2) an award was made by an assistant tithe commissioner under stat. 6 & 7 Will. 4. c. 71., with respect to certain alleged district moduses. Both the vicar and the landowners of the parish being dissatisfied with the award, the vicar brought an action against one of the landowners, and seventy-four of the landowners brought actions against the vicar, in order to try the disputed right under issues to be directed pursuant to the forty-sixth section of the statute. But the court refused to order the seventy-four actions brought by the landowners against the vicar to abide the event of the action brought by him.

When the vicar
must be rated
as the occupier
of land.

Under stat. 6 & 7 Will. 4. c. 96. s. 1. the vicar of a parish receiving composition for small tithes is to be rated on such receipt in the same way as the occupier of land; that is, on the sum for which the same would let, free from tenant's rates and taxes and ecclesiastical dues. (3)

(1) *Eagle on Tithe Commutation Acts*,
3d ed. Introd. xi.

(2) 1 M. & G. 559.

(3) *Regina v. Capel (Clerk)*, 12 A. & E. 382.

TOLLS.

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1. GENERALLY.

GENERALLY.

Respecting tolls it may be stated, as a general principle, that where private property is by the consent of the owner invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. (1)

There are various descriptions of tolls, which have been created either by custom, charter (2), or statute, the principal of which are toll traverse, toll thorough, tolls in markets, highway tolls, and canal tolls.

(1) *Allatt v. Inglis*, 12 East, 527.(2) *Vide Merewether and Stephens' Hist. of Boroughs*, 50. 380. 392.

GENERALLY.

Toll (*tolnetum vel theolonium*) is a Saxon word, and properly a payment in towns, markets, and fairs for goods and cattle bought and sold. It is a reasonable sum of money due to the owner of the fair or market upon sale of things tollable within the same (1), and it is used for a liberty, as well to take as to be free from toll.

By the ancient law of this land, the buyers of corn or cattle in fairs or markets were obliged to pay toll to the lord of the market, in testimony of the contract there lawfully made; for toll was first invented that contracts in markets should be openly made before witnesses, and private contracts were held unlawful.

Toll does not of common right belong to a fair, though it has been holden, that some toll is due of common right, as appears from the immunities of several persons not to pay toll, which proves, that if it was not for those privileges, they ought to pay toll of common right.

Toll traverse. Toll traverse is where one claimeth to have tolls for every beast driven over his ground, for which a man may prescribe, and distrain for it *in vid regid.* (2)

Toll thorough. Toll thorough is when a town prescribes to have toll for such a number of beasts, or for every beast that goeth through their town, or over a bridge or ferry maintained at their cost, which is reasonable, though it be for passing through the king's highway, where every man may lawfully go, as it is for the ease of travellers that go that way. (3)

Port toll. A prescription to have port toll for all goods coming into a man's port may be good, and this, it is said, without any consideration. (4) And it hath been adjudged, that the liberty of bringing goods into a port for safety implies a consideration in itself. (5)

None but reasonable tolls can be exacted. What shall be deemed reasonable toll is to be determined by the judges when it comes judicially before them. Toll may be said to be unreasonable where a reasonable toll is due, and excessive toll is taken, or when no toll is due, or where toll is unjustly usurped, &c. (6)

When the king grants a fair, he may likewise grant that toll shall be paid, though it be a charge upon the subjects, but then it must be reasonable, for the king cannot grant a burthensome toll; and one may have toll by prescription for some reasonable cause, but such a prescription to charge the subject with a duty of toll, must import a benefit or recompense for it, or some reason must be shewn why it is claimed. (7)

When the language of an act of parliament imposing tolls is ambiguous. If the language of an act of parliament obtained by a company for imposing a rate or toll upon the public be ambiguous, or will admit of different meanings, that construction will be adopted, which is most favourable to the public; therefore, where an act of parliament contained a clause authorising a railway company to demand a rate not exceeding 4*d.* per mile upon coals carried along the railway, and a subsequent clause directing that for all coals shipped for exportation a rate not exceeding $\frac{1}{2}$ *d.* per ton per mile should be charged: — It was holden, that the second clause was to be read

(1) 2 Inst. 220.

(2) *Smith v. Sheppard*, Cro. Eliz. 710.

(3) *Terms de Ley*, 561, 562.

(4) *Prideaux v. Warne*, 2 Lev. 96. *Bennington v. Taylor*, 2 Lutw. 1519.

(5) *London (Mayor of) v. Hunt*, 3 Lev. 37.

(6) 2 Inst. 222. In *Wright v. Bruistcr*

(4 B. & Ad. 116.) it was holden, that a toll of one penny for every pig brought into a market, was not necessarily unreasonable.

(7) *Heddy v. Wheelhouse*, Cro. Eliz. 538. *Crispe v. Belwood*, 3 Lev. 424. *James v. Johnson*, 2 Mod. 144. *Warrington v. Moseley*, 4 ibid. 323.

GENERALLY.

as an exception engrafted upon the first, and also that coals shipped for London were coals shipped for the purpose of exportation. (1) And where an act of parliament directed, that a railway company should take a lower rate of tonnage upon goods conveyed by the railway and shipped in the port of A., goods shipped at a place within the legal port of A., but at some distance from the town of A., were (under the circumstances) held to be entitled to the benefit of the reduction, though the act had previously spoken of "the port and town of A." (2)

If two acts be *in pari materia*, a clause giving additional toll in the second act, is to be construed with reference to that giving toll in the first act. (3)

If the grantee of a royal franchise of toll, grant an immunity thereout, and the franchise of toll afterwards become extinct by unity of possession in the crown, the immunity does not thereby cease; and if the crown regrant the toll, the grantee must take it subject to the immunity. (4)

In order to support a prescription against public right, a consideration must be proved. (5)

A toll thorough requires a consideration to be shewn, in order to support its demand (6), and moving to the person from whom it is claimed. (7).

If a person, claiming a toll for passing over a highway, can shew an immemorial usage, and that the soil and toll were, before the time of legal memory, in the same hands, though severed since, it will be presumed, that the soil was originally granted to the public in consideration of the toll. (8)

In *Lyons v. Fitzgerald* (9) the plaintiff having proved certain patents and proceedings in parliament, which were evidence to shew, that the toll in question was toll thorough originally, and granted in consideration of the corporation keeping up the gates of L., which had been a fortified town, but which had ceased to have gates or fortifications for more than sixty years. It was contended, that even though such evidence was not conclusive (which question was raised by bill of exceptions), yet it was persuasive evidence that the toll was toll thorough, and that the jury had found against the weight of it:—but it was holden, that although if the toll was originally toll thorough, it could not now be toll traverse, yet that whether it was or not, was upon the evidence a mere jury question, which was fairly submitted to them by the judge, who did not disapprove of the finding; and that there was no ground to set aside the verdict, being against the weight of evidence.

The repair of some streets in a town is not sufficient consideration to support a claim of toll thorough in all parts of the town. (10)

Two statutes *in pari materia* giving tolls.

Franchise of toll becoming extinct by unity of possession.

To support a prescription against public right, a consideration must be proved.

TOLL THOROUGH.

Beneficial consideration must be shewn for a toll thorough.

Presumption that the soil was originally granted to the public.

When evidence not conclusive but persuasive, that a toll is toll thorough.

Insufficient consideration to support a claim of toll thorough.

(1) *Barrett v. Stockton and Darlington Railway Comp.* 2 M. & G. 134.

(2) *Ibid.*

(3) *Rez v. Tone River (Conservators of)*, 1 B. & Ad. 561.

(4) *Tewkesbury (Bailliff of) v. Bricknell*, 2 Taunt. 120.

(5) *Nottingham (Mayor of) v. Lambert*, Willes, 111., vide *Richards v. Bennett*, 1 B. & C. 223. *Colton v. Smith*, 1 Cowp. 47. *Crispe v. Belwood*, 3 Lev. 424. Com. Dig.

Toll thorough (C.), et vide *Truman v. Walsingham*, 2 Wils. 296.

(6) *Yarmouth (Mayor of) v. Eaton*, 3 Burr. 1402.

(7) *Quære*, Whether toll of goods sold in a market can be due from the seller? *Hill v. Smith*, 4 Taunt. 520. 10 East, 476.

(8) *Felham (Lord) v. Pickersgill*, 1 T. R. 660.

(9) *Smith & Batty (Irish)*, 405.

(10) *Brett v. Beales*, 10 B. & C. 508. M. & M. 416.

GENERALLY.

TOLL TRAVERSE.

To support a claim of toll traverse a special consideration need not be shewn.

To support a claim of toll traverse, a special consideration need not be shewn: where, therefore, to an action of trespass for distraining goods brought to the market of F., for tolls due in respect thereof, the defendant justified the distress by shewing a prescriptive right as lord of the manor of F., of which the town of F. formed a part, to take a certain reasonable toll for goods brought within the town for the purpose of being there delivered, and in fact delivered; and averred certain special considerations for taking the toll, to which the plaintiff was no party:—It was held after verdict, that the prescriptive right of soil in the manor (the toll being coeval therewith) was a sufficient general consideration for the toll, as a toll traverse, the plaintiff having bought and delivered goods within the manor; for where a legal commencement of a prescription can be presumed, it is sufficient to support such claim after verdict. (1)

Immemorial liberty to pass over a highway not inconsistent with a toll traverse.

Insufficient evidence of toll traverse.

TOLLS IN MARKETS.

Grant of toll passes reasonable toll.

Prescriptive right of a corporation not destroyed by charter.

Temporary agreement to vary the amount of tolls.

Where owner only entitled to tolls under an act of parliament.

An immemorial highway, upon which there had been taken immemorially a toll for liberty to pass over it, is not inconsistent with a toll traverse. (2)

In an action for toll traverse, evidence that the defendant on a market day sold forty-one quarters of corn by two sacks pitched in the market:—was holden not to be sufficient to authorise a verdict against him. (3)

A grant of a fair or market, with an express grant of toll, passes reasonable toll, though no amount of toll be specified. (4)

The prescriptive right of a corporation to tolls is not destroyed by a charter granting and confirming, among other things, all the ancient rights of the corporation, but exempting the inhabitants from toll in all places except London, such exemption applying to the tolls of all other places except London, but not to the tolls of the borough, to which the charter may have been granted. (5)

If the lessee of tolls under a corporation vary, by temporary agreement, the amount of toll claimed of individuals, it will not affect the right to the tolls, if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. (6)

Where an act of parliament for the better regulating a market enacted, “that it should be lawful for the owner thereof to take all such tolls as were usually collected or taken, or which were payable within the market:”—It was held, that such owner, although not entitled at common law to any toll, might, under that act, recover such tolls as at the time of the passing thereof as were usually paid in any part of the market, although the tolls then usually paid in respect of the same articles were different in other parts of the market. (7)

Tolls can be let or mortgaged. (8)

Under charters granting to a dean and chapter, “that they and all their men shall be quit of toll, passage, cheminage, &c. in city and borough, fair and market, in the passage of bridges, and all ports of the sea, in all places

Tolls can be let or mortgaged.

Ecclesiastical exemptions.

(1) *Richards v. Bennett*, 2 D. & R. 389. 1 B. & C. 223. *Colton v. Smith*, 3 Burr. 48. *Nottingham (Mayor of) v. Lambert*, Willes, 111., sed vide *Colton v. Smith*, Lofft, 463. Cowp. 47.

(2) *Lyons v. Fitzgerald, Smith & Batty* (Irish), 405.

(3) *Pines v. Reading (Mayor)*, 4 Bing. 8. 12 Moore, 201.

(4) *Stamford (Corporation of) v. Pawlett*, 1 C. & J. 57. 400. 1 Tyrw. 291.

(5) *Truro (Mayor of) v. Reynolds*, 8 Bing. 275.

(6) *Lancum v. Lovell*, 6 C. & P. 463.

(7) *Bedford (Duke of) v. Esmeatt*, 3 B. & A. 366.

(8) *Fairtair d. Mytton v. Gilbert*, 2 T. R. 169.

 GENERALLY.

throughout England," their lay tenant of lands included in the charters is exempt from market toll and toll traverse, not only for articles going to or coming from the lands for the necessary manurance and enjoyment of them, but also for goods sent out or coming in for the purpose of merchandise. (1)

Where the plaintiff claimed a right under custom to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove, and landing fish therein; and it was proven, that the plaintiff and his ancestors had from time immemorial furnished and maintained a capstan and rope for the use of fishermen; that in stormy weather, boats could not be drawn up from the sea with safety to the crews without them; that the spot on which the capstan stood belonged to the plaintiff, but that the rest of the cove over which the boats were drawn was the property of a third person, it was decided, that the keeping of the capstan and the rope was a good consideration for the exaction of the toll from all boats landing in the cove, whether the capstan and rope were used or not. (2)

What is a good consideration for the exaction of toll.

A claim of toll to be taken in specie for goods sold in a market, is supported by evidence of a right to toll for goods brought into the market, and there sold, without showing any right to toll for goods sold in the market without being brought there. (3)

Toll to be taken in specie.

A prescription for toll of corn brought into a town to be there sold on a market-day, any part of which is pitched within the market for sale, and which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market. (4)

Cannot be toll for goods not brought into market.

A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported. (5)

Goods sold by sample.

The court of Chancery has jurisdiction to decree toll, due by custom, in respect of a mill, although the custom was established in a former suit. (6)

COURT OF CHANCERY CAN DECREE TOLL.

By stat. 1 & 2 Will. 4. c. 25. s. 1. no toll is to be taken or demanded for or in respect of any horse, ass, sheep, swine, or other beast or cattle of any kind, going to or from water or pasture, or to or from being shod or farried, and passing on any turnpike road, provided it is not more than two miles. (7)

HIGHWAYS.
Stat. 1 & 2 Will. 4. c. 25. ss. 1 & 2.

A cart drawn by horses laden with manure for the manuring of land is exempt from toll. (8)

By stat. 1 & 2 Will. 4. c. 25. s. 2. no toll is to be demanded or taken for any horse or other beast of draught, or for any waggon, wain, cart, or other carriage, when employed, or going to be or returning from having been employed in the performance of statute labour on any road.

Road materials.

By stat. 2 & 3 Will. 4. c. 124., where, by any local act, double toll shall be imposed on any waggon, cart, or other carriage, or any horse or other beast drawing the same, which shall at the time of first passing through any

Stat. 2 & 3 Will. 4. c. 124.
Amount of toll.

(1) *Middleton (Lord) v. Lambert*, 1 A. & E. 401. 3 N. & M. 841. *Quare*, Whether in the latter case the exemption could have been claimed by ecclesiastical persons? *Ibid*.

Quare, also, Whether the exemption from toll claimable at common law by ecclesiastical persons and tenants in ancient demesne, extended to goods bought and sold, or carried for the mere purpose of trade? *Ibid*.

(2) *Falmouth (Earl of) v. George*, 2 M. & F. 457. 5 Bing. 286.

(3) *Moseley (Bart.) v. Pierson*, 4 T. R. 104.

(4) *Wells v. Miles*, 4 B. & A. 559.

(5) *Hill v. Smith*, 4 Taunt. 520., *sed vide* S. C. 10 East, 476.

(6) *Norfolk (Duke of) v. Myers*, 4 Madd. 83.

(7) *Vide* stat. 5 & 6 Will. 4. c. 50., which consolidates and amends the laws relating to highways.

(8) *Rex v. Adams*, 6 M. & S. 52.

GENERALLY.

A bridge not a highway.

Stat. 13 Geo. 3. c. 84. s. 60.

Cattle going to or returning from pasture. Timber carriages.

When carriage of lime not exempted.

Where alteration of a carriage for goods, will not vary the right to toll.

When the toll is imposed on horses only.

CANALS.

Rights to toll when derived from statute.

turnpike or toll-gate have paid single toll only, such waggon, &c. on re-passing through the same gate before twelve o'clock at night, so laden as to be subject to double toll, shall only be liable to pay one other single toll.

A bridge was held not to be a highway within the meaning of stat. 13 Geo. 3. c. 84. s. 60., by which carriages employed in carrying materials for the repair of any turnpike road or public highway were exempted from toll; and, therefore, toll was payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road. (1)

In a turnpike act, imposing tolls on horses, &c., "cattle going to or returning from pasture," and "horses attending cattle returning from pasture," were exempted:—It was held, that a horse ridden by the owner of the cattle at pasture, in order to fetch them from pasture, did not come within either of the exceptions. (2) But timber carriages, laden with only one piece, are not excepted out of the turnpike acts. (3)

Under an exemption from toll in an act of parliament for carts carrying compost, &c., or any thing whatever used in the manuring of land, the carriage of lime is not exempt; the words, "or any thing whatsoever used in the manuring of land," being considered as only applying to the carriage of ploughs, harrows, and such like instruments. (4)

Where it appeared in evidence upon an action of *indebitatus assumpsit* for toll, that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city on horses, or in carts or waggons (that is, at the rate of 1d. for every horse-load, and 2d. for every cart-load drawn by one horse, and 2d. more for each additional horse):—It was held, that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage-coaches instead of carts or waggons, could not vary the right of toll in the proportion of 2d. for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods. (5)

By a turnpike act a toll was imposed "for every horse, &c. drawing any coach, &c.," with a proviso that no person should be subject to pay toll more than once in any one day, "for or in respect of any carriage, or any horse, &c." passing through the gates of the trust, such person producing a ticket denoting that the toll had been paid on that day. In *Niblett v. Pottow* (6), where toll was once exacted from the plaintiff for a stage-coach drawn by four horses, it was held, that he was not liable to a second toll for passing again on the same day with the same horses, though drawing a different carriage, the toll being imposed on the horses only.

Where a canal is made pursuant to act of parliament, the right of the proprietors to toll is derived entirely from the act; and it is to be considered, as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act. (7)

(1) *Osmond v. Widdicombe*, 2 B. & A. 49.

(2) *Harrison v. Brough*, 6 T. R. 706.

(3) *Stevens v. Duffy*, 4 Burr. 2258.

(4) *King v. Gough*, 2 Chitt. 655.

(5) *Carlisle (Mayor of) v. Wilson*, 5 East,

2. 1 Smith, 297.

(6) 4 M. & Sc. 595.

(7) *Stourbridge Canal Comp. v. Whaley*, 3 B. & Ad. 798.

In *Stourbridge Canal Comp. v. Wheeley* (1) it appeared, that a canal was formed upon two levels, which were connected by a chain of locks; upon the upper level there was no lock whatever. By the act of parliament for making the canal, all persons were at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the company, not exceeding the rates therein mentioned; and, by another clause, the company were authorised to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:—It was adjudged, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks.

GENERALLY.

When canal tolls cannot be demanded.

Where a canal act directed, "that no boat navigating thereon, which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of twenty tons"; and it did not appear that in any part of the act a boat *per se* was made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—It was holden, that the clause in question was confined to boats carrying some loading, and did not attach upon an empty boat passing through the locks. (2)

Empty boats when ex-empted.

2. BY WHOM THE ACTION CAN OR CANNOT BE MAINTAINED.

It is almost needless to observe, that the grantor of the toll is the person by whom the action should be instituted, when the grantee has been guilty of a default.

BY WHOM THE ACTION CAN OR CANNOT BE MAINTAINED.

A corporation aggregate can maintain *assumpsit* for the use and occupation of buildings, or lands, or tolls, though they did not grant the tolls to the occupier by any instrument under their common seal. (3)

Corporations.

Generally speaking, a mere servant or agent, with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action therein (4); consequently, where A., by a memorandum in writing signed by himself only, agreed in writing to pay the rent of certain tolls, which he had hired to the treasurer of certain commissioners, it was decided, that no action for the rent could be supported in the name of the treasurer, the contract being in legal contemplation with the commissioners, and to pay them. (5)

Servants or agents.

(1) 2 B. & Ad. 793.

(2) *Leeds and Liverpool Canal Navigation Comp. v. Hustler*, 2 D. & R. 556. 1 B. & C. 424., overruling *Hollinshead v. Liverpool and Leeds Canal Comp.* 2 B. & A. 66., *et vide act* 59 Geo. 3. c. cv.

(3) *Stafford (Mayor of) v. Till*, 12 Moore,

260. *Carmarthen (Mayor of) v. Lewis*, 6 C. & P. 608.

(4) *Evans v. Evans*, 1 H. & W. 289.

(5) *Pigott v. Thompson*, 3 B. & P. 147., *vide etiam dict.* Mansfield C. J. in *Bowen v. Morris*, 2 Taunt. 381.

DECLARATION
AND PLEAD-
INGS.FORM OF AC-
TION.

Variance.

Case.

Case the proper
action for fraud
upon the toll.

Trover for ex-
cess of toll.

Debt.

Demise not
under seal.

Duress.

Distress.

3. DECLARATION AND PLEADINGS.

In actions for disturbance of franchises, or subtraction of tolls (1), ferries (2), and offices (3), the declaration should state the possessory interest of the plaintiff, and that by reason thereof he was entitled to the right, in the exercise of which he had been disturbed. (4)

Generally in actions of tort the plaintiff can succeed, although he only prove a part of his complaint; but in prescribing for, or otherwise stating a right to tolls, &c., it is judicious to avoid claiming or stating more than constitutes the subject-matter of the particular dispute, for by this precaution a variance may be avoided. (5)

Case, being the general remedy for disturbing a party in the enjoyment of an easement (6), can be maintained, although the right to the easement be conferred by a written agreement, and which stipulates for its enjoyment (7); it therefore lies for disturbance, obstruction, or other injuries, to offices, franchises, ferries, markets, or tolls, or for not grinding at an ancient mill, &c. (8)

An action on the case is the proper remedy for a fraud upon the toll of a market. (9)

Where a toll of corn had been customarily taken by dipping into the sack, so as to bring out a certain quantity, and the collector varied from the proper mode (by sweeping instead of lifting the toll), so as to take more:—It was held, that trover lay against him for the excess. (10)

Debt is sustainable for tolls, and also for port duties. (11)

Though a demise of tolls, unless under seal, is void, yet, after the beneficial occupation thereof, *assumpsit* or debt lies for the rent. (12)

Assumpsit is maintainable where a toll keeper exacts an illegal toll (13)—for money due for tolls, or to recover the value of goods which should have been rendered in specie for toll; but in such case the declaration must state, that the goods were of some certain value. (14)

A distress or seizure for tolls must be pleaded specially. (15)

(1) 2 Saund. 113. (a.), 172. (o.), n. 1. *Tewkesbury (Bailiffs of) v. Diston*, 6 East, 438. (a.) n. *Drake v. Wiglesworth*, Willes, 654. *Escot v. Lanreny*, Owen, 109. *Dent v. Oliver*, Cro. Jac. 43. *Stamford (Corporation of) v. Pawlett*, 1 C. & J. 57.

(2) *Peter v. Kendal*, 6 B. & C. 703. *Blissett v. Hart*, Willes, 508. 2 Saund. 114. 172. n. 1. *Trotter v. Harris*, 2 Y. & J. 285.

(3) *Bishop of Sarum's case*, 10 Co. 59. (b.) *Ferrer v. Johnson*, Cro. Eliz. 335. *Strode v. Byrt*, 4 Mod. 422.

(4) 1 Chitt. Pl. 381.

(5) 2 Saund. 172. n. 1. *Tewkesbury (Bailiffs of) v. Bricknell*, 1 Taunt. 142. *Morewood v. Wood*, 4 T. R. 160. Bull. N. P. 59. (a.) 1 Camp. 315. n. *Rex v. Buckingham (Marquis of)*, 4 ibid. 189. *Brook v. Willet*, 2 Hen. Black. 234. 17 Vin. Abr. Prescriptions, 280. [W.]. 1 Chitt. Pl. 377.

(6) *Mast v. Goodson*, 3 Wils. 348. *Corbett v. Packington*, 6 B. & C. 273. 9 D. & R. 265.

(7) Ibid.

(8) Com. Dig. Action on the Case, Disturbance (A. 6.). Ibid. Nuisance (D. 1.) *Keeble v. Hickeringill*, 11 East, 576. n.

(9) *Blakey v. Dinsdale*, Cowp. 664.

(10) *Norman v. Bell*, 2 B. & Ad. 190.

(11) Com. Dig. Debt (A. 9.). 1 Chitt. Pl. 109.

(12) *Carmerthen (Mayor of) v. Lewis*, 6 C. & P. 608. *Bird v. Higginson*, 1 H. & W. 61.

(13) *Parsons v. Blandy*, Wightw. 22.

(14) *Reading (Mayor of) v. Clarke*, 4 B. & A. 268. *Falmouth (Earl of) v. Perrow*, 6 B. & C. 385. 9 D. & R. 452.

(15) *Vinkensterne v. Edden*, 1 Ld. Raym. 384. Carth. 357. 1 Chitt. Pl. 502. *Farmouth (Mayor of) v. Eaton*, 3 Bull. 1402. *Wilkes v. Kirby*, 2 Lutw. 1519.

A plea of prescription in trespass for a toll through the streets of Gainsborough, in consideration of repairing certain streets there:—was held bad, because it did not say that the defendant repaired all the streets there, and for all that appeared, the plaintiff might be passing through a street, which he did not repair. (1)

DECLARATION
AND PLEAD-
INGS.

Defective plea.

In a plea to an action of covenant for rent due for turnpike tolls, it was stated, that before it became due, the trustees on &c. entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c. from thence hitherto; to which it was replied, that the trustees did not enter into or upon the said part of the tolls, or eject, &c. the defendant from the possession thereof *modo et formâ*:—It was holden bad on special demurrer, as putting in issue not only the expulsion, which was the only material allegation of the plea, but also the entry, which was immaterial. (2)

4. EVIDENCE.

EVIDENCE.

In an action of replevin brought to try the right of the corporation of Limerick to certain tolls, there were several issues, all of which lay on the defendant except one, which was joined upon an averment by the plaintiff, that the defendants had detained the distress for an unreasonable time. The issue lying on the plaintiff, he insisted on the right to open the case generally on all the issues, and to the reply; but the judge at Nisi Prius having ruled against the plaintiff, the defendant opened the case generally, replied, and obtained a verdict. Upon an application to set aside the verdict on such grounds it was refused. (3)

Right to begin.

An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence of the existence of the tolls. (4)

Ancient deed.

In the case of customs or tolls, verdicts, whether modern or ancient, respecting the same custom or toll, are evidence between other parties. (5)

Judgments in questions of tolls, evidence between third persons.

Depositions relating to a question of custom or tolls, upon which hearsay would be good evidence, may be read against a person who was no party to the former suit. (6) So a deposition taken in a cause between other parties will be admitted for the purpose of contradicting what the same witness swears at a trial. (7)

Depositions in a cause between third persons, admissible.

An issue having been joined as to the right of the corporation of Limerick to toll traverse over the *locus in quo*, it was proved on the part of the defendants, that the toll in question had been constantly received from time immemorial. There was also evidence, that before the reign of King John

What is evidence to go to the jury of a toll traverse.

(1) *Truman v. Walgham*, 2 Wils. 296.

(2) *Palmer v. Gooden*, 7 M. & W. 486.

(3) *Lyons v. Fitzgerald*, Smith & Batty (Irish), 405. *Quare*, Whether the plaintiff if he had so insisted at the trial, would have been entitled to open the case on the single issue lying on him, that issue going only to the amount of damages, in a case in which

nominal damages only could be required. *Ibid*.

(4) *Brett v. Beales*, M. & M. 416.

(5) *London (City of) v. Clerke*, Carth. 181. Bull. N. P. 233. (a.)

(6) Bull. N. P. 238. (a.), 239. (a.)

(7) *Ibid*.

EVIDENCE.

the citizens of Limerick had lands within their liberties, and that the *locus in quo* was held from them in burgage tenure more than 200 years ago :— It was held, that these facts *per se* were evidence to go the jury of the existence of a toll traverse, and were rightly left to them as such ; for that where there are facts, which will give a rightful origin to a toll as toll traverse, the taking of it may be referred to that right. (1)

Payment under duress.

The plaintiff can shew, that he has been compelled by duress to pay the money to the defendant, as to the toll keeper of a turnpike gate. (2)

Competency and incompetency of witness.

In an action for toll claimed on a public road, persons who have refused to pay the toll are, from necessity, competent to give evidence against the claim, notwithstanding their interest in the result of the cause, because the claim is in the nature of a public right in which all the king's subjects are interested, and no other evidence can be reasonably expected than that of persons from whom toll had been demanded. (3)

A fisherman frequenting the cove has been holden not to be a competent witness to disprove the existence of the custom, because he had an immediate interest in the event of the suit ; for, if the defendant obtained a verdict, the witness would thus be protected from the consequences of the non payment of tolls by himself. (4)

DISTRESS FOR TOLLS.

Under bye-laws.

5. DISTRESS FOR TOLLS.

The penalties imposed by bye-laws are also frequently recoverable by distress, but this is only when the bye-law itself enacts, that the penalty shall be levied by distress, or where there is a prescription for levying it in that manner. (5) A distress cannot be made for the toll of goods fraudulently sold out of the market to avoid the toll, the only remedy of the party injured being a special action on the case. (6) In the case of a distress for tolls, either the thing for which the toll is due may be taken, as a horse for a toll thorough (7), or a part of it, as a cable or anchor for the toll of a ship (8), or a sheep for the toll of the whole flock. (9)

Mere claim of right will not oust the jurisdiction of justices.

A mere claim of a right to take certain tolls, without shewing clearly that it is a *bond fide* claim, is not sufficient to oust justices of the jurisdiction to convict for taking them improperly. (10)

Where trams cannot be distrained.

A canal company were authorised by stat. 32. Geo. 3. c. 102. to demand and sue for certain tolls upon the carriage of goods, in respect of which any such tolls ought to be paid, and to distrain or detain the same until payment was made of such tolls, and for all arrears of the same then due from the owner of such carriage or goods ; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in a case of a distress for rent ; but they were not expressly authorised to levy any toll upon carriages :— It was held, that trams could not be distrained for arrears

(1) *Lyons v. Fitzgerald*, Smith & Batty (Irish), 405.

(2) *Fearnley v. Morley*, 5 B. & C. 25.

(3) *Lancum v. Lovell*, 9 Bing. 465. Phillips' Ev. 139.

(4) *Falmouth (Earl of) v. George*, 2 M. & P. 457. 5 Bing. 286., *vide ante*, 1726—1758. tit. EVIDENCE.

(5) *Bradby on Distress*, 125., *sed vide* *Adley v. Reeves*, 2 M. & S. 60.

(6) *Blakey v. Dinsdale*, Cowp. 661.

(7) *Harrison v. Brough*, 6 T. R. 706.

(8) *Prideaux v. Warne*, 2 Lev. 96.

(9) *Smith v. Shephard*, Cro. Eliz. 710.

(10) *Rex v. Hampshire (Justices of)*, 3 Dowl. P. C. 47.

of tolls due from the owners for goods carried in them, if they were not carrying goods of such owners at the time of the distress. (1)

DISTRESS FOR
TOLLS.

The foregoing statute also enacted, that any action brought for any thing done in pursuance of its provisions, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed : — It was held, that a distress similar to that, to which allusion has been recently made, was a thing done in pursuance of the act ; and that where an owner of trams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of sale on a count complaining of injury done to his reversionary interest by the seizure and sale. (2)

The Swansea Canal Act (34 Geo. 3. c. cix.) gives the company tolls for all goods carried along the canal, which tolls, if not paid upon demand, they are empowered to recover by action, or they may seize the goods or other things in respect whereof such rates ought to have been paid, and the boat or other vessel laden therewith, and to detain the same until payment of such rates, and all arrears due from the owner of the boats ; and if such goods be not redeemed within seven days after the taking thereof, the same are to be appraised and sold as in case of a distress : — It was holden, that this clause did not empower the company to sell the boats ; and that their right to seize was confined to the limits of the canal, and that therefore they were not authorised to seize goods after they have been landed. (3)

When right to seize confined to the limits of the canal.

(1) *Jenkins v. Cooke*, 1 A. & E. 372. n.

(2) *Ibid.*

(3) *Fraser v. Swansea Canal Comp.* 3 N. & M. 391.

TRESPASS.

1. DEFINED, p. 2629.

2. WHERE TRESPASS CAN OR CANNOT BE MAINTAINED, pp. 2629—2632.

REAL PROPERTY — *The property must be tangible — Wrongful intent need not exist — Lawful entry but a subsequent abuse — When subsequent act is a trespass, a wrongful intent will be assumed — The subsequent act must, in order to render the original act a trespass, be in itself forcible — Trespass lies for most illegal takings — When distress has ceased to be lawful — Trespass lies for an illegal distress for tithes — Wrongfully continuing a building on the land of another — One joint tenant or tenant in common injuring the land of his co-tenant — PERSONAL PROPERTY — Taking or injuring personal property — Animals feræ naturæ — Wrongful act committed to personal property when in the lawful adverse possession of a wrong-doer.*

3. BY WHOM AND AGAINST WHOM TRESPASS LIES, pp. 2632—2639.

REAL PROPERTY — *Distinctions between personal and real property as to the right of the owner — The gist of the action is the injury to the possession — Actual and exclusive possession without a legal title is sufficient against a wrong-doer — Person having an exclusive right to dig turves — If a party having a legal title to land, enter thereon with intent to take possession, he can maintain trespass against a person wrongfully in possession — When the interest of the possessor is temporary — The daughter or the servant of an occupier of a house can maintain trespass against a person who wrongfully enters — Overseers acting under stats. 59 Geo. 3. c. 12. and 1 & 2 Will. 4. c. 42. — Tenant at will — By parson for damage to tombstones — All who direct or assist in trespass can be made defendants — Partners — Husband and wife — Owner of animals mansuetæ naturæ — BY WHOM TRESPASS CANNOT BE MAINTAINED — Mere right of entry — Parson before induction — Parishioner in respect of a pew — Vendee of a growing crop of grass — PERSONAL PROPERTY — Plaintiff must have an actual or constructive possession — Finder of an article can maintain trespass against any person but the owner — Tenant for years against a stranger for cutting down trees — He who has the absolute or general property, may support the action, although he never had the actual possession — Bailee who has an authority coupled with an interest — Bailee who has only a bare authority — Bailee killing a beast — When the right of possession is in reversion — Assignees of a bankrupt — Mere misuser by one tenant in common — When injury has arisen from accident — INJURIES TO THE PERSON.*

4. DECLARATION, pp. 2639—2641.

Venue — The trespass should not be stated by way of recital — The day — Reg. Gen. H. T. 4 Will. 4. V. s. 1. — Locus in quo — Taking goods — Taking animals.

5. PLEADINGS, pp. 2641—2650.

"Not guilty" — When defendant should demur — Effect of "not guilty" in trespass quare clausum fregit — Plea of "not guilty" and payment of money into court to the whole action, will not be allowed — Variance in the description of the locus in quo is admissible as a defence, under the general issue — Trespass de bonis asportatis — Property of the goods in the plaintiff, must be specially denied — RIGHT OF COMMON — Reg. Gen. H. T. 4 Will. 4. — LIBERUM TENEMENTUM — LICENSE — JUSTIFICATION — PROCESS — ACCORD AND SATISFACTION — ESTOPPEL — TENDER OF AMENDS — STATUTE OF LIMITATIONS.

6. EVIDENCE, pp. 2650—2654.

RIGHT TO BEGIN — If a party plead the general issue under a statute, he can prove his whole defence — When the plaintiff has a right to the trial of all the issues —

Permissive enjoyment — When defendant cannot set up property in a stranger against the plaintiff's possession — Plaintiff may prove a trespass at any time before action brought — When a joint trespass is alleged and proved, plaintiff cannot elect to go upon a separate trespass against one — Judgment of Lord Lyndhurst in *Tait v. Harris* — Object of the description of the locus in quo in the declaration — Judgment of Mr. Justice Patteson in *Bassett v. Mitchell* — Stat. 11 Geo. 2. c. 19. s. 21. — Judgment of Mr. Justice Rooke in *Vaughan v. Davis* — Stat. 3 & 4 Will. 4. c. 42. s. 1. — Overseer under "not guilty," can prove, that the distrained goods did not belong to the plaintiff — When license cannot be proved, it not having been pleaded by way of replication — Under plea of *liberum tenementum* the defendant is not liable to prove the whole of the close to be his property — Where plea of *liberum tenementum* not supported by proof of acts of ownership for less than twenty years — If plaintiff when he new assigns give evidence of only one trespass, he is bound to shew it is a different one from that mentioned in the plea — In a proof of boundary where reputation is evidence, a verdict between third parties is evidence — Fraudulent sale — INCOMPETENCY OF WITNESS.

7. STAY OF PROCEEDINGS — NEW TRIAL — DAMAGES — COSTS — JUDGMENT AND EXECUTION, pp. 2654—2657.

STAY OF PROCEEDINGS — NEW TRIAL — DAMAGES — Stat. 3 & 4 Will. 4. c. 42. s. 29. — A recovery of damages against a co-trespasser is not admissible — Taking goods in a place to which the process does not run — Cutting into the plaintiff's close and carrying away the soil — When jury are justified in giving damages to the full amount of the valuation of the property taken — When nominal damages should only be found — When a jury cannot, in estimating the damages, take into consideration a debt due to the defendant — Where the jury cannot assess contingent damages without the assent of the defendant — COSTS — Stat. 3 & 4 Vict. c. 24. — Reg. Gen. H. T. 4 Will. 4. s. 7. — Stat. 3 & 4 Vict. c. 24. s. 2. applies to all actions of trespass and trespass on the case — Certificate by undersheriff under stat. 3 & 4 Vict. c. 24. s. 2. that the trespass was malicious — When plaintiff entitled to costs from the defendant not having inserted in the margin of his plea "by statute" — Where defendant has a verdict on one of two pleas — When a successful defendant's costs will be set off against the costs of the plaintiff — Certificate of arbitrator — When defendant not entitled to the general costs of the cause after payment of money into court, and the entry of a *nolle prosequi* — Plaintiff refusing amends and then accepting it, is not entitled to costs after refusal — JUDGMENT AND EXECUTION.

1. DEFINED.

Trespass in the most extensive sense means any injury arising to another's person or property from the misfeasance or act of another; and, therefore, all such injuries, though they assume different names, are in fact actions of trespass. DEFINED.

Where the act is wilful and the injury immediate, trespass is the only remedy. But where the act is not wilful, but the result of negligence, trespass or case (1) will lie at the option of the plaintiff, even though the injury be immediate. (2)

2. WHERE TRESPASS CAN OR CANNOT BE MAINTAINED.

It has been previously stated where trespass can or cannot be maintained for adultery (3), assault and battery (4), common (5), mesne profits (6),

WHERE TRESPASS CAN OR CANNOT BE MAINTAINED.

(1) *Antd*, 1003. tit. CASE.

(2) *Moreton v. Hardern*, 4 B. & C. 223.

(3) *Antd*, 6—28.

(4) *Antd*, 208—228.

(5) *Antd*, 1027—1052.

(6) *Antd*, 1490—1497.

WHERE TRESPASS CAN OR CANNOT BE MAINTAINED.

REAL PROPERTY. (7)

The property must be tangible.

"Close" defined.

Wrongful intent need not exist.

Lawful entry but a subsequent abuse.

When subsequent act is a trespass, a wrongful intent will be assumed.

The subsequent act must, in order to render the original act a trespass, be in itself forcible.

Trespass lies for most illegal takings.

When distress has ceased to be lawful.

fishery (1), game (2), false imprisonment (3), malicious arrest (4), malicious prosecution (5), and seduction. (6)

Trespass lies to recover damages for an illegal entry upon, or an immediate injury to, real property corporeal in the possession of the plaintiff. (8)

It is not requisite to support trespass, that the property should be fenced from the adjoining land.

The nature of the real property affected must in general be something tangible and fixed, as a house, a room, outhouse, or other buildings or land; but the term "close" is technical, and signifies the interest in the soil, and not merely a close or inclosure in the common acceptance of that word. (9)

It is not requisite to maintain trespass that, in committing the tort, there should be a wrongful intent. (10)

If the entry be not for a justifiable purpose this action lies, however unintentional it may be (11), notwithstanding that the *locus in quo* be uninclosed (12), or that the door of the house be open; and even shooting at and killing game on another's land, though without an actual entry, is in law an entry. (13)

Though the entry were lawful, yet by a subsequent abuse of an authority in law to enter, as to distrain &c. (except for rent or poor's rates (14), or under the Turnpike Act (15)), the party may become a trespasser *ab initio*. (16) Thus, in the case of distress damage feasant, a subsequent conversion of the goods renders the original seizure illegal. (17)

If the subsequent act be a trespass, the law assumes, that the party did not enter for the purpose alleged in the plea, but for the purpose of committing the trespass. (18)

But the subsequent act must, to render the original entry a trespass, be in itself forcible, and an act of such a nature, that trespass would lie, if no authority or right existed; and therefore a sheriff, acting under a *feri facias*, is not a trespasser *ab initio*, merely because he extorts more than he was justified in levying. (19)

Trespass lies for most illegal takings (20), and it is the proper form of action, if a person continue on the premises of another to keep possession of distrained goods after the distress has ceased to be lawful. (21)

- (1) *Anté*, 1942—1950.
- (2) *Anté*, 2002—2016.
- (3) *Anté*, 2017—2046.
- (4) *Anté*, 2265—2273.
- (5) *Anté*, 2274—2289.
- (6) *Anté*, 2351—2357.
- (7) *Vide post*, tit. WATER AND WATER-COURSES; *et etiam*, tit. WAY.
- (8) *Haward v. Bankes*, 2 Burr. 1114.
- (9) *Harker v. Birkbeck*, 3 *ibid.* 1556. *Jones v. Maunsell*, Doug. 302. *Rex v. Watson*, 5 East, 485. *Doe d. Foley v. Wilson*, 11 *ibid.* 56. 7 Bac. Abr. Trespass (C.), 656.
- (10) *Stammers v. Dixon*, 7 East, 207. *Lade (Sir John) v. Shepherd*, Str. 1004. *Harrison v. Parker*, 6 East, 154. *Goodtitle d. Chester v. Alker*, 1 Burr. 133.
- (11) *Basely v. Clarkson*, 3 Lev. 37. *Co. vell v. Laming*, 1 Camp. 497. *Colwill v. Reeves*, 2 *ibid.* 576.

- (11) 7 Bac. Abr. Trespass (F.), 674. 3 Rol. Abr. Trespass (X.), 555.
- (12) *Stammers v. Dixon*, 7 East, 207.
- (13) *Keble v. Hickringill*, 11 Mod. 74. 130. *Pickering v. Rudd*, 1 Stark. 58. *Quere*, If shooting over another's land be a trespass? *Ibid.*
- (14) *Wallace v. King*, 1 Hen. Black. 13.
- (15) Stat. 3 Geo. 4. c. 126. s. 144.
- (16) 7 Bac. Abr. Trespass (B.), 648. *Sir Carpenters' case*, 8 Co. 146. *Reed v. Harrison*, 2 W. Black. 1218. Com. Dig. Trespass (C. 2.). *Taylor v. Cole*, 3 T. R. 292. *Shorland v. Govett*, 5 B. & C. 488.
- (17) *Dye v. Leatherdale*, 3 Wils. 20.
- (18) *Shorland v. Govett*, 5 B. & C. 489.
- (19) *Ibid.*
- (20) *Rackham v. Jessup*, 3 Wils. 336., *vide anté*, 1363—1369. tit. DISTRESS.
- (21) *Ladd v. Thomas*, 12 A. & E. 117.

In *Charleton v. Alway* (1) the plaintiff, being vicar of E. and owner and occupier of the vicarial tithes, and being also occupier of the rectorial tithes which belonged to B., and on which the land tax had been redeemed, was assessed to the land tax in a gross sum for the vicarial and rectorial tithes. The whole sum up to the quarter day then last past, being demanded by the defendant who was the collector, the plaintiff refused to pay the sum at which the rectorial tithes had been redeemed, but paid the residue of the assessment. The collector distrained on him under stat. 38 Geo. 3. c. 5. s. 17. for the amount withheld; but the distress warrant did not specify the property: — It was held: — that the distress was illegal, as being for a sum not due; — that the assessment should have separated the tithes belonging to different proprietors under stat. 20 Geo. 3. c. 17. s. 3.; — that trespass lay for the distress; — that the plaintiff was not bound to appeal under stat. 38 Geo. 3. c. 5. s. 8.; — and that the demand having been made for a sum alleged to be due for a quarter then expired, the defendant could not justify the distress by shewing, that a sum was due at the expiration of the current quarter for vicarial tithes, which would cover the sum distrained for. (2)

WHERE TRESPASS CAN OR CANNOT BE MAINTAINED.

Trespass lies for an illegal distress for tithes.

Stat. 38 Geo. 3. c. 5. s. 17.

Where the defendant seized and converted the goods of the plaintiff before the latter was discharged as an insolvent, it was held, that after his discharge, the plaintiff might maintain trespass to recover damages for the loss he had sustained by being deprived of the use of his goods for the period, between the commission of the trespass and the assignment of his property to the assignee. (3)

Trespass is the proper remedy for wrongfully continuing a building on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation, and a recovery with satisfaction for erecting it, does not operate as a purchase of the right to continue such erection; therefore, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass: — It was held, that, after notice to the defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar. (4)

Wrongfully continuing a building on the land of another.

The proper remedy by one joint tenant or tenant in common of realty against the other who commits a partial injury to the land or other property, as by waste, &c., is an action on the case, as for misfeasance (5); but if one tenant in common totally destroy the subject-matter of the tenancy in common, his companion can support trespass. (6)

One joint tenant or tenant in common injuring the land of his co-tenant.

If there be two tenants in common of a folding, and one of them by force prevent the other from erecting hurdles, trespass can be maintained. (7)

(1) 11 A. & E. 993.

(2) Where the plaintiff had demanded and received a copy of the warrant: — It was held, that he was not bound to join as defendants, the commissioners who issued the warrant, stat. 24 Geo. 2. c. 44. s. 6. being inapplicable, though the commissioners were also acting magistrates for the division. *Ibid.*

(3) *Aspinall v. Arrott*, 1 Jones & Carey (Irish), 145.

(4) *Holmes v. Wilson*, 10 A. & E. 503.

(5) *Martyn v. Knowllys*, 8 T. R. 145. Com. Dig. Estate (K. 8.). *Cubitt v. Porter*, 8 B. & C. 268.

(6) *Cubitt v. Porter*, 8 B. & C. 268. Co. Litt. 200.

(7) Co. Litt. 200. (b.)

WHERE TRESPASS CAN OR CANNOT BE MAINTAINED.

PERSONAL PROPERTY.

Taking or injuring personal property.

Animals *feræ naturæ*.

Wrongful act committed to personal property, when in the lawful adverse possession of a wrong-doer.

Trespass lies for taking or injuring inanimate personal property, and such domiciled and tamed animals as are usually marketable, such as dogs, &c. (1), parrots, monkeys, &c. (2) If the animals be *feræ naturæ*, and not generally merchandisable, it should appear, that they were reclaimed or dead, or at least, that the plaintiff was possessed of them. (3)

Trespass lies for taking animals *feræ naturæ*, and not reclaimed; as if a hare or rabbit be killed on the land of another, such proprietor can support trespass for taking it, because he has a local property *ratione soli* in such hare or rabbit, notwithstanding the wrong-doer did not enter on the land. (4) If the game be started on the land of A., and pursued and killed on the land of B., A. may support the trespass for taking the hare, if he also pursued the same; for by the pursuit he prevented an abandonment of his local property. (5) And it may be here observed, that the same rules prevail in the case of fish. (6)

Trespass will sometimes lie for any wrongful act or injury committed to personal property whilst in the lawful adverse possession of the wrong-doer, as where he has been guilty of an abuse, which renders him a trespasser *ab initio*. (7) This rule prevails in general whenever the person who first acted with propriety under an authority or license given by law afterwards abuses it; in which case the taking, as well as the real tortious act, may be stated to be illegal, as in the *Six Carpenters' case*. (8) Thus, trespass lies for cutting nets lawfully taken damage feasant (9), or for working a distrained horse, &c. (10)

BY WHOM AND AGAINST WHOM TRESPASS LIES. REAL PROPERTY.

Distinctions between personal and real property as to the right of the owner.

The gist of the action is the injury to the possession.

3. BY WHOM AND AGAINST WHOM TRESPASS LIES.

A distinction exists between personal and real property respecting the rights of the owner. In the first case the general property draws to it a sufficient possession to enable the owner to support trespass, though he has never been in possession (11): but in the case of land and other real property, there is no such constructive possession; and unless the plaintiff had the actual possession by himself or his servant (12) at the time when the injury was committed, he cannot maintain this action. (13)

The gist of an action of trespass is the injury to the possession; and unless at the time the injury was committed the plaintiff was in actual possession, trespass cannot be supported (14); and though the title may come

(1) 1 Saund. 84. n. 2, 3. *Ireland v. Higgins*, Cro. Eliz. 125. *Dand v. Sexton*, 3 T. R. 37. Com. Dig. Trespass (A. 1.).

(2) *Grymes v. Shack*, Cro. Jac. 262. *Wright v. Ramscott*, 1 Saund. 84. n. 2.

(3) 7 Bac. Abr. Trespass (I.), 695. *Ibid.* Trover (D.), 806. Bull. N. P. 79. (a.) *Somerset (Duke of) v. Fogwell*, 5 B. & C. 879.

(4) *Sutton v. Moody*, 2 Salk. 556. 1 Ld. Raym. 251. *Coney's case*, Godb. 123. *Churchward v. Studdy*, 14 East, 249.

(5) *Ibid.*

(6) *Child v. Greenhill*, Cro. Car. 554.

(7) 7 Bac. Abr. Trespass (B.), 649. 2 Rol. Abr. Trespass (G.), 562.

(8) 8 Co. 146. (b.)

(9) *Reynell v. Champenoon*, Cro. Car. 228.

(10) *Bagshaw v. Goward*, Cro. Jac. 147. *Ozley v. Watts*, 1 T. R. 12. *Dye v. Leatherdale*, 3 Wils. 20., *vide ante*, 1315. tit. DISTRESS.

(11) 2 Saund. 47. (a.) Bull. N. P. 33.

(12) *Bertie (Clerk) v. Beaumont*, 16 East, 33.

(13) *Rex v. Watson*, 5 *ibid.* 485. 487. 7 Bac. Abr. Trespass (C.), 656.

(14) *Rex v. Watson*, 5 East, 485. 487.

in question, yet it is not essential to the action that it should. (1) Therefore a landlord cannot, during a subsistent lease or demise, support trespass for an injury to the land, but the action of trespass must be in the name of the tenant. (2)

A proprietor of land agreed to grant leases to the defendant of certain houses he had undertaken to build on the land, who was to hold the land and premises for eighty years, yielding therefore 400*l.* a year rent, and to build a wall all along the west side of the land, the landlord to have a right of way over the streets between the houses. The defendants entered, paid rent, built houses, and obtained leases of the houses as fast as they were built: — It was held, that he was, under these circumstances, in possession of the soil between the houses, and that the landlord could not maintain trespass against him for erecting a wall, on the west side of the land, across the end of one of the streets. (3)

Actual and exclusive possession (4), without a legal title, is sufficient either against a wrong-doer or a person, who cannot make out a title *prima facie* entitling him to the possession (5), or shew any right or authority from the real owner (6); therefore, a person in possession under an illegal lease from a clergyman (7), or under a mere license or valid demise from the crown (8), or even it should seem an intruder upon crown land, but not treated as such, may maintain this action. A tenant for years (9), a lessee at will (10), and a tenant at sufferance (11), may support trespass against a stranger, or even against his landlord, unless a right of entry be expressly or impliedly reserved to the latter. (12) And where the contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close across a stream there for the purpose of completing their work, it was holden, that they had a possession sufficient to entitle them to maintain trespass against a wrong-doer. (13)

A person having an exclusive right to dig turves or coals, &c. may support trespass *quare clausum fregit* against another for digging and taking away turves, &c. therein, though others had common pasture over the land. (14) And if J. S. agree with the owner of the soil to plough and sow it, and to give him (the owner) half the profits, J. S. may support trespass *quare clausum fregit* against a stranger for treading down the corn. (15)

If the party having the legal title to land enter thereon (as by going on the land, and beginning to plough, &c.) with intent to take possession,

BY WHOM AND
AGAINST WHOM
TRESPASS LIES.

Actual and exclusive possession without a legal title, is sufficient against a wrong-doer.

Person having an exclusive right to dig turves.

If a party having a legal title to land, enter

(1) *Lambert v. Stroother*, Willes, 221. *Graham v. Peat*, 1 East, 244. *Chasley v. Barnes*, 10 *ibid.* 74.

(2) 1 Chitt. Pl. 175.

(3) *Alexander v. Bonnin*, 4 Bing. N. C. 799.

(4) Vide *Holmes v. Newlands*, 11 A. & E. 44.

(5) *Birkley v. Presgrave*, 1 East, 224. *Chambers v. Donaldson*, 11 *ibid.* 65, 67. *Catleris v. Cowper*, 4 Taunt. 547., et vide *Hughes v. Gillman*, 2 C. & P. 33. Per Best C. J. in *Revett v. Brown*, 5 Bing. 9.

(6) *Chambers v. Donaldson*, 11 East, 65.

(7) *Graham v. Peat*, 1 *ibid.* 244.

(8) *Harper v. Charlesworth*, 4 B. & C. 574.

(9) 2 Rol. Abr. Trespas (N.), 551. *Geary v. Barecroft*, 1 Sid. 347.

(10) *Ibid.*

(11) *Ibid.* *Graham v. Peat*, 1 East, 245. n. (a.) Com. Dig. Trespass (B. 1.). 1 Saund. 322, n. 5.

(12) *Prince v. Clark*, 11 Mod. 209. Com. Dig. Biens (H.). *Liford's case*, 11 Co. 48.

(13) *Dyson v. Collick*, 5 B. & A. 600.

(14) *Wilson v. Mackreth*, 3 Burr. 1825. *Harker v. Birkbeck*, *ibid.* 1560—1562. *Crosby v. Wadsworth*, 6 East, 606.

(15) Bull. N. P. 85. (a.) *Wilson v. Mackreth*, 3 Burr. 1827. Co. Litt. 4. (b.)

BY WHOM AND
AGAINST WHOM
TRESPASS LIES.

thereon with
intent to take
possession, he
can maintain
trespass against
a person
wrongfully in
possession.

When the in-
terest of the
possessor is
temporary.

The daughter
or the servant
of an occupier
of a house can
maintain tres-
pass against a
person who
wrongfully en-
ters.

Overseers act-
ing under stats.
59 Geo. 3.
c. 12. and 1 &
2 Will. 4.
c. 42.

Tenant at will.

By parson for

although he does not declare, that such is his intention, he may maintain trespass against a person wrongfully in possession at the time of the entry, and who, without quitting possession, desires the owner to go away, and in fact continues his wrongful possession afterwards. (1) A party wrongfully holding possession of land cannot treat the rightful owner who enters on the land as a trespasser. (2) A disseisee can maintain trespass against a disseisor for the disseisin itself, because he was then in possession, but not for an injury after the disseisin (3), until possession has been acquired by re-entry, and then he may support this action for the intermediate damage; because, after the entry, the law, by a kind of *jus postliminii*, supposes the freehold to have uninterruptedly continued in him. (4)

Where a tenant was to hold land according to certain rules in writing under which a former tenant held, but the length of his term was agreed on orally:—It was held, that to shew the expiration of the term, it was not necessary to produce the rules, and that the lessor having entered at the expiration of the term might sue in trespass persons claiming under the late tenant as well as the late tenant himself. (5)

Trespass lies, however temporary the plaintiff's interest, notwithstanding it be merely in the profits of the soil, as *vestura terre, herbagii pasturae* (6), *prima tonsura* (7), chase, free warren, &c. (8), if it be in exclusion of others (9); or for a trespass of a portion of a common field after an allotment authorising the feeding the same only for a certain time. (10)

It seems, that the daughter, or even a female servant of the occupier of a house, has such a possession of her bed-room as will enable her to maintain trespass against a person who wrongfully forces himself into it, while she is in bed. (11)

Overseers who inclosed parcel of a waste, under stats. 59 Geo. 3. c. 12. and 1 & 2 Will. 4. c. 42., were held to have sufficient possession to maintain trespass against an inhabitant of the parish who destroyed their fence without establishing any right of common, notwithstanding they failed to shew the consent of the lord of the manor to their inclosure. (12)

Trespass lies against a mere tenant at will for pulling down a house, or cutting trees during the tenancy at will, the interest being thereby determined (13); and if trees be excepted in the lease of a lessee in part, and he cut them down, trespass lies for such cutting. (14)

The parson may support trespass against a person preaching in his church

(1) *Butcher v. Butcher*, 7 B. & C. 399. 1 Chitt. Pl. 177.

(2) *Taunton v. Costar*, 7 T. R. 431. *Turner v. Meymott*, 1 Bing. 158.

(3) 2 Rol. Abr. Trespas (S.), 553. 3 Black. Com. 210.

(4) 20 Vin. Abr. Trespas, 463. [T.]. *Liford's case*, 11 Co. 51. (a.) 3 Black. Com. 210. 2 Rol. Abr. Trespas (T.), 554.

(5) *Hey v. Moorhouse*, 6 Bing. N. C. 52. Issue having been taken as to the existence of an agreement between the lessor and the late tenant in satisfaction of all demands, it was held, that proof of the consideration of the agreement could not be required. Ibid.

(6) Co. Litt. 4. (b.) *Rez v. Watson*, 5 East, 480. *Crosby v. Wadsworth*, 6 ibid.

606. 2 Rol. Abr. Trespas (N.), 552. *Webb v. Brown*, 5 T. R. 535.

(7) *Stammers v. Dixon*, 7 East, 200.

(8) *Smith v. Kemp*, 2 Salk. 637.

(9) *Dacre (Lord) v. Tebb*, 2 W. Black. 1150. *Blackett v. Lowe*, 2 M. & S. 499. *Crosby v. Wadsworth*, 6 East, 602.

(10) *Welden v. Bridgewater*, Cro. Eliz. 421. *Burt v. Moore*, 5 T. R. 335.

(11) *Lewis v. Ponsford*, 8 C. & P. 687.

(12) *Matson v. Cook*, 4 Bing. N. C. 392.

(13) *Salop (Countess of) v. Crompton*, Cro. Eliz. 784. 5 Co. 13. (b.) *Magdalen College Case*, 11 ibid. 81. (b.), 82. (a.) Co. Litt. 57. (a.)

(14) 1 Saund. 322. n. 5. 7 Bac. Abr. Trespas (C.), 656.

without his leave. (1) It may also be brought by a person who erected a tombstone against another, by whom it was wrongfully removed and defaced. (2)

Trespass will lie not only against the party who did the act, but against all who direct or assist in its commission. A master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care: thus, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally, and as was to be expected, ran or rolled against the wall, it was held, that the master was liable in trespass. (3)

In *Petrie v. Lamont* (4) the defendants were partners in business as brewers, and one of them in the name of the others, wrongfully ejected the tenant of a canteen, who held under a lease from the board of ordnance, the firm (the defendants) being sureties for the payment of his rent, and for his quiet tenantry. It was holden, that the co-partners were not responsible, because, that one partner could not involve his copartners in an action of trespass unless in the ordinary course of their business.

But an exception to this doctrine arises, where the trespass is in the nature of a taking, which is available to the partnership; and under such circumstances the jury should find, not only whether the defendants were partners, but also whether, before the trespass, they all joined in ordering it, or that they concurred and received the benefit of it afterwards.

Where one of the trespassers is servant to the others, it is a question for the jury, whether he acted merely as servant, or whether he were so implicated in the matter as to make himself a principal trespasser.

Husband and wife may be jointly sued in trespass for their joint act. (5)

The owner of animals *mansuetæ naturæ* is liable for trespass committed by them on the lands of another. (6) But a party is not liable for any injury done on the lands of another by animals *feræ naturæ*, over which he has no control, such as rabbits which escape from his lands. (7)

If A. command or request B. to beat or impress C., or to take his goods, or to commit a trespass on his land, and B. do it, this action lies as well against A. as against B. (8)

If A. command his servant to do a lawful act, as to distrain the goods of B., and he wrongfully take the goods of C., A. is not liable (9), the liability of the sheriff being an exception. And the mere acceptance of goods illegally taken by another, does not always furnish evidence of an assent (10), as if a pound-keeper receive goods illegally distrained. (11)

A mere right to enter is not sufficient to maintain trespass; and the proprietors of a navigation having by statute a mere easement or right to use land for the purposes of the navigation, do not necessarily acquire such an

BY WHOM AND
AGAINST WHOM
TRESPASS LIES.

damage to
tombstones.

All who direct
or assist in
trespass, can be
made defend-
ants.

Partners.

Husband and
wife may be
jointly sued.
Owner of ani-
mals *mansuetæ*
naturæ.

BY WHOM
TRESPASS CAN-
NOT BE MAIN-
TAINED.

Mere right of
entry.

(1) *Rex v. Longcrichill* (*Inhab. of*), 12 Mod. 420. *Turton v. Reynolds*, *ibid.* 433.

(2) *Spooner v. Brewster*, 3 Bing. 136. Churchwardens can justify removing persons by force who place themselves improperly in pews. *Reynolds v. Monkton*, 2 M. & Rob. 384.

(3) *Gregory v. Piper*, 9 B. & C. 591.

(4) 1 C. & Marsh. 93.

(5) *Vine v. Saunders*, 4 Bing. N. C. 96.

(6) Com. Dig. Trespass (C. 1.).

(7) *Boulston's case*, 5 Co. 104. (b.), vide *Cooper v. Marshall*, 1 Burr. 259.

(8) *Flewster v. Royle*, 1 Camp 187. *Rafael v. Verelst*, 2 W. Black. 1055. 7 Bac. Abr. Trespass (G.), 684. Com. Dig. Trespass (C. 1.).

(9) *Saunderson v. Baker*, 3 Wils. 312. 317. *McManus v. Crichton*, 1 East, 108.

(10) 2 Rol. Abr. Trespass (Y.), 555.

(11) *Badkin v. Powell*, Cowp. 476.

**BY WHOM AND
AGAINST WHOM
TRESPASS LIES.**

Parson before
induction.

Parishioner in
respect of a
pew.

Vendee of a
growing crop
of grass.

**PERSONAL
PROPERTY.**

Plaintiff must
have an actual
or constructive
possession.

Finder of an
article can
maintain tres-
pass against
any person but
the owner.

Tenant for
years against a
stranger for
cutting down
trees.

He who has
the absolute or
general prop-
erty, may sup-
port the action,
although he
never had the

interest in the soil of a bank adjoining thereto, and formed out of the earth excavated from a new channel, made for the first time under the act, as will enable them to maintain trespass. (1)

Before entry and actual possession, a parson cannot maintain trespass, though he may have the freehold in law, as a parson before induction (2); or a purchaser by lease or a release, though the statute executes the use (3); or an heir (4); or a devisee against an abator (5); or a lessee for years before entry. (6)

A parishioner not having the exclusive legal possession of a pew, trespass cannot be supported even against a stranger for entering it (7); but it seems, that, for breaking a pew, the owner may maintain trespass. (8)

Where a party had purchased, by a verbal contract, a growing crop of grass, with liberty to go on the close where it grew for the purpose of cutting and carrying it away, it was held, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass, for that this was in substance an action charging the defendant on the contract within sect. 4. of the Statute of Frauds. (9)

The plaintiff must, at the time when the injury was committed, have had an actual or a constructive possession (10), and also a general or qualified property therein.

The finder of any article can maintain trespass against any person but the real owner (11); and even a person not having a strict legal right, but being in possession, may, it seems, support this action against any person but the legal owner. (12) So a person in possession under an assignment, fraudulent as against creditors, may support trespass against a person who cannot shew, that he was justified in what he did as a creditor. (13)

A tenant for years cannot support trespass against a stranger merely for carrying away trees cut down during his term. (14)

The person who has the absolute or general property may support this action, although he has never had the actual possession, or although he has parted with his possession to a carrier, servant, &c., giving him only a bare authority to carry or keep, &c., not coupled with an interest in the thing (15); it being a rule of law, that the general property of personal chattels *prima facie*, as to all civil purposes, draws to it the possession (16); therefore the owner of title may support trespass against the occupier of the land where

(1) *Hollis v. Goldfinch*, 1 B. & C. 205. 2 D. & R. 316.

(2) 9 Vin. Abr. Entry, 449. [C.]. 20 *ibid*. Trespass, 463. [S.]. 4 Bac. Abr. Leases (M.), 844.

(3) *Geary v. Bearcroft*, Carter, 66. 20 Vin. Abr. Trespass, 463. [S.]. *Greene v. Wallwin*, Noy, 73. Com. Dig. Trespass (B. 3.).

(4) *Browning v. Beston*, Plowd. 142. Anon. 2 Mod. 7.

(5) Anon. 2 Mod. 7.
(6) 4 Bac. Abr. Leases (M.), 845.
Browning v. Beston, Plowd. 142.

(7) *Stocks v. Booth*, 1 T. R. 430. *Mainwaring v. Giles*, 5 B. & A. 361. *Bryan v. Whittier*, 8 B. & C. 294.

(8) *Spooner v. Brewster*, 3 Bing. 137, 138.

(9) *Carrington v. Roots*, 2 M. & W. 248.

(10) *Smith v. Milles*, 1 T. R. 480. *Bus v. Cartwright*, 4 *ibid*. 490. *Gordon v. Harper*, 7 *ibid*. 9.

(11) 2 Saund. 47. (d.) *Catteris v. Cooper*, 4 Taunt. 547.

(12) *Rackham v. Jesup*, 3 Wils. 332. *Woodson v. Newton*, Str. 777. *Brown v. Hooges*, 1 Salk. 290. 2 Saund. 47. (c.)

(13) 1 Chitt. Pl. 170.

(14) *Evans v. Evans*, 2 Camp. 491. *Blackett v. Lowes*, 2 M. & S. 499.

(15) *Gordon v. Harper*, 7 T. R. 12. *Bertie (Clerk) v. Beaumont*, 16 East, 33.

(16) 2 Saund. 47. (a, b, d.)

it has been set out, for turning in cattle and injuring it. (1) So the grantee of waifs, estrays, and wrecks, within a manor, or of felon's goods within a hundred, may, before seizure by him, maintain trespass against a wrongdoer (2); and the owner of a ship has, notwithstanding a charter-party, a sufficient possession thereof to support trespass. (3)

By WHOM AND AGAINST WHOM TRESPASS LIES.

actual possession.

Trespass lies by a bailee who has an authority coupled with an interest, though he never had actual possession, for any injury done during his interest. (4) The quantity or certainty of the interest is not material, and therefore a shopkeeper may maintain trespass for taking goods sent to him on sale or return. (5) So a tenant for years has a qualified property in trees whilst growing, and may support trespass for cutting them down, unless they be excepted in the lease, though he cannot support this action merely for carrying the trees away. (6)

Bailee who has an authority coupled with an interest.

A bailee, &c. with a mere naked authority, coupled only with an interest as to remuneration, may also support this action for an injury done while he was in the actual possession of the thing, as a carrier, factor, pawnee, sheriff, &c. (7); but it is otherwise in the case of a mere servant (8); and if a sheriff omit to continue in possession of the goods under an execution, he cannot maintain the action. (9)

Trespass can be supported against a bailee who has only a bare authority, as if a servant take goods of his master out of the shop, and convert them (10); so it is sustainable by an out-going tenant against the incoming tenant for taking manure, though the latter had a right to it upon payment of its value. (11)

Bailee who has only a bare authority.

But in general trespass is not sustainable against a bailee who has the possession coupled with an interest, unless he destroy the chattel, nor against a joint tenant or tenant in common for merely taking away and holding exclusively the property from his co-tenant (12), because each has an interest in the whole, and a right to dispose thereof (13); but if the thing be destroyed, trespass lies. (14)

Trespass not sustainable against a bailee who has the possession coupled with an interest.

Trespass lies if a bailee of a beast, &c. kill it, because, although the act may not render the party a trespasser *ab initio*, yet he may be considered as a trespasser for the wrongful act itself (15); and if a person be bailee, though coupled with a beneficial interest, as of sheep to feed his land, or of oxen to plough it (16), and he kill or destroy them, trespass lies, because his interest therein is thereby determined: the same as where a tenant at will

Bailee killing a beast.

(1) *Williams v. Ladner*, 8 T. R. 72.

(2) *Smith v. Milles*, 1 *ibid.* 480.

(3) *Piggott v. Wilkes*, 3 B. & A. 503. *Chad (Bart.) v. Tilsed*, 2 B. & B. 403. *Lucas v. Nockells*, 2 Y. & J. 310. 318.

(4) *Fowler v. Down*, 1 B. & P. 45. 2 Saund. 47. (d.), *ante*, 1916—1941. tit. FACTOR.

(5) *Colwill v. Reeves*, 2 Camp. 575.

(6) *Evans v. Evans*, *ibid.* 491. *Blackett v. Lowes*, 2 M. & S. 499.

(7) 2 Saund. 47. (b.) 2 Rol. Abr. Trespas (M.), 551. Wood's Inst. 93.

(8) *Bloss v. Holman*, Owen, 52. 3 Inst. 103. 2 Black. Com. 396. 2 Saund. 47. (b), c, d.)

(9) *Blades v. Arundale*, 1 M. & S. 711.

(10) *Gumbleton v. Grafton*, Cro. Eliz.

781. *Le Countess de Salop's case*, 5 Co.

13. (b.)

(11) *Beaty v. Gibbons*, 16 East, 116.

(12) *Holliday v. Cammell*, 1 T. R. 658. *Wilkinson q. t. v. Allot*, Cowp. 430. 2 Saund. 47. (g.)

(13) *Martyn v. Knowllys*, 8 T. R. 145. Co. Litt. 200. (a.) *Doe d. Fishar v. Prosser*, Cowp. 217. *Heath v. Hubbard*, 4 East, 121.

(14) Co. Litt. 200. (a.)

(15) *Ibid.* 57. (a.) *Salop (Countess of) v. Crompton*, Cro. Eliz. 777. 784. 5 Co. 13. (b.) *Bowles' case*, 11 *ibid.* 82. (a.)

(16) Co. Litt. 57, 58. *Salop (Countess of) v. Crompton*, Cro. Eliz. 784.

**BY WHOM AND
AGAINST WHOM
TRESPASS LIES.**

When the right
of possession is
in reversion.

cuts down trees. (1) So one joint tenant or tenant in common may support trespass against his co-tenant when the chattel is destroyed. (2)

If the general owner part with his possession, and the bailee, at the time when the injury was committed, have a right exclusively to use the thing, the inference of possession is rebutted, and the right of possession being in reversion, the general owner cannot support trespass, but only an action on the case, for any injury that may be committed by a stranger while the bailee's right continued. (3) Nor can the general owner under such circumstances support this action even against such bailee for mere abuse; though if a bailee destroy the thing, trespass may be supported, if the injury were forcible.

If, however, the general owner merely permit another gratuitously to use the chattel, such owner may sue a stranger in trespass for an injury done to it, while it was so used. (4)

Assignees of a
bankrupt.

Assignees of a bankrupt, though they have a constructive possession from the time of the act of bankruptcy, cannot support trespass against a sheriff, or any other officer acting in obedience to the process of a court of competent jurisdiction, for seizing goods after a secret act of bankruptcy; because such officers acting *bona fide*, ought not for such act to be liable as trespassers, but ought to be sued in trover, in which only the real value of the goods can be recovered. (5)

Mere misuser
by one tenant
in common.

For a mere misuser by one tenant in common, case is the remedy (6); and if goods bailed be not destroyed, trespass does not, it seems, lie against a bailee, coupled with an interest, for merely abusing the chattel (7), provided an interest and the right of possession still continue in the bailee, and a general owner has no immediate right of possession at the time the injury was committed; nor can trespass be supported even against a stranger, unless there be an immediate right of possession. (8) Trespass will not lie for a loss or injury occasioned by a bailee's negligence, because it does not lie for any nonfeasance. (9)

When injury
has arisen from
accident.

It would seem, that no action would lie if an injury arose from a mere accident, and unavoidably without any default or carelessness on the defendant's part.

Documents be-
longing to an
applicant for an
office, mutilated
by a public
officer.

Where a person applying to be employed in a public office, deposits with the head of the office a certificate of previous good character by way of testimonial, and on his ceasing to be so employed, such document is returned to him by the head of the office in a mutilated state, the head of the office is not *prima facie* responsible for the mutilation. Supposing the head of the office to be the person who mutilated the document, the remedy against him is by action on the case, not by trespass. (10)

(1) *Gordon v. Harper*, 7 T. R. 11. Co. Litt. 57. (a.) *Salop (Countess of) v. Crompton*, Cro. Eliz. 777. 784. 5 Co. 13. (b.) *Bowles' case*, 11 ibid. 82. (a.) *Dyer*, 121. (b.) pl. 17.

(2) 2 Saund. 47.

(3) *Ward v. Macauley*, 4 T. R. 489. *Gordon v. Harper*, 7 ibid. 9. *Biddlesford v. Onslow*, 3 Lev. 209. *Smith v. Middlesex (Sheriff of)*, 15 East, 607.

(4) *Lotan v. Cross*, 2 Camp. 464. *Bertie (Clerk) v. Beaumont*, 16 East, 33.

(5) *Cooper v. Chitty*, 1 Burr. 30. *Saith v. Milles*, 1 T. R. 480. *Price v. Edgar*, 4 Bing. 597.

(6) *Martyn v. Knowllys*, 8 T. R. 146. 2 Saund. 47. (b.)

(7) Ibid. (g.)

(8) *Gordon v. Harper*, 7 T. R. 9. *Ward v. Macauley*, 4 ibid. 489.

(9) *Le Countess de Salop's case*, 5 Co. 13. (b.), 14. (a.)

(10) *Taylor v. Rowan*, 1 M. & Rob. 490.

The remedies for injuries to the person have been discussed under the titles ASSAULT AND BATTERY (1), FALSE IMPRISONMENT (2), MALICIOUS ARREST (3), MALICIOUS PROSECUTION (4), MASTER AND SERVANT. (5)

A sailor who had lodged for some weeks at a publichouse and also received advances of cash from the person who kept it, having been paid his wages in the presence of the father of the publican, went to the house of the latter, and there, after drinking some spirits, became intoxicated, and fell asleep. The father of the publican in his son's presence, desired a young woman, an acquaintance of the sailor's, to take the money out of his pocket, which she did and laid it on the table. It was 19*l.* 17*s.* 6*d.* The publican took it up and said he would keep it till the man got sober. The father told her to say, when the sailor awoke, that his money was lost. The publican said she had better be there in the morning when he settled with the sailor. When he awoke and asked for his money, the father said it was all right till the morning. After this, by desire of the sailor, a pound in silver was given to the young woman out of the money, and the next morning on his applying for the remainder, he was offered two shillings and some copper as the balance, after deducting what he owed the publican :—It was held, that a joint action of trespass was maintainable against both the publican and his father, and that the sailor was entitled to recover the whole amount taken from him without any other deduction than that of the pound afterwards given to the woman. (6)

BY WHOM AND
AGAINST WHOM
TRESPASS LIES.

INJURIES TO
THE PERSON.
Taking money
from the pos-
session of an-
other.

4. DECLARATION.

In trespass *quare clausum fregit*, the venue is local, and must be laid in the county where the land lies (7); but trespass for taking goods is a transitory action, and the venue may be laid in any county. The declaration should embody a precise statement of the wrongs complained of, whether to the person, or to personal or real property, and that such injury was committed *vi et armis et contra pacem*. (8)

The commission of the fact should be stated directly and positively, and not by way of recital.

It is not requisite to state the day on which the trespass was actually committed—any day before the commencement of the action will suffice: but if it be alleged, that the defendant committed a single act, or an act which terminated in itself, on divers days and times, it can be specially demurred to. (9)

By Reg. Gen. H. T. 4 Will. 4. several counts in trespass for acts committed at the same time and place are not to be allowed.

By Reg. Gen. H. T. 4 Will. 4. V. s. 1. in actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration

DECLARATION.

VENUE.

The trespass
should not be
stated by way
of recital.

The day.

Reg. Gen. H.
T. 4 Will. 4. V.
s. 1.

(1) *Anté*, 208—228.

(2) *Anté*, 2017—2046.

(3) *Anté*, 2265—2273.

(4) *Anté*, 2274—2289.

(5) *Anté*, 2334—2358.

(6) *Peddell v. Rutter*, 8 C. & P. 337.

(7) *Sed vide* stat. 3 & 4 Will. 4. c. 42.
s. 22.

(8) *Vide anté*, 213. tit. ASSAULT AND BATTERY.

(9) *English v. Purser*, 6 East, 395. The form of the declaration is, "that defendant on such a day, in such a year, and on divers other days and times, between that day and the day of the commencement of the suit, committed several trespasses."

DECLARATION.

Locus in quo.

Full information must be given to the defendant of the place in which he is alleged to have committed the trespass.

by name, or abutments, or other description, in failure whereof the defendant may demur specially.

There must be a general accurate correspondence, faithfully describing the close in substance, and conveying full information to the defendant of the place in which he is alleged to have committed the trespass.

To an action of trespass for breaking, &c. a wall of the plaintiff's, bounded on the north by a workshop of the defendant: it was pleaded, that the wall was not the wall of the plaintiff—but that it was a party wall, standing partly on the plaintiff's and partly on the defendant's land;—that the roof of the defendant's workshop rested on the top of the wall on the defendant's side, and that the trespass was committed partly on the plaintiff's half of the wall:—It was held, that defendant was entitled to the verdict, for that the plaintiff must be understood to have brought his action for the whole wall; and even if the party wall were treated as two walls, the defendant's part could not be considered as part of the workshop; and therefore, that the description in the declaration with the abutments, comprehended the whole wall, and consequently the plaintiff had not proved his property in the wall as described in the declaration. (1)

In *Brownlow v. Tomlinson* (2) it appeared, that, in 1838, the occupier of a field, called the Hall Close, took down the old fence and added to the field a strip of land adjoining a public road. In an action for a trespass committed upon a strip of land about a year after it had been so taken in, the declaration described the *locus in quo* as the Hall Close:—It was held, that it was properly described. (3)

The close in which &c. does not mean the whole close referred to in the declaration.

The close in which &c. does not mean the whole close referred to in the declaration, but the place in which the trespass is proved to have happened, and the defendant may so apply it. Where the plaintiff had named the close in his declaration, and the defendant pleaded *liberum tenementum* generally, without giving any further description of the close, it was holden (4), that the plaintiff was not driven to a new assignment, but was entitled to recover upon proving a trespass committed in a close bearing the name given in the declaration, although the defendant might have a close in the same parish known by a similar name.

Where a declaration described the close as abutting “on the south, towards a certain highway in the parish of H., in the county of Sussex; towards the north, on certain land; on the east, on premises in the occupation of the plaintiff; and on the west, towards certain premises in the occupation of the defendant, and situate in the parish of H. :”—It was decided, that the word “towards” was an incorrect description, the proper description being “on” or “upon,” so as to exclude any intervening land; but as the defendant had pleaded, “that the close was his property, as a customary tenant of the manor,” &c., he adopted the description of the close set out in the declaration, and therefore was precluded from objecting to its insufficiency. (5)

Description of a close by two abutments.

A description of a close by two abutments only, is a sufficient compliance with the rule of H. T. 4 Will. 4. V. s. 1. (6)

(1) *Murly v. M'Dermott*, 8 A. & E. 138.

(2) 1 M. & G. 484.

(3) There may be both an occupation way and a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way. *Per Lord Denman C. J. ibid.*

(4) *Cocker v. Crompton*, 1 B. & C. 489. recog. in *Lempriere v. Humphrey*, 3 A. & E. 181., *vide post*, 2652.

(5) *Lempriere v. Humphrey*, 1 H. & W. 170. 4 N. & M. 638. 3 A. & E. 181.

(6) *North v. Ingamells*, 1 Dowl. P. C. N. S. 151.

In trespass for taking goods, the goods must be specified (1), and the omission will not be aided by verdict. DECLARATION.

The declaration must also state, that the land or goods were the plaintiff's lands or goods; hence, if the words "of the plaintiff" or "his" be omitted, the declaration will be bad; but this omission may be aided by pleading over. (2) Taking goods.
Property must be stated to be the plaintiff's.

To trespass for breaking and entering the plaintiff's house, the defendant pleaded, that before the said time when &c., H. was seised of and in the house in his demesne as of fee, and being so seised before the said time when &c., demised it to the churchwardens and overseers of the poor of the parish of A., and that they permitted S., a pauper, to occupy, who refused to deliver up possession; and the plea concluded by giving colour to the plaintiff by averring a charter of demise made to him by S. after the said refusal:—It was held on special demurrer;—that there was a sufficient allegation of a seisin in fee at the time of the demise;—that it was not necessary to state the demise to be by deed, or to mention the names of the churchwardens and overseers;—and that colour was sufficiently alleged. (3) What is a sufficient allegation of a seisin in fee.

In *Pitt v. Shew* (4) Chief Justice Abbott observed, "The value of fixtures may be recovered under the terms 'goods, chattels, and effects.' Fixtures may be taken in execution under a *feri facias*, which contains similar words. They are not distrainable, not being severable from the freehold; and, for that reason, not being capable of being restored in the same plight in which they were before severance." Value of fixtures.

In declarations for taking animals *feræ naturæ* it must be stated, that the animals were either dead, tame, or confined; otherwise property in the plaintiff cannot be alleged, at least such allegations will be bad on demurrer. Taking animals.

In trespass for taking *duas damas* belonging to the plaintiff, in a certain close of the plaintiff's called "the park" (5), the declaration was holden to be bad on general demurrer, because a person cannot have property in deer, unless they be tame and reclaimed.

5. PLEADINGS.

The general issue is "not guilty."

If the plaintiff do not give a proper description of his close by abutments or otherwise, the defendant should demur; if he plead a special plea, such as *liberum tenementum*, he will be deemed to have admitted, that the plaintiff was in possession of a close similar to that described in the declaration; and the plaintiff, on proving a trespass upon such a close, will be entitled to recover. (6) PLEADINGS.
"Not guilty."
When defendant should demur.

Reg. Gen. T. T. 1 Will. 4. s. 13. does not prevent a defendant from applying to the court when leave to plead several matters is refused by a judge; nor need the previous application be noticed in the rule. To trespass for entering a steam vessel, the court allowed the defendant to plead, Reg. Gen. T. T. 1 Will. 4. s. 13. does not prevent an application to a

(1) *Wyat v. Essington*, Str. 637. *Bertie v. Pickering*, 4 Burr. 2455.

(4) 4 B. & A. 206.

(2) *Brooke v. Brooke*, 1 Sid. 184.

(5) *Mallocke v. Eastly*, 3 Lev. 227.

(3) *Smith v. Adkins*, 1 Dowl. P. C. N. S.

(6) *Lempriere v. Humphrey*, 3 A. & E.

129.

181. Kennedy on Pleading, 180.

PLEADINGS.

judge, and also to the full court, for leave to plead several matters.

Effect of "not guilty" in trespass *quare clausum fregit*.

The plea of "not possessed" denies not the title but the possession.

The plea of "no property" puts in issue merely the property as stated in the declaration.

Plea of "not guilty" and payment of money into court to the whole action will not be allowed.

When ambiguity exists in pleading "by statute."

Variance in the description of the *locus in quo* is admissible as a de-

1st, not guilty; 2dly, leave and license; 3dly, that the defendant entered the vessel to prevent a breach of the peace; 4thly, that the vessel was in danger of being wrecked, and that the defendant went on board to save it; 5thly, that a third party had a lien on the vessel, and that the defendant as his servant went on board to take possession of her. (1)

By Reg. Gen. H. T. 4 Will. 4. V. s. 2., in actions of trespass *quare clausum fregit*, the plea of "not guilty" shall operate as a denial, that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

The plea of "not possessed" denies not the title, but the possession stated in the declaration, *i. e.* a sufficient possession to sustain the action. (2) But where the plaintiff complained of an injury to a messuage and premises in his possession, and the defendant pleaded not possessed; and it being found, that the plaintiff had only part of the house, the defendant occupying the rest, it was holden, that the plaintiff was entitled to a verdict. (3) The plea puts in issue the possession of the close described in the declaration (4); and if more than one close be described, the issue upon this plea is divisible, and the defendant will be entitled to a verdict as to so much, as may not be proven. (5)

Analogous to the plea of not possessed, the plea of no property puts in issue merely the property as stated in the declaration, *i. e.* a sufficient property to maintain the action as against a wrong-doer. Therefore a bare possession is enough (6); but if the defendant claim the goods, he may shew his title, and that the plaintiff's title is fraudulent; for under such circumstances, as against the defendant, the plaintiff has no property. (7) If the defendant justify the taking of the goods as assignee of a bankrupt, and the plaintiff reply, that the goods are not the goods of the assignee, but are his goods, he cannot, under that replication, dispute the bankruptcy. (8)

In an action of trespass, the court refused to allow the defendant to plead the pleas of not guilty and payment of money into court to the whole action, but directed either, that the latter plea should be confined to so much only of the cause of action as was intended to be admitted or should be struck out. (9)

Where in an action of trespass for hunting over the plaintiff's land, the defendant pleaded not guilty by statute, the court, on an affidavit of the plaintiff, that he could not discover the statute under which the defendant meant to justify, made absolute a rule upon the defendant to point out within three days the statute under which the plea was pleaded, or else that the words "by statute" should be struck out of the margin. (10)

A variance in the description of the *locus in quo* will, however, be admissible as a defence under the general issue, because the plea of not guilty is a traverse of the committing of the trespass in the place mentioned, and if the plaintiff prove, that the trespass was committed in a place varying in

(1) *Johnstone v. Knowles*, 1 Dowl. P. C. N. S. 30.

(2) *Heath v. Milward*, 2 Bing. N. C. 98.

(3) *Fenn v. Grafton*, *ibid.* 617.

(4) *Bond v. Downton*, 2 A. & E. 26.

(5) *Phythian v. White*, 1 M. & W. 216.

(6) *Ashmore v. Hardy*, 7 C. & P. 501.

(7) *Ashby v. Minnett*, 9 N. & P. 231. *Nicolls v. Bastard*, 2 C. M. & R. 659.

(8) *Jones v. Brown*, 1 Bing. N. C. 485.

(9) *Thompson v. Jackson*, 8 Dowl. P. C. 591.

(10) *Coy v. Forester (Lord)*, 8 M. & W. 312.

its description from the place mentioned, he does not, as it seems, prove the issue. (1) Every other defence must, however, be pleaded specially.

In actions of trespass *de bonis asportatis*, the plea of "not guilty" operates as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

The property of the goods in the plaintiff must therefore be specially denied, and all matters in justification or excuse must be pleaded, as well as a release, or other matter in discharge of the action. (2)

In an action of trespass for breaking and entering the plaintiff's house and taking his goods, a special plea justifying an entry to seize goods fraudulently removed by the defendant's tenant under stat. 11 Geo. 2. c. 19. (3), should be confined to the breaking and entry, and the property in the goods should be traversed in a separate plea. (4)

To an action of trespass for breaking and entering plaintiff's house and taking his goods it was pleaded, that the plaintiff, at the time when &c., held and enjoyed a dwelling-house, &c. of L. as tenant thereof to L., under a demise thereof, viz. a demise before then made by L. to the plaintiff; on which demise a certain weekly rent, viz. &c., was reserved and made payable at the end of each week by the plaintiff to L.; that such rent being in arrear, the plaintiff had fraudulently removed the said goods from the dwelling-house so held by him to the house in which &c., to prevent L. from distraining them for the said rent, leaving no sufficient distress behind; and because the said goods had been so removed, and were kept in the said house in which &c., and the said house was locked up; the defendants, as the servants and by command of L., broke and entered the house, and seized the goods (justification according to stat. 11 Geo. 2. c. 19. s. 1.); to which *de injuriâ* was replied. (5) The plea was on general demurrer holden to be good; and that it did not set up any "interest in the land," or "matter of interest" within the second resolution in *Crogate's case* (6), but that it alleged "an authority given by the law" within the third resolution, and, therefore, that the replication *de injuriâ* was bad; and seemingly, that the "authority given by the law" mentioned in the third resolution, must also be "mediately or immediately derived from the plaintiff." (7)

By Reg. Gen. H. T. 4 Will. 4., in trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed. But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

PLEADINGS.

fence, under the general issue.

Trespass *de bonis asportatis*.

Property of the goods in the plaintiff, must be specially denied.

RIGHT OF COMMON. (8)

Reg. Gen. H. T. 4 Will. 4.

(1) Roscoe's Law Tracts, 54. Lutwyche on Pleading, 158.

(2) Tidd's N. P. 378.

(3) "The uniform course of pleading under this statute, and also in cases of entering one man's house to seize the goods of another under a *fi. fa.*, has been to confine the plea to the trespasses in regard to the house." *Per* Lord Denman in *Fletcher v. Marillier*, 9 A. & E. 462.

(4) *Fletcher v. Marillier*, 9 A. & E. 457.

Quare, Whether in trespass *de bonis &c.*, a special plea shewing property in another gives sufficient implied colour to the plaintiff, if it distinctly admit his possession?

(5) But it seems, that it would have been bad on special demurrer, for not stating the demise with sufficient particularity.

(6) 8 Co. 66. (b.)

(7) *Bowler v. Nicholson*, 12 A. & E. 341.

(8) *Anté*, 1027—1052. tit. COMMON.

PLEADINGS.
LIBERUM
TENEMENTUM.

In trespass to real property, the defendant can specially plead the plea of *liberum tenementum*, if the *locus in quo* be his freehold, or of some other party under whom he justifies, if he have a possessory title thereto.

This plea admits, in fact, the plaintiff's possession of a close corresponding with the description of the close, either by name or abutments, in the declaration.

Liberum tenementum can be pleaded (1) to compel the plaintiff to new assign, if he have not set forth the abutments or name of the close in his declaration. (2)

A new assignment to a plea of *liberum tenementum* waves all the trespasses in the place mentioned in the plea. (3)

When the plaintiff can traverse or reply to the plea, and also new assign.

The plaintiff can sometimes traverse or reply to the plea, and also new assign: thus, a defendant pleaded, that the house in the declaration was called C.'s house, and one of the closes Blackacre, and the other Whiteacre, and that they were his freehold; and the plaintiff traversed that C.'s house and Blackacre were the defendant's freehold, and new assigned the trespass in twenty acres other than Whiteacre; to which it was objected, that by the new assignment the plaintiff had waved the former pleadings as to all, and therefore ought to have omitted the traverse; but the court held, that as the defendant had pleaded in respect of some of the places in which the plaintiff intended to lay some of the trespasses, the plaintiff was at liberty to answer as to that part, and that the defendant was not at liberty to waive his plea thereto, and to plead to all *de novo*. (4)

New assignment not necessary where there has been but one single act of trespass.

A new assignment is not necessary, where there has been but one single act of trespass, except where that has been of a continuing nature, as in the case of imprisonment (in which case it may perhaps be said to consist of several acts of trespass), or except where the plea of *liberum tenementum* has rendered a particular description of the *locus in quo* necessary; and, in general, where a new assignment is unnecessary, it will be improper, and sometimes fatal, to the plaintiff's right to recover. (5)

Where the defendant pleads *liberum tenementum* in A. B., and that the defendant entered by his command, the plaintiff can in his replication traverse the command.

Where a stipulation should be made the subject of a rejoinder.

In an action of trespass, the defendant pleaded *liberum tenementum*, and leave and license. The plaintiff denied the license, and replied to the other plea a demise from year to year, commencing on the 16th November, 1836. The defendant, in his rejoinder, denied the demise. There was evidence, that the 16th November was the first day of each year of the tenancy, but from the evidence it seemed, that the tenancy must have commenced before 1836. The defence (which was sought to be proved by an admission of the plaintiff) was, that, at the time of the letting, the plaintiff had agreed to give up the possession, whenever the defendant required to have the land: — It was held, that the allegation of the tenancy was proved, although the tenancy had begun on some 16th November several years before 1836, because a tenancy from year to year is considered as recommencing every year,

(1) *Vide ante*, 2641.

(2) *Chambers v. Donaldson*, 11 East, 65.

Stevens v. Whistler, *ibid.* 51.

(3) *Freeston v. Crouch*, Cro. Eliz. 492.
1 Saund. 299. (e.)

(4) 1 Saund. 300. (b.) *Prettyman v. Lawrence*, Cro. Eliz. 812.

(5) 1 Chitt. Pl. 632.

and that the defendant could not avail himself of the above defence on these pleadings, as the stipulation to give up possession should have been made the subject of a rejoinder, and that it could not be gone into on the plea of leave and license, as it was a part of the original bargain. (1)

PLEADINGS.

In settling the plea of *liberum tenementum* the following rules should be carefully attended to:—1st, in the statement of a derivative title, the derivation or commencement of an estate in fee simple need not be shewn. It suffices in general to deduce the title from the last absolute owner in fee simple from or through whom the defendant claims, although the fee was only conditional or determinable on a certain event; 2dly, in the case of particular estates, being interests or titles less than a seisin in fee simple, and in case of copyholds, their commencement must be shewn, that is, the derivation of the title from the last seisin in fee must be alleged; 3dly, a party claiming by inheritance or descent, must specially shew how and in what character he is heir; 4thly, if the party claim by conveyance, each distinct conveyance and the nature thereof must be specially set forth; 5thly, it is a rule, that the conveyance should be pleaded according to its legal import and effect, rather than its form of words; 6thly, where the nature of the conveyance is such, that it would at common law be valid without deed or writing, no deed or writing need be alleged in the pleading, though such document exist, and a statute render it necessary, as in case of a conveyance with livery of seisin, &c.; but where the nature of the conveyance requires at common law a deed or other writing, such instrument must be alleged, as in case of a grant of any thing which lies in grant, and cannot be granted without deed (2); and if a transfer of property be inoperative except by statute, and the act require writing, as in case of a devise of lands, the pleading must shew that the will was in writing. (3)

Rules for pleading *liberum tenementum*.

The plea of license is, where the defendant committed the alleged trespass under the permission of the plaintiff, a good plea in an action of trespass, but it must be specially pleaded; and it may be here observed, that a license to enter and occupy land for a certain time amounts to a lease, and should be pleaded as such. (4)

LICENSE.

What amounts to a lease.

In an action of trespass *quare clausum fregit*, by a tenant against a landlord, it was holden, that the latter could not avail himself of a license from the plaintiff to take possession, unless he pleaded it specially. (5)

When license must be specially pleaded.

If A. give B. leave to go on a field, in which A. has no right, and B. enter thereupon, this will not make A. liable as a co-trespasser with B.; but if A. order and authorise B. to go on the field, and he do so, A. is a joint trespasser with B.; the latter being an authority, the former a leave and license only. (6)

Distinction between an authority and a license.

If a person be licensed to do an act, the implication is, that the grantor authorises the grantee to do every thing that is essentially requisite, in order that such act should be fully executed or performed. (7)

Implication necessary, where a person is licensed to do an act.

(1) *Tomkins v. Lawrance*, 8 C. & P. 729.

(2) 1 Saund. 276. (a.)

(3) Ibid. Stephen on Pleading, 362, et seq. 3 Chitt. Pl. 1014. Leigh's N. P. 1448.

(4) *Per cur.* 5 Hen. 7. c. 1. (a.) cit. in *Paramour v. Yardley*, Plowd. 542. (a.)(5) *Cox v. Painter*, 7 C. & P. 767.(6) *Robinson v. Vaughton*, 8 ibid. 252.(7) *Dennett v. Grover*, Willes, 195.

PLEADINGS.

In *Wood v. Manley* (1) it appeared, that goods which were upon the plaintiff's land were sold to the defendant; and that by the conditions of sale to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods:—It was held, that, after the sale, the plaintiff could not countermand the license; and that the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and license and a peaceable entry to take, to which the plaintiff replied *de injurid*, he, (the defendant,) was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter, and that the defendant had broken down such gates and had entered to take the goods.

Where a contract for the sale of an interest in land may operate as a license.

Customs under a fair.

A contract for the sale of an interest in land without a note in writing may operate as a license, so as to excuse the entry of the purchaser on the land; but it cannot be made available in any way as a contract. (2)

In trespass for breaking and entering the plaintiff's close, and erecting stalls, posts, booths, and tables there, the defendant justified under a custom, that at fairs holden at certain times of the year, on some part of the commons and waste of a manor, to be named by the lord of the manor (the *locus in quo* being parcel of such commons and waste, and named by the lord), every liege subject exercising the trade of a victualler might enter at the time of the fairs, and erect a booth, &c. and continue the same for a reasonable time after the fairs, for the more conveniently carrying on his calling, paying 2d. to the lord:—It was held, that the custom was reasonable, and the plea good. (3)

LICENSE IN LAW.

Under the plea of license, the following entries on house or land may be justified, viz. to distrain for rent, or cattle damage feasant; to execute legal process; for a remainder man or a reversioner to see whether waste has been made, or repairs properly executed; for a commoner to view his cattle, &c.; for an entry into an inn on reasonable occasions; and for a landlord to resume possession after the expiration of a tenant's lease.

In *Fekham v. Cartwright* (4) the plaintiff being distrained on for rent, gave the defendant her landlord the following undertaking:—"In consideration of Mr. C. giving me the furniture distrained for rent, I undertake to give him possession of the premises on or before one week from the date hereof." The plaintiff acted on this instrument by selling some of the furniture for her own use, and at the end of a week the defendant took possession. The plaintiff having sued him in trespass, and the defendant having pleaded leave and license, it was held, that the above instrument established the plea.

What is not sufficient to re-vest the possession of property in the landlord.

But where a tenant remains in possession after the expiration of his term, a landlord is not justified in expelling him by force, in order to regain possession. And it seems, that possession so acquired is not sufficient to vest the possession in the landlord with relation to the termination of the term. (5)

When license is not implied.

A license is not implied by law to the purchaser of goods (though sold under an execution or distress) to enter upon the premises of the former owner, and take them away, although they have remained there with his

(1) 11 A. & E. 34.

(2) *Carrington v. Roots*, 2 M. & W. 248.

(3) *Tyson v. Smith*, 6 A. & E. 745.

(4) 5 Bing. N. C. 569.

(5) *Newton v. Harland*, 1 M. & G. 644.

assent. To support a plea of leave and license to an action of trespass for taking away goods under such circumstances, there must be proof of an express agreement, that the purchaser should enter on the premises and take the goods. (1)

Where a man abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant plead such license or authority, the plaintiff should reply its abuse (2); for if he new assign, that the trespass is a different trespass, he cannot recover, as he can only prove one continued act of trespass, which is admitted by the assignment; for though the defendant becomes a trespasser *ab initio*, it is not a new trespass. (3)

Where the plaintiff complains of several trespasses committed on several days, and the defendant pleads a license, to which the plaintiff replies *de injuriâ sud propriâ absque tali causâ*, the defendant must shew a license for each act of trespass proved by the plaintiff (4); and under such circumstances the plaintiff need not new assign, because the meaning of the replication is, that the defendant committed the several trespasses without a license for each.

The principles which apply to new assignments in trespasses to the person (5) are generally applicable in trespasses to personal property. Where in an action of trespass for taking away the plaintiff's oaks, the defendant pleaded, that the oaks were standing in a certain close, situate in the manor of A., the freehold of B., who felled them, and justified taking them away by the command of B.:—It was held, that the plaintiff might new assign, that the oaks were growing in his own close, within the manor of W., and were other oaks from those mentioned in the plea. (6)

A replication of excess admits the cause of justification, and precludes the plaintiff from giving evidence to negative the justification. Thus, if the defendant justify as abating a nuisance, and the plaintiff reply excess, he cannot go into evidence to negative the nuisance. (7)

It will be a justification, if the defendant broke and entered the plaintiff's close under a legal process. (8)

In pleading a justification, there is a difference in the case of an officer acting under process of the court, and of a private person.

In trespass against the sheriff, it is a sufficient justification, if he shew his writ without shewing a judgment (9): so it is in the case of his bailiff or officer, with this difference, that the sheriff must shew, that the writ was returned if returnable, but the bailiff need not, because it is not in his power.

But in trespass against the plaintiff in a former action, or a mere stranger, they cannot justify, unless they shew a judgment as well as an execution; for the judgment might be reversed, and it ought to be at their peril, if they take out execution afterwards. (10)

PLEADINGS.

When the plaintiff should reply the abuse of an authority or license.

Principles which apply to new assignments in trespasses to the person, generally applicable to personal property.

JUSTIFICATION.
Replication of excess admits the cause of justification.

PROCESS.

Officer acting under process.

Plaintiff in a former action, or a mere stranger.

(1) *Williams v. Morris*, 8 M. & W. 489. *Quare*, Whether there can be an irrevocable license to enter upon land, without its amounting to an interest in land, which therefore can pass only by deed.

(2) 1 Saund. 300. (d.)

(3) *Aithenhead v. Blades*, 5 Taunt. 198.

(4) *Barnes v. Hunt*, 11 East, 451.

(5) *Vide ante*, 208. tit. ASSAULT AND BATTERY.

(6) 1 Saund. 300. (a.)

(7) *Pickering v. Rudd*, 1 Stark. 56.

(8) *Crowther v. Ramsbottom*, 7 T. R. 654.

(9) *Britton v. Cole*, 1 Salk. 408.

(10) 1 Esp. N. P. 422., sed vide *Cheasley v. Barnes*, 10 East, 73.

PLEADINGS.

And the same rule applies to all principal officers of inferior courts as has been previously stated respecting sheriffs, viz. that they must shew returnable process returned.

It may be laid down as a general principle, that, if a person justify a taking under any authority, he must shew every matter and fact of that authority, under which he justifies.

Officer cannot justify breaking open outer doors.

An officer in the execution of civil process (1) cannot justify the breaking open an outer door or window (2); but if the outward door be open, and he enter, he can if refused, or otherwise unable to procure ingress, break open inward doors to execute his process.

In *Kerbey v Denby* (3), which was an action of trespass for breaking and entering a dwelling-house, assaulting the plaintiff, &c., the defendant pleaded not guilty and two justifications under a *ca. sa.*, except as to the breaking, &c., alleging, that the outer door was open; and to that *de injurid* was replied:—upon which it was held, “that the door being open, is a condition precedent to executing the writ in the dwelling-house, and therefore that the averment is material; and if so, it is well traversed by the replication *de injurid abque residuo causæ* (4);” and secondly, it being proved, that the defendant had broken the outer door, whereby he was a trespasser *ab initio*, the jury were properly directed to give damages for the whole of the injury complained of.

In the execution of criminal process against any person in the case of a misdemeanour, it is necessary to demand admittance, before the breaking open the outer door can be justified. (5)

Inner doors of a house cannot be broken open on suspicion, to arrest another on mesne process.

And an officer cannot justify breaking the inner doors of the house of a stranger, upon suspicion that a defendant is there, to search for him, in order to arrest him on mesne process. (6)

Stat. 10 Geo. 1. c. 10. s. 13.

Under stat. 10 Geo. 1. c. 10. s. 13. the commissioners of excise can issue a warrant, to search the house of a person whom they reasonably suspect of having contraband goods, and the officer executing the process can break open locks if refused to be unopened; and no evidence need be given of the grounds of his suspicion for breaking open the locks. (7)

Where the declaration complained of breaking and opening divers doors of the plaintiff's dwelling-house, and breaking to pieces their locks, &c.; and the plaintiff then new assigned, that he brought his action for the defendant's breaking the outer door of the house; and then new assigned again, that he brought his action for the defendant's breaking, &c. the locks, &c. belonging to the outer door, and wherewith it was fastened:—It was held, that the second new assignment was not bad, inasmuch as under the complaint of breaking the outer door, the plaintiff might give evidence of breaking the locks, &c., and that the second new assignment and the plea to it raised the question, whether the sheriff, under the circumstances in the plea, might break open the outer door, as if the declaration had been merely for breaking the lock, &c. of the outer door. (8)

(1) *Burdett (Bart.) v. Abbot*, 14 East, 1.

(2) Sed vide *White v. Wiltshire*, 2 Rol. 137. *Anon. Cro. Jac.* 555. *Pugh v. Griffith*, 7 A. & E. 827.

(3) 1 M. & W. 336.

(4) *Per Parke B. ibid.*

(5) *Launock v. Brown*, 2 B. & A. 592.

(6) *Johnson v. Leigh*, 6 Taunt. 240.

(7) *Cooper v. Boot*, 3 Esp. N. P. C. 135. overruling *Bostock v. Sanders*, 2 W. Black. 912. 3 Wils. 434.

(8) *Pugh v. Griffith*, 7 A. & E. 827.

Accord and satisfaction is a good plea in trespass, but accord without satisfaction is a bad plea. (1)

PLEADINGS.

In *Thurman v. Wild* (2), which was an action for a trespass committed by the defendant as a servant and by command of P. B., acceptance of satisfaction by the plaintiff from P. B. was held to be a defence.

ACCORD AND
SATISFACTION.

Where the defendant introduces an immaterial averment in his plea, the plaintiff cannot in his replication so traverse the matters of the plea, as to include such immaterial averment in the issue; therefore, where the defendant in trespass pleaded, that the trespass was committed by command of P. B., and then stated an executed accord between the plaintiff and P. B., with the consent of the defendant, and acceptance thereof by the plaintiff in satisfaction of the trespasses: — It was held, that a replication traversing the accord and execution thereof, with the consent of the defendant, was bad on special demurrer; for that, as no rights of the defendant appeared to be compromised by the accord, his consent was unnecessary. (3)

If in trespass a verdict be positively found on any fact or title, it may be pleaded as an estoppel in any subsequent action between the same parties or their privies. (4)

ESTOPPEL.

In *Doe v. Huddart* (5) Mr. Baron Bolland observed, “The general rule of law since the case of *Vooght v. Winch* must, we think, be taken to be clearly established; and that is, that a judgment between the same parties is not conclusive, unless pleaded as an estoppel. There are two modes, as Mr. Justice Holroyd there observes, which a party may adopt: he may say, the other party is not at liberty to call upon me to answer for what has been previously decided; or he may say, that his opponent has no such ground of action, as he has alleged. In the latter case he refers the question to the jury, who are to determine, not whether it has been previously so decided, but whether the right be as alleged in the pleadings of the parties. And in *Goddard's case* (6) it is laid down, that although in pleading the obligee cannot allege delivery before the date, because he is estopped from taking an averment against any thing expressed in the deed, yet the jurors who are sworn to say the truth, shall not be estopped.”

Judgment of
Mr. Baron
Bolland in *Doe*
v. Huddart.

To trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded, that an action was brought by him against the plaintiff, which was referred to arbitration, and that the arbitrator awarded a certain sum to be due to the defendant, and ordered the plaintiff to pay it on a certain day, which the plaintiff having refused to do, the defendant issued a writ of *feri facias* and levied on the plaintiff's goods; to which it was replied, that by a rule of court the said writ was ordered to be set aside for irregularity; and in rejoinder by way of estoppel, that after the making the rule of court, the plaintiff ruled the sheriff to return the writ: — It was holden; upon special demurrer to the rejoinder, that the replication was good, and that it was unnecessary to aver, that the rule of court was acted on; — that the act of ruling the sheriff to return the writ did not stop the plaintiff from shewing, that the writ was not a good writ; neither

When it is unnecessary to aver that, a rule of court was acted upon.

(1) 1 Rol. Abr. Accord (A.), 128. *Reniger v. Fogassa*, Plowd. 5. 11. (b.) *James v. David*, 5 T. R. 141.

(2) 11 A. & E. 453.

(3) Ibid.

(4) *Outram v. Morewood* (Clerk), 3 East, 346., *anté*, 1603, 1604. tit. EVIDENCE.

(5) 2 C. M. & R. 323.

(6) 2 Co. 4. (b.).

PLEADINGS.

did the filing of record affirm the existence of a void writ;—that stat. 1 & 2 Vict. c. 110. s. 18. does not authorise a party to issue execution for money ordered to be paid by an award; and that, although the statute does not authorise execution unless the amount appears by the order, yet execution may issue for costs when ascertained by the officer, and that an order after the officer has taxed is not requisite. (1)

TENDER OF AMENDS.

Stat. 21 Jac. 1. c. 16. s. 5.

By stat. 21 Jac. 1. c. 16. s. 5. "in all actions of trespass *quare clausum fregit*, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant may plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends for such trespass before action brought." (2)

If a person bring an action of trespass for taking away his beasts or other goods, tender of sufficient amends before action brought is not a bar, because the party making the tender is not the owner of the goods, as in the case of a distress, but a trespasser, to whom the law does not shew any favour. (3)

Where the time of tender is no part of the matter in issue.

To a declaration in trespass for breaking and entering the plaintiff's house, continuing there &c., and seizing and converting his goods, it was pleaded, that the defendants entered as bailiffs to distrain, and distrained for rent in arrear, impounded the goods in the most convenient part of the premises for the purpose of the distress, and remained there a reasonable time for that purpose: to which it was replied, that the plaintiff sued not only for the trespasses attempted to be justified, but also because, after the defendants had entered for the purposes mentioned in the plea, and after the plaintiff had tendered to them a sufficient sum in satisfaction of the rent and costs, and after the defendants ought to have accepted the sum so tendered and withdrawn, and given up the goods so seized and distrained as in the plea mentioned, the defendants remained on the premises a long time &c., and converted the goods; which trespasses newly assigned, are other and different trespasses, &c. Rejoinder, that plaintiff did not tender a sufficient sum for arrears and costs. Issue thereon:—It was held, on motion in arrest of judgment after verdict for the plaintiff, that on the whole record it did not appear, that a tender had been made before the distress was impounded, but that the contrary was to be inferred; and taking the statement to be ambiguous, that it was not cured by verdict, since the time of tender was no part of the matter in issue; and judgment was consequently arrested. (4)

STATUTE OF LIMITATIONS.

By stat. 21 Jac. 1. c. 16. s. 3. all actions of trespass *quare clausum fregit* shall be commenced and sued within six years next after the cause of such actions.

EVIDENCE.

6. EVIDENCE.

RIGHT TO BEGIN.

In an action of trespass to land, the defendants pleaded not guilty, and a right of way. The plaintiffs replied *de injuria* to the plea of right of way, and newly assigned, that the trespasses were committed "on other

(1) *Jones v. Williams*, 9 Dowl. P. C. 702.
(2) Vide *Allen v. Bayley*, 2 Lutw. 1596.

(3) 2 Inst. 107.
(4) *Ladd v. Thomas*, 12 A. & E. 117.

and different occasions" than that in the second plea mentioned. The defendants pleaded to the new assignment a payment of money into court, and by this plea relinquished and abandoned so much of the general issue "as traverses or denies, or can be deemed or construed to traverse or deny the said trespasses newly assigned or any part thereof." The replication to this plea, accepted the sum paid into court "in full satisfaction and discharge of the said several trespasses above newly assigned:"—It was held, that as the plea of not guilty was not entirely withdrawn, the plaintiff had the right to begin; and that, if in a case like this, the defendant wished to begin &c., he should take out a summons, and by a judge's order withdraw the general issue entirely from the record. (1)

If a statute enact, that a party may prove his defence under the general issue, it means, that he may prove the whole matter of defence. (2)

In trespass *quare clausum fregit*, where there are several issues, and amongst them one on the plaintiff's possession of the close, the plaintiff has a right to a trial of all the other issues, though it appears on the opening of the evidence, that he was not in possession of the close. (3)

In trespass upon issue joined, whether the defendant had for thirty years enjoyed as of right a certain privilege &c. upon the plaintiff's land, the plaintiff, in order to raise the presumption, that the enjoyment was permissive, may give in evidence an old lease made to the defendant's predecessor, and expiring immediately before the commencement of the thirty years, whereby the lessee was entitled to the privilege &c. during the term (4); and it may be here observed, that it is not necessary in such a case for the plaintiff to reply the lease specially under stat. 2 & 3 Will. 4. c. 71. s. 5. (5)

In trespass, on pleas of 1. not guilty, and 2. that the goods were not the goods of the plaintiff, and issues thereon, the defendant cannot set up property in a stranger, under whom he does not justify, in answer to the plaintiff's possession. (6)

"The plaintiff may prove a trespass at any time before the action brought, though it be before or after the day laid in the declaration. (7) But in trespass with a *continuando* the plaintiff ought to confine himself to time in the declaration; yet he may waive the *continuando* and prove a trespass on any day before the action brought, or he may give in evidence only part of the time in *continuando*." (8)

When trespasses are alleged to have been committed on a particular day, and on divers others days and times between that day and the commencement of the action, the plaintiff may prove either one trespass before the day specified, or as many trespasses as he can within the space of time mentioned in the declaration, but he cannot do both, and must waive the one or the other. (9)

EVIDENCE.

If a party plead the general issue under a statute, he can prove his whole defence.

When the plaintiff has a right to the trial of all the issues.

Permissive enjoyment.

When defendant cannot set up property in a stranger, against the plaintiff's possession.

Plaintiff may prove a trespass at any time before action brought.

(1) *Price (Bart.) v. Seaward*, 1 C. & Marsh. 23.

(2) *Haine v. Davey*, 4 A. & E. 892., see *vide* Reg. Gen. H. T. 4 Will. 4. r. 2. In trespass, where there are several defendants, who having separate defences, plead by separate attorneys, and appear at the trial by separate attorneys and counsel, the latter may cross-examine the plaintiff's witnesses and address the jury separately. *Dixon v. Dane*, 1 Armstrong & Macartney (Irish), 152.

(3) *Fry v. Monkton*, 2 M. & Rob. 303.

(4) *Clay v. Shackeray*, *ibid.* 244.

(5) *Ibid.*

(6) *Carter v. Johnson*, *ibid.* 263.

(7) Co. Litt. 283.

(8) Bull. N. P. 23. 85. (a.) *Webb v. Turner*, Str. 1095.

(9) *Per* Gould J. Northumberland Sum. Ass. 1775, MSS. *Chambre J. cit. Selw. N. P.* 1341.

EVIDENCE.

When a joint trespass is alleged and proved, plaintiff cannot elect to go upon a separate trespass against one.

Judgment of Lord Lyndhurst in *Tait v. Harris*.

Object of the description of the locus in quo in the declaration.

Judgment of Mr. Justice Patteson in *Bassett v. Mitchell*.

Stat. 11 Geo. 2. c. 19. s. 21.

Judgment of Mr. Justice Rooke in *Vaughan v. Davis*.

Stat. 3 & 4 Will. 4. c. 42. s. 1.

Overseer under "not guilty" can prove, that the distrained goods did not belong to the plaintiff.

When license

In *Tait v. Harris* (1) Lord Lyndhurst said, "Where a joint trespass is alleged and proved, the plaintiff cannot afterwards elect to go upon a separate trespass against one. If there had been only an unsuccessful attempt to prove a joint trespass, the plaintiff might afterwards elect to go for the several trespass, but not where the joint trespass has been proved. The plaintiff must therefore, in this case, confine himself to the trespasses committed by all three defendants." (2)

In *Bassett v. Mitchell* (3) the plaintiff declared in trespass for breaking his close, and set out the close by abutments. The defendant justified, alleging that the said close in which &c. was part of an allotment of six acres made by commissioners duly authorised for certain purposes in execution of which he entered. The plaintiff denied, that the said close in which &c. was part of the six acres in the plea supposed to have been allotted; and thereupon issue was joined. It appeared, that the close set out by abutments was not all within the allotment, but that the part in which the actual trespass occurred was within it: — It was held, that the justification was made out, Mr. Justice Patteson observing, "The description given in the declaration is merely for the purpose of identifying the close which is the subject of action. When the trespasses are stated, the words 'in the said close' do not mean every part of the close, and the plea must be understood in an equally confined sense."

By stat. 11 Geo. 2. c. 19. s. 21. "in actions of trespass brought against any person entitled to rents or services of any kind, their bailiff or receiver, or other person, relating to an entry by virtue of this act or otherwise upon the premises, chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon, the defendants may plead the general issue, and give the special matter in evidence."

Where goods were taken by way of distress for rent off the premises chargeable with the rent, and an action of trespass was brought for the taking, it was held, that the defendant must plead the special matter in justification, and could not give it in evidence under the general issue under stat. 11 Geo. 2. c. 19., Mr. Justice Rooke observing (4), "that the evidence was inadmissible under the general issue, said, that the construction contended for on the part of the plaintiff was the true one, and that he was of opinion, that the intention of the legislature was, to confine the indulgence of so pleading to cases of distress made upon the premises chargeable with the rent, as there might exist many reasons why the same indulgence should not be given to distresses made off the premises; and that if the defendant meant to have relied on the special matter, he should have pleaded it." (5)

Under stat. 3 & 4 Will. 4. c. 42. s. 1. an overseer, sued in trespass for taking A.'s goods, may prove under the plea of "not guilty," that he as overseer, distrained the goods for a poor's rate due from B., and that the goods were the goods of B. and not of A. (6)

A defendant justified the stopping the plaintiff's cart, on the ground, that he was loading his cart with turf wrongfully cut from the waste of the

(1) 1 M. & Rob. 282.

(2) *Sed vide dict.* Patteson J. in *Hitchen v. Teale*, 2 *ibid.* 31.

(3) 2 B. & Ad. 99. *recog.* Richards v. Peake, 2 B. & C. 918.

(4) *Vaughan v. Davis*, 1 Esp. N.P.C. 257.

(5) *Vide etiam Furneaux v. Fetherby*, 4 Camp. 136.

(6) *Haine v. Dacey*, 4 A. & E. 892, *note* stat. 43 Eliz. c. 2 s. 19.

manor, and that the defendant as bailiff of the lord stopped the cart. The plaintiff having replied *de injuriâ sua propriâ*, it was holden, that in order to rebut the justification, he could not give in evidence a license from the lord to cut the turf, because it had not been pleaded by way of replication. (1)

Under the plea of *liberum tenementum*, the defendant is not liable to prove the whole of the close to be his property, but is entitled to a verdict, if he prove his right to that part on which the alleged trespass was committed. (2) "When, therefore, the defendant following the declaration, asserts in his plea, that the close in which &c. is his soil and freehold, this plea means, that the part of the close so described in the declaration, on which he admits, that he has done the acts complained of, was his soil and freehold. By this plea, therefore, he undertakes to prove two propositions: first, that some part of the described close belongs to him; and secondly, that it is on this part of the close, that all the acts complained of have been done. If he does this, he is entitled to the verdict; if not, the plaintiff must succeed." (3)

A plea of *liberum tenementum* to an action of trespass *quare clausum fregit*, is not supported by proof of the exercise of acts of ownership by the defendant for a period of less than twenty years, where it appears, that before the commencement of that period, and also within twenty years, the estate was in a third person. (4)

In trespass where a justification is pleaded, to which the plaintiff new assigns, that the action is brought for another and different trespass than that mentioned in the plea, and not guilty is pleaded to the new assignment; if the plaintiff give in evidence only one trespass, it is incumbent on him to shew, that the trespass so given in evidence, is clearly a different one from that mentioned in the plea. If the circumstances are alike, the jury ought to consider it to be the same. (5)

The fact of a line of boundary between W. and O. may be shewn by the finding of a jury summoned under a commission from the duchy court of Lancaster for the purpose of determining the boundary between manors J. and O., on the petition of former owners of J. and O., who had represented, that the boundary was uncertain, and that suits were likely to grow between them, notwithstanding no steps may have been taken after the return of the verdict to the duchy court, and that another commission had issued in the next year to ascertain the boundary of O.—because on a question of boundary, reputation is evidence; and where reputation is evidence, a verdict between third parties is evidence; and it will be assumed, that the duchy court had authority to issue the commission. (6)

In trespass for taking the plaintiff's goods it was pleaded, that the goods were not the plaintiff's;—the plaintiff proved, that the sheriff had seized the goods, being the property of B., under an execution against B., and had sold them to the plaintiff:—It was held, that the defendant might shew on the issue here joined, that the sale was fraudulent as against creditors, that he himself had taken the goods under an execution against B., and that this was the alleged trespass. (7)

EVIDENCE.

cannot be proved, it not having been pleaded by way of replication.

Under plea of *liberum tenementum* the defendant is not liable to prove the whole of the close to be his property.

Where plea of *liberum tenementum* not supported by proof of acts of ownership for less than twenty years.

If plaintiff when he new assigns, give evidence of only one trespass, he is bound to shew it is a different one from that mentioned in the plea.

In a proof of boundary where reputation is evidence, a verdict between third parties is evidence.

Fraudulent sale.

(1) *Taylor v. Smith*, 7 Taunt. 156.

(2) *Smith v. Royston*, 1 Dowl. P. C. N. S. 124. 8 M. & W. 381.

(3) *Per Alderson B.* *ibid.*

(4) *Brest v. Lever*, 7 *ibid.* 593.

(5) *Darby v. Smith*, 2 M. & Rob. 184.

(6) *Brisco v. Lomax*, 8 A. & E. 198.

(7) *Ashby v. Minnitt*, *ibid.* 121.

EVIDENCE.

INCOMPETENCY
OF WITNESS.

Trespass justified under the commands of another.

Where a defendant justified a trespass to chattels by a plea alleging them to be the property of I. S., and that he committed the trespass by the command of I. S., it was held, that I. S. was not a competent witness for the defendant, and that he could not be rendered competent by indorsing the *postea* under stat. 3 & 4 Will. 4. c. 42. s. 26. (1)

To prove the plaintiff, a lessee, in possession of premises, in an action of trespass for breaking and entering them, the lessor is not a competent witness. (2)

When the lessor is not competent to prove the possession of the lessee, a bill drawn by the lessor and accepted by the lessee for rent of the premises cannot be given in evidence with that view; nor a receipt, prepared for the occasion, in court, during the progress of the trial. (3)

STAY OF PROCEEDINGS—
NEW TRIAL—
DAMAGES—
COSTS—JUDGMENT AND EXECUTION.

STAY OF PROCEEDINGS.

NEW TRIAL.

7. STAY OF PROCEEDINGS—NEW TRIAL—DAMAGES—COSTS—
JUDGMENT AND EXECUTION.

An order cannot be made for staying proceedings on payment of debt and costs in an action for unliquidated damages. (4)

Nor in an action to recover a sum due from a third person, with the costs of certain proceedings against that third person, the payment of which the defendant has guaranteed. (5)

Under a plea of leave and license to an action of trespass for taking the plaintiff's goods, it was proved, that the plaintiff's father having become bankrupt, the plaintiff upon examination was told by the commissioner, incorrectly, that the goods belonged to his father; whereupon the plaintiff said he would give them up. The defendant was present, but it did not appear, that he had heard what the commissioner said. The jury having been directed to consider, whether the plaintiff's consent was obtained by an untrue representation, without any question being put as to the defendant's participation in such representation, and a verdict having been found for the plaintiff, the court granted a new trial. (6)

The court refused to grant a rule *nisi* for a new trial, on the ground, that the verdict was against evidence, where the damages fell below 20*l.*, although the case was stated to be of general importance as relating to the boundaries of a jurisdiction. (7)

DAMAGES.
Stat. 3 & 4
Will. 4. c. 42.
s. 29.

A recovery of damages against a co-trespasser is not admissible.

Taking goods in a place to which the process does not run.

By stat. 3 & 4 Will. 4. c. 42. s. 29. the jury, on the trial of any issue, or on any inquiry of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the seizure, in actions of trespass *de bonis asportatis*.

In trespass, a recovery of damages against a co-trespasser, not sued, is not admissible in mitigation of damages under the plea of "not guilty." (8)

In trespass for taking goods under process, upon a regular judgment, but in a place to which the process did not run, the plaintiff may recover the whole value of the goods, and not merely the amount of damage which he has sustained by their being taken in a wrong place. (9)

(1) *Green v. Warburton*, 2 M. & Rob. 105.
(2) *Walker v. Masterson*, 1 Armstrong & Macartney (Irish), 36.
(3) *Ibid.*
(4) *Per* Erskine J. in *Fisher v. Pyne*, 1 M. & G. 265

(5) *Ibid.*
(6) *Roper v. Harper*, 4 Bing. N. C. 20.
(7) *Sowell v. Champion*, 6 A. & E. 407.
(8) *Day v. Porter*, 2 M. & Rob. 151.
(9) *Sowell v. Champion*, 6 A. & E. 407.

In trespass for cutting into the plaintiff's close, and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition. (1)

In *Lockley v. Pye (Sheriff of Staffordshire)* (2) it appeared, that A. succeeded B. in the occupation of a house, and, on taking possession, agreed with B. for the lease at the sum of 80*l.*, and to take the furniture and fixtures at a valuation as between an outgoing and incoming tenant. The goods were accordingly valued at 109*l.* 15*s.* 10*d.*, and the amount paid by A., and an assignment executed. The plaintiff afterwards commissioned the auctioneer who had valued the goods to sell them, but before he could do so, the sheriff entered and seized them under an execution against B., and (the same auctioneer being employed by the sheriff) the goods were sold, and produced only 73*l.*, the plaintiff himself being a purchaser to the amount of 20*l.* In an action of trespass brought by A. against the sheriff it was held, that the jury were justified in giving damages for the full amount of the valuation.

To a count for an expulsion A. pleaded not guilty, and B. and C. paid 20*s.* into court, and pleaded, that the plaintiff had sustained no greater damages; to which it was replied, that the plaintiff had sustained greater damages. The jury wished to find a verdict for the plaintiff against A. for 20*l.* beyond the sum paid into court, and a verdict that 20*s.* as to B. and C. was sufficient: — It was held, that this could not be done, and that if the jury thought that A. was guilty, and that the damages the plaintiff had sustained did not exceed 20*s.*, they should find a verdict against A. with nominal damages only, and a verdict in favour of C. and D.; but that if the jury thought the damages, that the plaintiff had sustained exceeded 20*s.*, they should find a verdict against all the defendants for so much as the plaintiff's damages exceeded that sum. (3)

Where the seller of goods, which have not been paid for according to the contract, retakes them from the buyer without his consent, although under circumstances inducing a suspicion of fraud in the buyer, such retaking would be no answer to an action by the buyer for the price; therefore, in an action of trespass by the buyer against the seller, for so taking the goods, the plaintiff is entitled to recover their full value, and the jury cannot, in estimating the damages, take into consideration the debt due to the defendant, nor treat it as being diminished *pro tanto* by the value of the goods retaken. (4)

If a verdict be found for the defendant upon an issue which bars the action, the jury cannot assess contingent damages for the plaintiff, without the assent of the defendant. (5)

By stat. 3 & 4 Vict. c. 24., if in any action of trespass the plaintiff recover less damages than 40*s.*, he will not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever. (6)

By Reg. Gen. H. T. 4 Will. 4. s. 7., upon the trial, where there is more than one count, plea, avowry, or cognisance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect

DAMAGES.

Cutting into the plaintiff's close and carrying away the soil.

When jury are justified in giving damages to the full amount of the valuation of the property taken.

Where nominal damages should only be found.

When a jury cannot in estimating their damages take into consideration a debt due to the defendant.

Where the jury cannot assess contingent damages without assent of the defendant.

COSTS.

Stat. 3 & 4 Vict. c. 24.

Reg. Gen. H. T. 4 Will. 4. s. 7.

(1) *Jones v. Gooday*, 8 M. & W. 146. 1 Dowl. P. C. N. S. 50.

(2) 8 M. & W. 139. 9 Dowl. P. C. 744.

(3) *Walker v. Woolcott*, 8 C. & P. 352.

(4) *Gillard v. Brittan*, 8 M. & W. 575.

(5) *Newton v. Harland*, 1 M. & G. 644.

(6) *Vide* stat. 3 & 4 Vict. c. 24., *ante*, 228., *vide etiam* stat. 4 & 5 Vict. c. 28.

Costs.

Stat. 3 & 4
Vict. c. 24. s. 2.
applies to all
actions of tres-
pass and tres-
pass on the
case

Certificate by
under-sheriff
under stat. 3 &
4 Vict. c. 24.
s. 2. that the
trespass was
malicious.

When plaintiff
entitled to
costs, from the
defendant not
having inserted
in the margin
of his plea "by
statute."

Where defend-
ant has a ver-
dict on one of
two pleas.

When a suc-
cessful defend-
ant's costs will
be set-off
against the
costs of the
plaintiff.

Certificate of
arbitrator.

When defend-
ant not entitled
to the general
costs of the
cause after pay-
ment of money

of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognisance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, &c., including those of the evidence as well as those of the pleadings. (1)

Stat. 3 & 4 Vict. c. 24. s. 2. applies to all actions of trespass and trespass on the case, and the court will not exclude from its operation a case, where only 1s. damages has been given for an injury arising from defendant's negligence apparently contrary to the justice of the case, the judge trying the cause having refused to certify. (2)

On an execution of a writ of inquiry in trespass, the jury having assessed the damages at one farthing, the under-sheriff was applied to certify, under stat. 3 & 4 Vict. c. 24. s. 2., that the trespass was wilful and malicious. He said, that the trespass was wilful, but he would take time to consider, whether he would certify, that it was malicious. The court then adjourned, and on the same day at 5 P. M. met again to take an inquisition under an *elegit*:—It was held, that a certificate given by the under-sheriff pursuant to the act on the same day, but after the court had so met again, was valid. (3)

Where in trespass *quare clausum fregit* the defendant pleads the general issue, intending to give the special matter in evidence by virtue of an act of parliament, if the jury find less than 40s. damages, the plaintiff is entitled to costs, unless the defendant, in pleading the general issue, has inserted in the margin of the plea "by statute," pursuant to the rule of T. T. 1 Vict. (4)

In trespass, to which not guilty and *son assault demesne* were pleaded, the defendant had a verdict on the latter plea, and the plaintiff on the former:—It was holden, that the defendant was not entitled to the costs of the issue on the former. (5)

Where plaintiff has failed against one of two defendants, and succeeded against the other, the successful defendant's costs will be set off against the costs of the plaintiff, without regard to the alleged lien of such plaintiff's attorney, under Reg. Gen. H. T. 2 Will. 4. s. 93., if it be shewn, that the attorney is substantially the plaintiff in the cause. (6)

Where an action of trespass was referred by order of *Nisi Prius*, which empowered the arbitrator to amend the pleadings, and to certify for costs, in the same manner as a judge at *Nisi Prius*, and the arbitrator awarded a verdict for the plaintiff with nominal damages, and certified in his award, that the action was brought to try a right, &c.:—It was held, that he had power to do so, and that the plaintiff was entitled thereon to his full costs. (7)

In an action of trespass *quare clausum fregit*, the defendant pleaded first, not guilty; secondly, that the plaintiff was not possessed of the close; thirdly and fourthly, special pleas of prescriptive rights. The plaintiff, after joining issue on the first two pleas, traversed the right in the last two pleas, and new assigned excess. The defendant paid 10s. into court on the new

(1) *Vide post*, APPENDIX, tit. THE NEW RULES.

(2) *Marriott v. Stanley*, 9 Dowl. P. C. 59.

(3) *Page v. Pearce*, 8 M. & W. 677.

(4) *Jones v. Thomas*, 8 Dowl. P. C. 93.
11 A. & E. 193.

(5) *Mullins v. Scott*, 5 Bing. N. C. 423.

(6) *Pocock v. O'Shaunnessy*, 6 A. & E. 807.

(7) *Spain v. Cadell*, 8 M. & W. 129.

assignment, and the plaintiff accepted that sum in satisfaction, and entered a *nolle prosequi* as to the other causes of action: — It was held, that the defendants were not entitled to the general costs of the cause. (1)

A plaintiff, who in one stage of an action for unliquidated damages refuses to accept from the defendant in satisfaction of the suit a sum which he afterwards takes, is not entitled to the costs incurred after the refusal. (2)

In trespass, the judgment when for the plaintiff is, "that he recover his damages and costs against the defendant" (3), and the execution is also for his "damages and costs." (4)

COSTS.

into a court and the entry of a *nolle prosequi*.

Plaintiff refusing amends and then accepting it, is not entitled to costs after refusal.

JUDGMENT AND EXECUTION.

(1) *Benn v. Bateman*, 8 M. & W. 666.

(2) *Fisher v. Pyne*, 1 M. & G. 265.

Where on the execution of a writ of inquiry, the parties agree to withdraw the case from the jury, and to submit it to the master under a judge's order, the master sits as an

arbitrator appointed by the parties, and the court will not interfere with his finding as to the facts. *Ibid.*

(3) *Tidd*, 931.

(4) *Ibid.* 993.

TROVER.

1. DEFINED, p. 2660.

2. PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED, pp. 2661—2666.

*Plaintiff must have the right to specific personal chattels — Damages, not the goods in specie, are the object of the action — Property severed from the freehold — Fixtures when accessory to a matter of a personal nature — Title deeds deposited for the performance of a condition — Abstract of title to real property — Cancelled deeds — Leases — Bills of exchange and promissory notes — Bank notes — Policy of insurance — Unstamped agreement — Books of account — Undivided part of a chattel — Specific sale of a chattel on credit — Master for the trade books of his servant — Payment of freight &c. by a wrongful claimant — Advancing money to take goods out of pawn — Goods by mistake forwarded to a wrong consignee — GOODS TAKEN UNDER A WRONGFUL DISTRESS — Goods improperly seized by custom-house officers — Rooks grown on a common — Lost dog — WHERE TROVER CANNOT BE MAINTAINED — Fixtures eo nomine — Incoming tenant to recover the value of the away-going crop taken by the off-going tenant — Conversion of a record — When any material act remains to be done to the chattel before its delivery — Contract to manufacture goods after value received — Money had and received — Goods regularly sold under a distress — Judgment of Mr. Baron Parke in *Joule v. Jackson* — Effect of a writ of execution on the property of the debtor.*

3. BY WHOM TROVER CAN OR CANNOT BE MAINTAINED, pp. 2667—2682.

*Plaintiff at the time of the conversion, must have had a complete property either general or special — Absolute ownership and special property need not be co-existent — To maintain trover there must be some exercise of ownership over the chattel taken, inconsistent with the owner's right of dominion over it — Judgment of Mr. Baron Alderson in *Foulds v. Willoughby* — Goods sold or bailed under a void contract — Bankrupt against his assignees — SPECIAL PROPERTY OR INTEREST — Party having a special property, may support trover against a stranger — Possession of goods on the terms of sale and return — Temporary property — Bare possession without a legal right — Unregistered owner of a ship — A bridge dedicated to the public — Special property gives no right against one who has the general property — RIGHT OF POSSESSION — In case of special property it need not be accompanied with possession — General property of personal chattels creates a constructive possession — CORPORATIONS — LANDLORD AND TENANT — TENANTS IN COMMON — PARTIES TO PROMISSORY NOTES AND BILLS OF EXCHANGE — GOODS FRAUDULENTLY OBTAINED — London dock company improperly delivering goods — Retention of fraudulent documents — Bill of exchange fraudulently negotiated — Where an agreement to use property only amounts to a personal license — Creditor holding a ship's papers, but the cargo delivered over to other creditors — Consignee of goods who is also the vendee — Vendee of undelivered goods — Goods sold under a contract subsequently rescinded — Exchange of goods — Rights of owner of goods after delivery of them to a carrier — Gratuitous loan — Party entitled in remainder to plate — Grantee of wreck — STOLEN PROPERTY — Conversion by an agent — SERVANTS — WHO CANNOT MAINTAIN TROVER — Without absolute or special property trover cannot be maintained — On a sale of goods, there must be a specific right to some specific chattel — Verbal gift of a chattel not sufficient to pass property to donee — Donatio mortis causa — An award that a chattel shall be delivered by A. to B. — Owner of goods standing by, and voluntarily allowing another to treat them as his own — Affirmation of the acts of a wrong-doer — Acting under a valid and else under an invalid authority — First pawnee of a chattel against a second pawnee without notice — Where vendee does not perform his part of the contract — Goods to be delivered according to the custom of trade — Owner entrusting goods to another upon sale or return — Goods delivered in furtherance of an illegal contract — Tenant in tail expectant on the determination of an estate for life — Trustees of*

an estate pur autre vie — Second mortgages against mortgagor for title deeds — Member of an amicable society against another member — Joint owner of a ship — Tenant in common — Timber wrongfully cut down by landlord during the term of a tenant — Landlord for goods distrained, or for goods leased as furniture — Auctioneer for excessive distress — Auctioneer receiving goods for sale — Attachment of property in the hands of the garnishee — Assignees of a bankrupt — Bank notes, exchequer bills, and Prussian bonds, fraudulently obtained — GOODS FELONIOUSLY TAKEN — Bill of exchange improperly delivered by banker — Goods removed to avoid a sale under an admiralty warrant.

4. THE CONVERSION, pp. 2682—2690.

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III. WHEN A DEMAND IS REQUISITE, pp. 2685, 2686.

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VI. MODE OF MAKING THE DEMAND, p. 2687.

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5. RIGHT OF LIEN, pp. 2690—2695.

WHEN A LIEN EXISTS — WHEN NO LIEN EXISTS — WAIVER OF LIEN.

6. DECLARATION AND PLEADINGS, pp. 2695—2701.

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When the introductory part of a plea confesses and avoids the declaration — Justification — When replication does not admit the right of property in a third person.

7. EVIDENCE, pp. 2701—2713.

THE TITLE — What is requisite to support trover — Right to begin — Direct evidence of title — Possession of lands — Identity of goods — When plaintiff has not had actual possession, he must resort to proof of his title — Conflicting titles — Possession is prima facie evidence of property in negotiable instruments — Action against a mere wrong-doer — Consignee of goods can prove his title by parol — What is not conclusive evidence of property — Defendant cannot prove a lien under a plea of "not guilty" — What is evidence under the plea, that the plaintiff was not possessed of the goods as of his own property — Where title of assignees should be pleaded — In trover for ore — Lender of money sued for a deed delivered to him as a security by his debtor — THE CONVERSION — Conversion consists in any tortious act — What act will amount to a conversion is a question of law — Constructive conversion — Presumptive evidence — Proof of notice when essential — Proof of a demand — Party having a lien relying upon a different right — Bailor not having any lien upon goods — Vendor of goods against captain of a vessel — Property of a bankrupt — Conversion by husband and wife — Conversion by an agent — Several defendants cannot be found guilty on the same count, without proof of a joint conversion — DOCUMENTARY EVIDENCE — When not requisite to produce a power of attorney — Where judgment against assignees of a bankrupt, as well as the writ of execution, must be proved — When loss must be given in evidence — Proof of notice — Party refusing to produce an instrument — Parol evidence of a bond — Contract by agent for goods — INSUFFICIENT EVIDENCE OF A CONVERSION — Evidence of a tortious act essential — Taking away and destroying a part of the property — Deed in the hands of an attorney — Goods under an attachment — Selling property on account of another — Third party retaining possession — Persons representing that they acted by the commands of the defendant — Refusal to deliver property to assignees — Receipt of bills of exchange — Papers in the hands of an attorney — COMPETENCY OF WITNESS — DAMAGES.

8. ARREST IN TROVER — LIMITATION OF ACTION — NEW TRIAL — PAYMENT OF MONEY INTO COURT AND RESTORATION OF GOODS — COSTS — JUDGMENT — EXECUTION, pp. 2713—2716.

1. DEFINED.

DEFINED.

In trover the party is supposed to have obtained possession of the goods lawfully, but to have unlawfully converted them to his own use. (1)

Judgment of
Lord Mansfield in *Cooper*
v. Chitty.

In *Cooper v. Chitty* (2) Lord Mansfield has thus defined the action of trover, — "In form it is a fiction; in substance a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies and has been brought in many cases, where in truth the defendant has got the possession lawfully. Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waves the trespass, and admits the possession to have been lawfully gotten. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it. This is an action of tort, and the whole tort consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action, 1. property in the plaintiff, and 2. a wrongful conversion by the defendant."

(1) *Golightly v. Ryn*, Lofft, 88.

(2) 1 Burr. 31. 1 W. Black. 67.

2. PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED.

To support trover the plaintiff must have the right to some identical or specific goods (1), and the action is confined to the conversion of goods or personal chattels.

This action can be maintained for so many pieces of gold or silver, though not in a bag, because damages and not the goods or articles themselves *in specie* are the object of the suit. (2)

If after the severance from the freehold, as in the case of trees, or fixtures, or earth, the property severed be taken away, or if coals dug in a pit be afterwards thrown out (3), or if a tenant during his tenancy remove a dung heap, and at the time of so doing dig into and remove virgin soil that is beneath it, trover can be maintained. (4)

Trover lies for salt pans though fixed in the floor of a building, because, wherever the fixed instrument, engine, or utensil, is an accessory to a matter of a personal nature, it is considered as personalty. (5) Thus, where certain parts of a machine had been put up by a tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant:—It was held, that these were the goods and chattels of the outgoing tenant, for which he might maintain trover. (6)

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right to be considered as tenant. Where, therefore, the term, pursuant to a proviso in the lease was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade, and the jury found that it was not removed within a reasonable time after the entry of the lessor:—It was held, that they had no right so to remove it, and that the lessor might recover it in trover. And it seems, that such would have been the case without such finding of the jury. (7)

When property in land passes by deed, the property in the deed passes with it (8), it being "an established principle, that whoever is entitled to the land, has also a right to all the title deeds affecting it." (9)

If title deeds be deposited with a third party in trust for the performance of a condition, trover will lie for the recovery upon the performance of the condition: thus, where A. sold an estate to B., who paid part of the purchase money, and the title deeds were deposited with C. to be delivered up to B.

PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED.

Plaintiff must have the right to specific personal chattels.

Damages and not the goods in specie are the object of the action.

Property severed from the freehold.

Fixtures when accessory to a matter of a personal nature.

Tenant's right to remove fixtures continues only during his original term.

Title deeds deposited for the performance of a condition.

(1) *Orton v. Butler*, 5 B. & A. 654. 1 D. & R. 285.

(2) 7 Bac. Abr. Trover (D.), 807. *Jackson v. Anderson*, 4 Taunt. 24.

(3) Com. Dig. Biens (H.). 7 Bac. Abr. Trover (B.), 794. *Gordon v. Harper*, 7 T. R. 13. Bull. N. P. 44. *Pitt v. Shew*, 4 B. & A. 206.

(4) *Higgon v. Mortimer*, 6 C. & P. 616.

(5) *Eluces v. Maw*, 3 East, 53, 54. *Fitzherbert v. Shaw*, 1 Hen. Black. 259. *Lawton*

v. Salmon, *ibid.* n. *Davis v. Jones*, 2 B. & A. 165., vide etiam *Penry v. Brown*, 2 Stark. 403. *Thresher v. East London Water Works Comp.* 2 B. & C. 608. *Colegrave v. Dias Santos*, *ibid.* 76. 1 Chitt. Pl. 146.

(6) *Davis v. Jones*, 2 B. & A. 165.

(7) *Weeton v. Woodcock*, 7 M. & W. 14.

(8) *Lord v. Wardle*, 3 King. N. C. 680.

(9) *Per Lord Tenterden in Harrington v. Price*, 3 B. & Ad. 173.

PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED.

Abstract of title to real property.

Cancelled deeds.

Leases.

Bills of exchange and promissory notes.

Bank notes.

Policy of insurance.

when he paid the residue; and A. got possession of them again, and lent them to D. for a valuable consideration:—It was held that B., on tendering the remainder of the purchase money, was entitled to recover the deeds from D. (1)

Upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract, until either the purchase is finally rescinded by consent, or declared impracticable by a court of equity; and when the contract is determined, the abstract becomes the property of the vendor: if the sale proceed, the abstract is the property of the vendee; but an opinion written thereon on the seller's paper by his own consent continues to be his property. (2)

In *Esdaile v. Orenham* (3) it appeared, that A. had contracted to purchase an estate of B., and procured deeds of conveyance to be prepared at his own expense, and sent them to the latter for execution; which, when executed, were delivered to a servant to be returned, but the servant delivered them to C., an attorney, to whom B. was indebted for business done. In consequence of the refusal of other necessary parties to join in the conveyance, A. threw up the contract and demanded the deeds from C., who refused to deliver them, until his demand against B. was satisfied:—It was held, that trover would lie by A. against C. for the deeds in a cancelled if not in an uncanceled state.

A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease, in order that he might get an assignment made out; A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s under-tenant had removed some fixtures:—It was held, that B. might insist on A. accepting the assignment, and, after demand and refusal of the lease, might maintain trover for it. (4)

Bills of exchange indorsed to an agent of the plaintiffs or order for their account, and deposited with the defendants by such agent as a security for future advances, may be recovered by the plaintiffs in an action of trover. (5)

If A. indorse a bill, drawn in his favour and accepted by B., in order that he may raise money for A. by negotiating it, and B. gives it to C., who puts it into the hands of D., without consideration, two years after the bill is due, A. may recover back the bill from D. in trover. (6)

But where a person having three bills of exchange, applied to a country banker, with whom he had had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonoured:—It was held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. (7)

Trover will lie for a lost bank-note, which the defendant has tortiously converted to his own use, though part of the proceeds has been paid by him to the plaintiff (8); or for a policy of insurance by the insured, if wrongfully withheld either by the broker employed by him to effect it, or by any other person to whose hands it may happen to come. (9)

(1) *Hooper v. Ramsbottom*, 1 Marsh. 414.
6 Taunt. 12.

(2) *Roberts v. Wyatt*, 2 Taunt. 268.

(3) 3 B. & C. 225. 5 D. & R. 49.

(4) *Parry v. Frame*, 2 B. & P. 451.

(5) *Truettel v. Barandon*, 1 Moore, 543.

(6) *Goggerley v. Cuthbert*, 2 N. R. 170.

(7) *Hornblower v. Proud*, 2 B. & A. 337.

(8) *Burn v. Morris*, 2 C. & M. 578.

(9) *Harding v. Carter*, 1 Park on Insurance, 4.

In *Jones v. Keene* (1) it appeared, that a policy of insurance on the life of A. had been assigned to the plaintiff; the defendant having privately ascertained, that A. was dangerously ill, treated with the plaintiff for the purchase of the policy for a small sum, representing it as the then value of the policy, the plaintiff not being aware of A.'s illness:—It was held, that the sale was void, and that the plaintiff might recover the value of the policy in an action of trover.

PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED.

Policy of insurance illegally assigned.

Trover lies for an unstamped agreement, if it can, upon payment of a penalty and stamp duty, be stamped and rendered available (2); or for an undivided part of a chattel. (3)

Unstamped agreement.
Books of account.

Undivided part of a chattel.

Specific sale of a chattel on credit.

The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession until that price be paid: but default of payment does not rescind the contract; and the vendee on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel, for on sales of chattels, time is not the essence of the contract, unless it be made so by express agreement. (4)

A calico-printer is entitled, after having discharged his head colourman, to the book in which that servant has entered the processes for mixing colours during his service, although many of the processes were the invention of the head colourman himself. (5)

Master for the trade books of his servant.

Goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner (6); and a tender of freight and charges is not necessary previous to bringing an action of trover for goods, of which the defendant has wrongfully obtained the possession. (7)

Payment of freight, &c. by a wrongful claimant.

A. having goods at a pawnbroker's, delivered the duplicate to B. to take them out of pledge; B. took them out accordingly, and paid the amount due on them. On A. sending to B. for the goods, B. said, he had not got them, and refused to tell who had them:—It was held, in trover brought to recover the goods, that B. had no right to insist on a tender of the money he had advanced to get them out of pledge. (8)

Advancing money to take goods out of pawn.

If goods be by mistake forwarded to a wrong consignee, who converts them to his own use, trover will lie: thus, a cargo of goods were shipped at Sunderland, intended to be sent to the plaintiff's agent in London, but by mistake were conveyed to the defendant, who sold part of them, being at that time ignorant of the plaintiff's being interested in them; the plaintiff, however, afterwards informed him, that they were his property, and directed him to detain them until further orders. In an action of trover for their recovery it was held, that the defendant was liable for the amount of those sold, as well as those which remained in his hands undisposed of. (9)

Goods by mistake forwarded to a wrong consignee.

Trover may be supported against a carrier (10) or a wharfinger (11), who Carriers and

(1) 2 M. & Rob. 348.

(2) *Scott v. Jones*, 4 Taunt. 865.

(3) *Watson v. King*, 4 Camp. 272. 1 Stark. 121.

(4) *Martindale v. Smith*, 1 G. & D. 1. cit. Selw. N. P. 1348.

(5) *Makepeace v. Jackson*, 4 Taunt. 770.

(6) *Lempriere v. Pasley*, 2 T. R. 485.

(7) *Ibid.*

(8) *Jones v. Cliff*, 1 C. & M. 541. 8 Tyrw. 576.

(9) *Featherstonehaugh v. Johnston*, 2 Moore, 181.

(10) *Youl v. Harbottle*, Peake's N. P. C. 68.

(11) *Stephenson v. Hart*, 4 Bing. 476. 482, 483.

(11) *Devereux v. Barclay*, 2 B. & A. 702.

PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED.

wharfingers delivering goods by mistake or under a forged order.

GOODS TAKEN UNDER A WRONGFUL DISTRESS.

What is a sufficient conversion by a sheriff under a writ of *fiery facias*.

Goods of a wrong person sold under a *fiery facias*.

Goods improperly seized by custom-house officers.

by mistake (1), or under a forged order (2), delivers goods to a wrong person; or against a person who illegally makes use of a thing found or delivered to him (3); or a bailee, employed merely to keep or carry the goods, and having no beneficial interest, who misuses a chattel entrusted to him (4); or against a carrier who draws out part of the contents of a vessel, and fills it with water (5); or a carrier or wharfinger, &c. who improperly breaks open a box containing goods, or sells them. (6).

If goods be taken under a wrongful distress (7), trover will lie for them.

An unfinished gig, which had been previously selected and paid for by the plaintiff, was taken in execution under a *fiery facias*, and left in care of the judgment creditor, who, when it was finished, assisted in giving it up to the plaintiff. The sheriff afterwards retook it. Trover was brought, and the execution found fraudulent:—It was held, that, whether the property in the gig passed or not to the plaintiff before the seizure, trover was maintainable, and the sheriff could not retake it, even to secure his poundage. (8)

Although the goods be not removed from the place in which they were, yet trover may be supported, because the possession in point of law is changed by their being seized as a distress. (9)

A sheriff's officer seized goods under a writ of *fiery facias*, part of which were afterwards packed up in two parcels, the one to satisfy the amount of the levy, the other to be sold to pay the sheriff's poundage and incidental expenses of the levy. The execution was afterwards abandoned, but the goods which were to be appropriated to the payment of the poundage were sent to the sheriff's officer, who afterwards received the amount of the poundage, and forwarded the parcel to the execution creditor. The party against whom the execution was sued out had previously committed an act of bankruptcy:—It was held, that there was a sufficient conversion by the sheriff to render him liable in trover to the assignee of the bankrupt, as the officer not only exercised a control over the bankrupt's goods, but assented to some of them being packed up, and which were sent to him to secure the payment of the poundage. (10)

Where a sheriff, under writ of *fiery facias* against A., sold the goods of B., the purchaser is liable to the latter in trover, although he purchased such goods at a public sale directed by the sheriff. (11)

Trover lies for seizing and carrying to the king's warehouses goods not seizable. (12) But by stat. 3 & 4 Will. 4. c. 53. s. 102., if the judge certify on the record, that there was a probable cause for such seizure, then the plaintiff beside his ship, goods, or animals so seized, or the value thereof, shall not be entitled to above two pence damages, nor to any costs of suit.

(1) *Devereux v. Barclay*, 2 B. & A. 702.
Stephenson v. Hart, 4 Bing. 483.

(2) *Lubbock v. Inglis*, 1 Stark. 104.
Stephenson v. Hart, 4 Bing. 476.

(3) *Mulgrave v. Ogden*, Cro. Eliz. 219.
Nicholson v. Chapman, 2 Hen. Black. 254.

(4) *Ibid.*

(5) *Richardson v. Atkinson*, Str. 576.
Granger v. George, 5 B. & C. 149. 7 D. & R. 729.

(6) *Anon.* 2 Salk. 655. *Barton v. Williams*, 5 B. & A. 401.

(7) *Shipwick v. Blanchard*, 6 T. R. 298.

(8) *Goode v. Langley*, 7 B. & C. 26. 9 D. & R. 791.

(9) *Cooper v. Monke*, Willes, 56. *Pri. v. Helyar*, 4 Bing. 597. *Baine v. Haines*, 2 Y. & J. 101. *Garland v. Cartish*, 2 C. & M. 31. *Wyatt v. Blades*, 3 Camp. 396.

(10) *Carlisle v. Garland*, 5 M. & P. 105. 7 Bing. 298.

(11) *Farrant v. —*, 3 Stark. 130.

(12) *Tinkler v. Poole*, 5 Burr. 9637. 3 Wils. 147.

A plaintiff who claims a right to cut rushes on a common, and cuts five or six loads, which the defendant carries away, may maintain trover for them. (1)

Trover will lie for a dog that was lost, if the delivery be refused, unless pecuniary payments have been made for the animal's keep. (2)

Trover does not lie for fixtures *eo nomine*; nor for injuries to land or other real property, even by severance of a part of what properly belongs to the freehold, unless there has also been an asportation; but the form of action should be trespass (3) or case (4) if the interest in the property be in reversion. (5)

Trover does not lie by an in-coming tenant to recover the value of the away-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right, after the end of the term at Lady-day, "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness preceding, so as the same exceeded not twenty-nine acres, and was summer fallowed and well manured, &c., and at harvest to reap and carry away the same;" for trover is not the proper action to try a question as to the right to the land, nor does the proper remedy for any mismanagement of the land during the former term appertain to the in-coming tenant, but to the landlord; and however the in-coming tenant might maintain an action against the off-going tenant for a breach of the custom of husbandry in the place, in not leaving one-third of the away-going crop of wheat sown upon a clover brush, yet the custom of the country could have no place where the off-going tenant held under a lease expressly making a different provision in respect of the away-going crop, or where he continued to hold over after the expiration of such a lease, without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms. (6)

Trover does not lie for the conversion of a record, because a record is not private property (7); but it will lie for the copy of a record. (8)

Trover cannot be maintained by the purchaser of goods, which form part of a larger quantity belonging to the seller, unless there has been a separation of the specific part sold from the rest. (9)

Where goods are delivered under a contract, to do something with them, and to deliver them according to the party's undertaking, an omission of the party's doing what he so undertook to do, will not sustain an action of trover, unless there has been an actual refusal to redeliver. (10)

If a person order a chattel to be made in accordance with his directions, he acquires no property in the chattel till it is finished and delivered to him; and therefore, before delivery, he cannot maintain trover for it, though the price may have been paid beforehand. (11)

PROPERTY FOR WHICH TROVER CAN OR CANNOT BE MAINTAINED.

Rushes grown on a common.

Lost dog.

WHERE TROVER CANNOT BE MAINTAINED.

Fixtures *eo nomine*.

In-coming tenant to recover the value of the away-going crops taken by the off-going tenant.

Conversion of a record.

When any material act remains to be done to the chattel before its delivery.

Contract to manufacture goods after value received.

(1) *Rackham v. Jesup*, 3 Wils. 332. 338.

(2) *Binstead v. Buck*, 2 W. Black. 1117.

(3) 7 Bac. Abr. Trover (B.), 794. *Davis v. Jones*, 2 B. & A. 167., *anté*, 2629—2632.

tit. TRESPASS.

(4) *Anté*, 1005—1019. tit. CASE.

(5) 1 Chitt. Pl. 147.

(6) *Boraston v. Green*, 16 East, 71.

(7) *Jones v. Winckworth*, Hardr. 111.

(8) *Ibid*.

(9) *Austen v. Craven*, 4 Taunt. 644. 1

Marsh. 4. n., *et vide White v. Wilks*, *ibid*. 2.

5 Taunt. 176., *sed vide Whitehouse v. Frost*, 12 East, 614.

(10) *Severin v. Keppell*, 4 Esp. N. P. C. 156.

(11) *Mucklow v. Mangles*, 1 Taunt. 318. *Woods v. Russell*, 1 D. & R. 58. 5 B. & A. 942.

PROPERTY FOR
WHICH TROVER
CAN OR CAN-
NOT BE MAIN-
TAINED.

But it is otherwise, where the bargain stipulates for advances which are to be regulated by the progress of the work. (1)

Thus, in *Woods v. Russell* (2) Lord Tenterden observed, "If a ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid; part when they are at the light plank; the payment of these instalments appears to us to appropriate specifically to the purchaser the very ship so in progress, and to vest in him a property in that ship."

Earnest given.

After earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then, if he do not come and pay for and take away the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person. (3)

Money had and received.

Trover does not lie for money had and received generally. (4)

Goods regularly sold under a distress.

Trover will not lie for goods regularly sold under a distress, but the stat. 11 Geo. 2. c. 19. s. 19. gives an action on the case for any injury that may accrue therefrom (5); nor can trover be maintained for an excessive distress. (6)

Judgment of Mr. Baron Parke in *Joule v. Jackson*.

In *Joule v. Jackson* (7) it was holden, that brewers' casks sent to a public house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the house, Mr. Baron Parke observing, "A landlord has a right to distrain all goods found upon the demised premises, with the exception of certain specified cases, which are not to be extended. *Prima facie*, every deposit of goods upon the premises where the trade is carried on, would have relation to that trade, and an exemption from distress would, in that view, be for the public good. But to hold all such goods to be exempt, would be establishing a very wide principle; and the case of *Muspratt v. Gregory* (8) having decided, that the principle of exemption already laid down in the books ought not to be extended, we are bound by that decision."

Effect of a writ of execution on the property of the debtor.

The goods of a debtor are bound, from the delivery of a writ of execution, to the sheriff; and the execution creditor cannot be defeated by a vesting order subsequently made by the insolvent debtors' court, under stat. 1 & 2 Vict. c. 110. s. 37., although the provisional assignee seize before the sheriff, for such vesting order is not equivalent to a sale in market overt (9); but the property in the goods is not changed by the delivery of the writ, and is still in the debtor, and he may sell them, subject to the rights of the execution creditor, to which they will be liable, unless the sale took place in market overt. (10) But after condemnation of goods in the Exchequer, the property is altered (11), so as that neither trespass nor trover will lie for the proprietor against the person who seized them.

(1) *Woods v. Russell*, 5 B. & A. 947.
Clarke v. Spence, 4 A. & E. 448. 6 N. & M. 399.

(2) 5 B. & A. 946.

(3) *Langfort v. Tiler*, 1 Salk. 113.

(4) *Orton v. Butler*, 5 B. & A. 652. 1 D. & R. 282.

(5) *Wallace v. King*, 1 Hen. Black. 13.

(6) *Whitworth v. Smith*, 1 M. & Rob. 193.

(7) 7 M. & W. 455.

(8) 1 *ibid.* 633. S. C. (in error), 3 *ibid.* 677.

(9) *Woodland v. Fuller*, 3 P. & D. 570.

(10) *Samuel v. Duke* (Sir J.), 3 M. & W. 622. recog. *Payne v. Drew*, 4 East, 523.

(11) *Ekins v. Smith*, Sir T. Raym. 336. cit. per cur. in *Martin v. Wilsford*, Carth. 337. et per Sir W. Blackstone in *Scott v. Sherman*, 2 W. Black. 981.

3. BY WHOM TROVER CAN OR CANNOT BE MAINTAINED.

The plaintiff must at the time of the conversion (1) have had a complete property, either general or special, in the chattel, and also the actual possession, or the right to the immediate possession (2); but if two persons jointly interested in a chattel make a joint demand of it, separate actions of trover may be maintained by them in respect of it, against a person who unjustly detains it. (3)

It is not essential to support trover, that the absolute ownership and special property or interest should exist in the same person; either will suffice (4); and it may be here observed, that "if the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or shipmaster, employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this is effected; nor is it material, whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor, as well as any other individual." (5)

The doctrine that "whenever trespass for taking goods will lie, that is, when they are taken wrongfully, trover will also lie," is incorrect, because, to maintain trover, there must be some exercise of ownership over the chattel taken, inconsistent with the owner's right of dominion over it. Thus, in *Foulds v. Willoughby* (6) Mr. Baron Alderson observed, "It seems that the horses were ultimately sold, and that the plaintiff never regained possession of them; and therefore, if there really has been a conversion, it would be a strong proposition for us to say, that the plaintiff is not entitled to recover their full value, as damages for the wrongful act. I think, however, that the jury were misdirected upon the other point. Any asportation of a chattel for the use of the defendant, or a third person, is a conversion, because it is inconsistent with the general right of dominion which the owner has in the chattel. So, if a man has possession of my chattel, and refuses to deliver it when required, that is evidence of a conversion, because there is an assertion of right, inconsistent with my right of general dominion over it. So of the destruction of a chattel, the effect of which is, to deprive the owner of it altogether. But if an act is done, which does not call in question my general right of dominion over the chattel, but, on the contrary, recognises it, that is no conversion. In the present case, Why were the horses removed? Was it not because they were the property of the plaintiff? The act of removal was not inconsistent with the plaintiff's right to use them. It may be a wrongful act, for which trespass is maintainable, but it is not a conversion. A trifling injury to a carriage would be a trespass, but it would be monstrous to say, that it would form the ground of an

BY WHOM TROVER CAN OR CANNOT BE MAINTAINED.

Plaintiff at the time of the conversion, must have had a complete property, either general or special.

Absolute ownership and special property need not be co-existent.

To maintain trover, there must be some exercise of ownership over the chattel taken, inconsistent with the owner's right of dominion over it.

Judgment of Mr. Baron Alderson in *Foulds v. Willoughby*.

(1) *Horwood v. Smith*, 2 T. R. 750.
Philips v. Robinson, 4 Bing. 106.

(2) 2 Saund. 47. (a.) n. 1. *Bloxam v. Sanders*, 4 B. & C. 941. 1 Chitt. Pl. 148.

(3) *Bleaden v. Hancock*, 4 C. & P. 152.

(4) *Webb v. Fox*, 7 T. R. 398.

(5) *Per Parke B. in Bryans v. Niz*, 4 M. & W. 775.

(6) 1 Dowl. P. C. N. S. 86.

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

Goods sold or
bailed under a
void contract.

Bankrupt
against his as-
signees.

SPECIAL PRO-
PERTY OR IN-
TEREST.

Party having
a special pro-
perty, may sup-
port trover
against a
stranger.

Possession of
goods on the
terms of sale
and return.

action of trover. The rule is well laid down in the arguments of Chambre and Holroyd Js. in the case of *Shipwick v. Blanchard* (1), that, 'in order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or the use of those for whom he is acting. And the destruction of goods is equally a conversion.'

The absolute and general owner of goods may maintain trover, although he had sold or bailed them under a void contract, as to a married woman, because he still retains a present right. (2) But if the owner has bailed the goods to the defendant, and, before a conversion of the goods by the latter, the bailor sells them, or otherwise ceases to be the owner, the action should be brought in the name of the person, who was the proprietor at the time of the conversion. (3) Where A., by direction of B., purchased coffee for B., which was to be delivered at Leghorn to B.'s order, and the coffee was accordingly sent to Leghorn, and was sold there by A.'s agents and by his directions:—It was held, that B. might maintain trover against A. for the conversion of the coffee, although the price had not been actually tendered to A. (4)

Trover lies by a bankrupt against his assignees, if the plaintiff be not subject to the bankrupt laws. (5)

"The immediate right to real property must be vested in one person only; whereas a special property, in the case of personalty, may be in one, as in the instance of carriers, while the absolute right to it may exist in another. When a competition arises between those two persons, the right of the latter must prevail; but, as against all other persons, a special property is sufficient." (6)

If the plaintiff possess a special property, such as churchwardens in parochial property (7), it will suffice; and it seems, that any temporary interest in the goods, either in his own right, and for his own use, or by authority of law for legal purposes, coupled with the right to take and keep possession, or to maintain a possession already subsisting, is sufficient. (8) Thus, in *Burton v. Hughes* (9) it was holden, that possession under a general bailment is sufficient to entitle a party to maintain trover against a stranger, who takes them out of his actual possession—as a sheriff (10), provided he remain in possession (11), carrier (12), factor or warehouseman (13), consignee, pawnee, trustee, agister of cattle, or gratuitous bailee (14):—and persons responsible over to their principals (15), or the hirer of goods, however temporary the purpose for which they were hired may happen to be, can likewise support trover. (16)

A person who has goods on the terms of sale and return, may sue for any damage done to them by a wrong-doer whilst in his possession. (17)

- (1) 6 T. R. 298.
- (2) *Smith v. Plomer* (Knt.), 15 East, 607.
- (3) 2 Saund. 476. (f.) n.
- (4) *Philips v. Robinson*, 4 Bing. 106.
- (5) *Payne v. Brander*, 2 Stark. 568.
- (6) *Summersett v. Jarvis*, 3 B. & B. 2.
- (7) *Per Lord Kenyon in Webb v. Fox*, 7 T. R. 396.
- (8) *Dent v. Prudence*, Str. 852. 2 Saund. 47. (c.)
- (9) 3 Stark. Ev. 3d ed. 1145.
- (10) 2 Bing. 173.
- (11) 2 Saund. 47.
- (12) *Blades v. Arundale*, 1 M. & S. 711.
- (13) 1 Rol. Abr. Action sur Case (K.), 4.
- (14) *Shalmer v. Pulteney*, 1 Ld. Raym. 576. Bull. N. P. 33. (b.) 2 Saund. 47. (b.) n.
- (15) *Martini v. Coles*, 1 M. & S. 147.
- (16) *Rooth v. Wilson*, 1 B. & A. 59.
- (17) 2 Saund. 47. (b.) *Stirling v. Vaughan*, 11 East, 626.
- (18) 2 Saund. 47. (b, c, d.) *Rooth v. Wilson*, 1 B. & A. 59. *Croft v. Alison*, 4 Esp. 590. *Rawlins (Sheriff) v. Davies*, 5 N. P. C. 38.
- (19) *Colwill v. Reeves*, 2 Camp. 575.

A plaintiff who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner. (1)

The bare possession of goods, without any strict legal title, confers a right of action against a mere wrong-doer having no right, and not clothed with any authority from the real owner (2); and trover lies by the owner of a ship, though not registered. (3) The only exception which appears to exist, is in the case of a mere servant acting professedly as such, and having only the custody of goods. (4)

Where a person has built a bridge and dedicated it to the public, the materials continue to be his property; and where they are severed and taken away by a wrong-doer, he can maintain trover. (5)

A special property, which may be sufficient as against a stranger, gives no right against one who has the general property. (6) A carrier, or the depository of goods for safe custody, may by reason of special property maintain trover against a stranger, although he could not succeed against an owner or co-proprietor. (7)

To support trover, the plaintiff must at the time of conversion have had the actual possession, or the right to immediate possession (8): thus, where a father gave his son a watch, some printed books, and several articles of wearing apparel:—It was held, that though the son was under age (viz. sixteen years old), the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. (9)

Where a colonel had purchased horses for government, and they being approved of by the proper inspecting officer, were sent under the care of a serjeant to the receiving dépôt for his majesty's use:—It was held, that the colonel had not such a special property as to maintain trover for one of them which was taken out of the possession of the serjeant as a distress for a turnpike toll. (10)

A., resident abroad, remitted a bill to B., his agent in England, drawn by A., and specially indorsed by him to C., with whom his children were at school, in payment of C.'s account for their board and education. B. got the bill accepted by the drawees, and sent a letter by post to C., stating that he had received a commission from A. to pay her some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B.'s hands, he received directions from A. to keep it and the proceeds in his hands, and to have a fair investigation into C.'s accounts, and after such investigation to pay her what might be due to her. No such investigation took place, and B. detained the bill:—It was held, that C. could not recover it in trover. (11)

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

Temporary
property.

Bare possession
without a legal
right.

Unregistered
owner of a ship.

A bridge dedi-
cated to the
public.

Special pro-
perty gives no
right against
one who has
the general
property.

RIGHT OF POS-
SESSION.

(1) *Roberts v. Wyatt*, 2 Taunt. 268.

(2) 2 Saund. 47. (c, d.)

(3) *Sutton v. Buck*, 2 Taunt. 302. *Gr-
ham v. Peat*, 1 East, 246.

(4) *Bloss v. Holman*, Owen, 52. 2
Saund. 47. (a, b, c, d.)

(5) *Harrison v. Parker*, 6 East, 154., vide
Esdaile v. Orenham, 3 B. & C. 225.

(6) *Holliday v. Cammell*, 1 T. R. 658.

(7) *Anté*, 991—994. tit. CARRIERS.

(8) *Benjamin v. England* (*Bank of*), 3
Camp. 417. *Bloxam v. Sanders*, 4 B. & C.
941. 7 D. & R. 407.

(9) *Hunter v. Westbrook*, 2 C. & P. 578.

(10) *Hopkinson v. Gibson*, 2 Smith, 205.

(11) *Brind v. Hampshire*, 1 M. & W
365.

**BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.**

When servant
has no property
in his livery.

A servant, being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—It was held, that he could not maintain trover for the clothes, for he had no property in the clothes till he served the year. (1)

Where plaintiff being indebted to J. G. shipped goods under a bill of lading addressed to R. P., with directions to him to sell the goods on the plaintiff's account, and place the net proceeds to the credit of J. G.; but R. P. pledged the goods:—It was held, that the plaintiff had a sufficient title to sue in trover, and that the right to the possession of the goods was not in J. G. (2)

In case of special property,
it need not be
accompanied
with possession.

It has been said, that in the case of a special property, it must have been accompanied with possession in order to support trover (3); but the general rule appears to be to the contrary; and it was observed by Chief Justice Eyre in *Fowler v. Down* (4), "that it is not true, that in cases of special property the party must once have had possession in order to maintain trover; for a factor, to whom goods have been consigned, and who has never received them, may maintain such an action."

General property
of personal chattels
creates a constructive
possession.

The person who has the absolute or general, and not the mere special property in a personal chattel may support this action, although he has never had the actual possession; for it is a rule of law, that the general property of personal chattels creates a constructive possession. (5) And when the plaintiff as executor declared on the possession of his testator, the court held it to be sufficient, because the property was vested in the executor, and no other person having the right of possession, the property drew after it the possession. (6)

CORPORATIONS.

It seems, that an incorporated company may be guilty of a conversion by the act of their agent, acting under the direction of a committee appointed for managing the affairs of such company; and that trover is maintainable by the owner of goods detained by the company's agent, after a notice had been given by the plaintiff, requiring the directors of such company to deliver the goods to him. (7)

**LANDLORD AND
TENANT.**

Landlord's
right to timber.

A landlord has generally speaking, in legal consideration, even during the term, the possession of the timber growing on the estate, if it be excepted in the lease; so that he may in such case maintain trespass even during the term, if it be cut down; and even if the timber be not excepted in the lease, the lessor has so far the possession of it when cut down by another, though cut pending the term, that if it be carried away, he may maintain trespass or trover, the interest of the lessee in the trees determining instantly that they are cut down. (8)

(1) *Crocher v. Molyneux*, 3 C. & P. 470.

(2) *Selleck v. Smith*, 3 Bing. 603. 11 Moore, 469. 2 C. & P. 284.

(3) *Coxe v. Harden*, 4 East, 214.

(4) 1 B. & P. 47. 2 Saund. 47. (d.) *Stirling v. Vaughan*, 11 East, 626.

(5) 2 Saund. 47. (a.) n. 1. 7 Bae. Abr. Trover (C.), 799. *Johns v. Whitley*, 3 Wils. 136. *Fowler v. Down*, 1 B. & P. 47. *Gordon v. Harper*, 7 T. R. 12.

(6) *Hudson v. Hudson*, Latch, 214.

(7) *Duncan v. Surrey Canal (Proprietors of)*, 3 Stark. 50. *Farborough v. England (Bank of)*, 16 East, 6.

(8) *Gordon v. Harper*, 7 T. R. 13. *Blackett v. Lowes*, 2 M. & S. 499, 500. 1 Saund. 322. n. 5. 20 Vin. Abr. Trespass, 463. [S.]. *Atteroll v. Stevens*, 1 Taunt. 191.

A remainder-man may support this action against a tenant for life, who does not hold without impeachment of waste, for taking away trees. (1)

Where the house of a lessee for life is blown down, he can maintain trover against one who takes the materials, for he has a special property in them for the purpose of rebuilding the house. (2)

If a lessee annex any personal chattel to the freehold during his term, and afterwards takes it away, it is waste. But this principle has been relaxed in favour of utensils set up in relation to trade (3), of matters of ornament, as pier glasses, hangings (4), cornices (5), wainscots fixed only by screws, pumps erected by tenants and slightly affixed, so as to be capable of being removed entire. (6) These the tenant may remove during the original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant (7); but if he do not remove them during that time, they become the property (8) of the landlord. A lessee cannot (9), even during his term, maintain trover for fixtures remaining affixed to the freehold; for the principle of law is, that whatsoever is planted in the soil belongs to the soil; and though the tenant has a right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on his term, they are not goods and chattels, but parcel of the freehold, and as such are not recoverable in trover.

Where a lessee for years mortgaged his lease and all his estate and interest in the premises, and afterwards became bankrupt, it was holden (10), that the mortgagee might declare in case as reversioner against the assignee of the tenant for the removal of the fixtures from the premises whereby they were injured, and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage, although there was a covenant in the original lease to the mortgagor, to deliver up to the lessor, at the determination of the term, "all fixtures and things to the premises belonging or to belong."

But it will lie for corn cut by an out-going tenant after the expiration of his term, though sown by him before that time, under the notion, that he was entitled to an away-going crop. (11)

Where the owner of furniture lent it to the plaintiff under the terms of a written agreement, and he placed it in a house occupied by the wife of B., who afterwards became bankrupt, and his assignees seized it: — It was held, that the plaintiff might recover in trover, without producing the agreement. (12)

If a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer. (13)

By whom
TROVER CAN
OR CANNOT BE
MAINTAINED.

Remainder-
man against
tenant for life.

House of lessee
for life blown
over.

Personal chat-
tels annexed to
the freehold.

Corn cut by an
out-going te-
nant.

Furniture lent
under a written
agreement.

Redeeming
goods from a
wrongful dis-
tress.

(1) *Com. Dig. Biens (H.) Pyne v. Doe*, 1 T. R. 55.

(2) 2 Saund. 47. (a.)

(3) *Penton v. Robert*, 2 East, 88.

(4) *Beck v. Rebow*, 1 P. Wms. 94.

(5) *Avery v. Cheslyn*, 3 A. & E. 75.

(6) *Grymes v. Boweren*, 6 Bing. 437.

(7) *Minshall v. Lloyd*, 2 M. & W. 455.
Weston v. Woodcock, 7 ibid. 14.

(8) *Lyde v. Russell*, 1 B. & Ad. 394.

(9) *Mackintosh v. Trotter*, 3 M. & W. 184. recog. *Minshall v. Lloyd*, 2 ibid. 450.

(10) *Hitchman v. Walton*, 4 ibid. 409.

(11) *Davis v. Connop*, 1 Price, 53.

(12) *Burton v. Hughes*, 2 Bing. 173. 9 Moore, 334.

(13) *Shipwick v. Blanchard*, 6 T. R. 298.

**BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.**

Purchaser of
goods under an
irregular dis-
tress.

Excessive dis-
tress.

Goods leased
as furniture
with a house,
and taken in
execution.

Landlord hold-
ing goods
under a dis-
tress for rent.

**TENANTS IN
COMMON.**

One tenant in
common cannot
in general sue
his co-tenant,
if the goods
remain in the
possession of
the latter.

Sed aliter, if one
co-tenant de-
stroy the chat-
tel of the other.

But a party who purchases goods under a distress irregularly conducted, has a sufficient title to maintain trover. (1)

Where a broker, having distrained goods for rent, was afterwards sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation:—It was held, that although the sale was irregular under stat. 2 Will. & M. sess. i. c. 5. s. 2., yet that the plaintiff had a sufficient title to enable him to maintain trover, stat. 11 Geo. 2. c. 19. having prevented such sale from being affected by any irregularity of the broker. (2)

A lodger may maintain an action if his goods be taken on an excessive distress by the landlord of the party under whom he occupies. (3)

Where goods leased as furniture with a house were wrongfully taken in execution, and absolutely sold by the sheriff, it was decided, that the landlord could not maintain trover against the sheriff pending the lease, but should have declared specially in an action upon the case. (4)

It is said, that a landlord holding goods under a distress cannot maintain trover, &c. for an injury to them, or taking them unlawfully (5); but this position seems to be doubtful.

Generally, one tenant in common of goods cannot sue his co-tenant, if the goods remain in the possession of the latter, although he refuse to permit the former to participate in the use of the article (6), because in law the possession of one is the possession of both; and the law, for reasons of policy, and on account of the difficulty of legislation on the subject, does not interfere to regulate the enjoyment of chattels amongst part owners, except in the instances of ships to prevent them from being unemployed.

Where an action is brought by one tenant in common of an indivisible chattel against another tenant in common, it is not sufficient to shew, that the defendant took forcible possession of the chattel and carried it away (7), or that he changed the form of the chattel by applying it to the use for which it was intended. (8)

But if one tenant in common destroy the chattel, or commit an act which is equivalent thereto, his companion may recover the value of his share in trover. (9)

Trover lies by one tenant in common of a ship against another who had forcibly taken it out of the possession of the plaintiff, the ship having been subsequently lost by the perils of the sea, while it was in the possession of the defendant. (10)

Where it appeared, that one tenant in common forcibly took a ship out of the other's possession, and secreted it from him, so that he did not know

(1) *Lyon v. Weldon*, 2 Bing. 334. 9 Moore, 629.

(2) *Ibid.*

(3) *Fisher v. Algar*, 2 C. & P. 374.

(4) *Gordon v. Harper*, 7 T. R. 9. *Hall v. Pickard*, 3 Camp. 187. *Pain v. Whittaker (Sheriff)*, R. & M. 99. *Parry v. Frame*, 2 B. & P. 451. *Smith v. Plomer (Knt.)*, 15 East, 607.

(5) *Per Probyn C. B.* in *Moneux v. Goreham*, cit. Selw. N. P. 1351., et vide *Whitley v. Roberts*, M'Clel. & Y. 112. 118.

(6) 1 Chitt. Fl. 79. 156. 2 Saund. 47.

n. Holliday v. Camself, 1 T. R. 658. *Saunders v. Stokes*, 1 East, 363.

(7) *Barnardiston v. Chapman*, cit. 4 East, 121. *Holliday v. Camself*, 1 T. R. 658. *Heath v. Hubbard*, 4 East, 110. *Barnes v. Williams*, 5 B. & A. 395.

(8) *Fennings v. Grenville (Lord)*, 1 Taunt. 241., vide *Graves v. Sawyer*, Sir T. Raym. 15. 1 Keb. 38. 1 Lev. 29.

(9) 2 Saund. 47. *n. Martyn v. Knowlton*, 8 T. R. 146.

(10) *Knight v. Coates*, 1 Jones & Carey (Irish), 18.

where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage, where it was lost : — It was held, that it was proper to be left to the jury, whether the destruction was not by the means of that tenant in common. (1)

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

If one tenant in common merely take the thing in common out of the possession of the other, and carry it away, no action lies ; but if he destroy the thing in common, the other may bring trespass or trover. (2)

Trover lies at the suit of one of the makers of a promissory note, especially if the other maker signed as surety. (3)

PARTIES TO
PROMISSORY
NOTES AND
BILLS OF EX-
CHANGE.

Makers of a
promissory
note.

In *Knight v. Legh* (4) it appeared, that E., being indebted to the plaintiffs, agreed, as the agent of P., to deposit with them a bill as security for a sum advanced by P., and having so deposited it, wrote to them in these terms : — "The bill you will hold subject to P.'s advance, and also for any advances or expenses you have against me." The bill having been, at the instance of the defendant, the acceptor, surreptitiously taken from the plaintiffs, it was held, that they might sue him in trover, although P. had previously sued him, and had recovered, by the award of an arbitrator, the amount of his advance ; Chief Justice Best observing, "The plaintiffs in this case had a general property in the bill, for the detention of which they sought to recover damages, and a right to the possession of it," and "there seems to be no reason why different plaintiffs who have different rights, should not sue the same defendant in respect of separate injuries, though arising out of one transaction."

Where the drawer of a bill of exchange deposits it with a creditor, giving him authority to receive the proceeds, and to apply them in a specified way, if the creditor, after an act of bankruptcy by such drawer, give up the original bill to the acceptor (taking another bill in lieu of it), this is a conversion by the creditor, and the assignees of the drawer may support trover. (5)

Drawer of a
bill of ex-
change deposit-
ing it with a
creditor.

Trover will lie for the produce of a stolen bank note in the hands of a third person, after conviction of the theft. (6)

Stolen bank
note.

If a banker in a small market town change a 500*l.* bank of England note for a stranger, without any further inquiry than merely asking his name, he will be liable in trover to the party from whose possession such note may have been unlawfully obtained ; and the question in such a case is, not whether there was an honest holding on the part of the defendant, but whether, under the circumstances, there was a want of due caution. (7) The plaintiff however, under such circumstances, must shew, that he did every thing which could reasonably be required. (8)

If a party possess himself of a stolen bill or note improperly, a demand and refusal are not necessary previous to an action of trover being brought for its recovery by the loser. (9)

It seems, that trover is the proper remedy for goods which have been sold

GOODS FRAU-

(1) *Barnardiston v. Chapman*, cit. 4 East, 121.

(2) *Brammel v. Jones*, cit. Selw. N. P. 1365.

(3) *Anon.* 1 Chitt. 501.

(4) 4 Bing. 589. 1 M. & P. 528.

(5) *Robson v. Rolls*, 1 M. & Rob. 239.

(6) *Golightly v. Ryn*, Lofft, 88.

(7) *Snow v. Peacock*, 3 Bing. 406. 11 Moore, 286. 2 C. & P. 215.

(8) *Ibid.*

(9) *Beckwith v. Corral*, 3 Bing. 444. 11

Moore, 335. 2 C. & P. 261., *vide ante*, 346. tit. ASSUMPSIT.

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

DULGENTLY OB-
TAINED.

London Dock
Company im-
properly de-
livering goods.

Retention of
fraudulent
documents.

Bill of ex-
change fraudu-
lently nego-
tiated.

Where an
agreement to
use property
only amounts
to a personal
license.

Creditor hold-
ing a ship's
papers, but the
cargo delivered
over to other
creditors.

on a credit, and, before the credit has expired, the goods have been resold at an under price (1); and obtaining goods upon false pretences, under colour of purchasing them, does not change the property. (2)

In *Lubbock v. Inglis* (3) it appeared, that A. directed the London Dock Company to deliver a quantity of hides belonging to him in their custody to B. (supposing that B. has purchased them from him), and the London Dock Company delivered them upon an order, purporting to be the order of B., but which was a mere forgery, B. in fact not having purchased the goods:—It was holden that, the London Dock Company were liable to A., although he neglected to apply to B. till four months afterwards, when the supposed time of credit expired, and although A. might, after discovering the fraud, have recovered possession of his hides from another person.

Where the defendant was employed by the plaintiff to negotiate a loan to assist the cause of the Greeks against the Porte, and the plaintiff lodged with him a power of attorney, which turned out to be a fabricated instrument, and also delivered to him engraved scrip receipts; but the whole transaction appeared to be founded in fraud:—It was held, in an action of trover to recover damages for their detention, that it was incumbent on the plaintiff to shew, that the power of attorney was a genuine document; and that as he had delivered it as well as the receipts to the defendant under a false pretence, he could not recover them back. (4)

R. being employed to procure a bill of exchange to be discounted for the plaintiff, instead of doing so, indorsed it, and placed it in the hands of the defendant, who was the clerk to a creditor of R. The defendant carried the bill to R.'s account with his creditor, and though afterwards apprised of the circumstances under which R. held the bill, refused to restore it:—It was decided, that the defendant was liable to the plaintiff in trover. (5)

In *Howes v. Ball* (6) it appeared, that the plaintiff's intestate bought and took possession of a coach of the defendant's, and gave him bills for the price, and agreed that the defendant "do have and hold a claim upon the coach until the debt was duly paid." One bill being dishonoured, and the intestate being dead, the defendant obtained possession of the coach by a trick:—It was held, that the agreement was only a personal license between the defendant and the intestate, for the defendant to take the coach if the bills were not paid, and would have been a good defence to an action of trover brought by the intestate, but was not available after the property had been transferred to the administrator.

A., of Liverpool, wishing to draw upon the banking-house of B., in London, to a large amount, agreed, among other securities given, to consign goods to a mercantile house, consisting of the same partners as the banking-house, though under the firm of B. & C.; accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to B. & C., but the cargo was prevented from leaving Liverpool by an embargo: A. then became bankrupt, being considerably indebted to B., and the cargo was delivered

(1) *Ferguson v. Carrington*, 3 C. & P. 457.

(2) *Noble v. Adams*, 7 Taunt. 59. 2 Marsh. 366. Holt's N. P. C. 248., et vide *Stephenson v. Hart*, 4 Bing. 476. 1 M. & P. 357.

(3) 1 Stark. 104.

(4) *De Witts v. Hendricks*, 9 Moore, 586.

2 Bing. 314.

(5) *Cranch v. White*, 1 Bing. N. C. 414.

(6) 7 B. & C. 481. 1 M. & R. 288.

to his assignees by the captain :—It was held, that B. & C. might maintain trover for it against the captain. (1)

The consignee of goods, who is also the vendee, is in general the person to sue for any injury to them whilst in the hands of the carrier, although they have never been in his actual or positive possession ;—and in fact, if every thing have been done by the vendor of goods which he contracted to do, the property will in many cases pass to the vendee, and he may maintain trover, although the goods remain in the possession of the vendor.

But the purchaser of goods cannot maintain trover for them, without paying the price ; for though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment or tender of the price ; and in order to maintain trover, he must have both the right of property and the right of possession. (2)

Thus, in *Bloxam v. Sanders* (3) Mr. Justice Bayley observed, “ If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him : but his right of possession is not absolute ; it is liable to be defeated if he becomes insolvent before he obtains possession.”

Where a contract was put an end to by both parties, but the goods remained in the possession of the intended purchaser ; and upon the price rising he converted them to his own use, and offered the former price, which the owner refused, and demanded the increased price, and on refusal held the defendant to bail “ for goods sold and delivered : ”—It was held, that it did not prevent him from suing in trover. (4)

Where the plaintiff exchanged a watch with the defendant for a pair of candlesticks, which the latter warranted to be silver :—It was holden, that the plaintiff could not maintain trover for the watch, on proof, that the candlesticks were of base metal. (5)

When a person has delivered goods to a carrier or other bailee, who has not the right to withhold the possession from the general owner, and so parted with the actual possession, yet he may maintain trover for a conversion by a stranger, for the owner has still the possession in law against the wrong-doer, and the carrier or other bailee is considered merely as his servant. (6)

The rule prevails in the case of a gratuitous loan, but not when there has been a letting to hire (7) ; and an executor or administrator is by legal construction possessed of the goods of the testator or intestate, from the time of his death. So the trustee of goods may sue, although the goods be in possession of the *cestui que trust*. (8)

Trover lies by a party entitled in remainder to plate, against a party to whom it was pledged by the deceased tenant for life, without notice of the limited title of the pawnor. (9)

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

Consignee of
goods who is
also the ven-
dee.

Vendee of un-
delivered
goods.

Goods sold
under a con-
tract subse-
quently re-
scinded.

Exchange of
goods.

Rights of
owner of goods
after delivery
of them to a
carrier.

Gratuitous
loan.

Party entitled
in remainder to
plate.

(1) *Haille v. Smith* (in error), 1 B. & P. 563. *Gordon v. Harper*, 7 T. R. 12. 2 Saund. 47. (b.)

(2) *Bloxam v. Sanders*, 7 D. & R. 396. 4 B. & C. 941. (7) *Lotan v. Cross*, 2 Camp. 464. *Hall v. Pickard*, 3 ibid. 187. *Gordon v. Harper*, 7 T. R. 9.

(3) 4 B. & C. 948.

(4) *Perry v. Dawson*, 3 Anst. 710.

(5) *Emanuel v. Dane*, 3 Camp. 299.

(6) *Dewell v. Moron*, 1 Taunt. 391. cit. in *Attersol v. Briant*, 1 Camp. 410. a.

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

Grantee of
wreck.
STOLEN PRO-
PERTY.

Goods not
originally sold
in market
overt, but sub-
sequently re-
sold in market
overt.

Stat. 21 Hen. 8.
c. 11.

Conversion by
an agent.

Sub-agent.
SERVANTS.

WHO CANNOT
MAINTAIN
TROVER.

Without abso-
lute or special
property trover
cannot be main-
tained.

A grantee of the crown of wrecks has a special property or title to the intermediate possession, until the true owner appears, and makes good his claim within the prescribed period. (1)

Unless the provisions of stats. 2 & 3 Phil. & M. c. 7. and 31 Eliz. c. 12 are complied with, the property in stolen horses is not altered by a sale in market overt.

When stolen goods have not been sold in market overt, and the purchaser resells them in market overt, before conviction of the felon, and such purchaser had notice of the felony whilst the goods were in his possession, he will be liable in trover. (2)

Stat. 21 Hen. 8. c. 11. (3) was confined to cases of felony; therefore, where goods were obtained from a person by false pretences, and passed to another for a valuable consideration, the original owner was not entitled to them upon conviction of the offender, and if he acquired possession of them, trover would lie at the suit of the purchaser. (4)

An agent or servant who acts under an authority from his principal, which is apparently legal, and for the benefit of his principal, is liable in trover, if the latter had in fact no authority. (5) Thus, where a bankrupt, on absconding, left plate with his wife, who delivered it to a servant to pawn, and the defendant went along with the servant, and received the plate at the door of the pawnbroker's shop, and went in and pawned it in his own name, and gave his own note to repay the money, and, on receipt of the money, took it and delivered it to the wife, it was held to be a conversion by the defendant, although he acted merely as a friend. (6)

A sub-agent may be liable in trover for his conversion. (7)

A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master (8), whether he has any authority or not from his master for so doing. (9)

A servant, acting under the orders of his master in detaining another's goods, is guilty of a conversion as well as his master; but a packer, having in the exercise of his business shipped goods, which had been pledged by a factor to several persons under the orders of a third person who employed him for that purpose, is not guilty of a conversion. (10)

Without an absolute or special property, this action cannot be maintained, because, as previously observed, a right of immediate possession before or at the time of the conversion is essential. (11)

While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely and adversely in another. (12)

Though a fraudulent vendee may be sued in trover by the vendor, yet

(1) Stat. 1 & 2 Geo. 4. c. 75. s. 26. *Dunwich (Bailiffs of) v. Sterry*, 1 B. & Ad. 831.

(2) *Peer v. Humphrey*, 2 A. & E. 495. 4 N. & M. 430.

(3) *Vide post*, 2680.

(4) *Parker v. Patrick*, 5 T. R. 175. A sale within the city of London in an open shop, of goods usually dealt in there, is a sale in market overt, though the premises are described in evidence as a warehouse, and are not sufficiently open to the street

for a person on the outside to see what passes within. *Lyons v. De Pass*, 11 A. & E. 326.

(5) Bull. N. P. 46. (b.), 47. (a.)

(6) *Parker v. Godin*, Str. 813.

(7) *Cranch v. White*, 1 Bing. N. C. 414.

(8) *Stephens v. Ethall*, 4 M. & S. 259.

(9) *Perkins v. Smith*, 1 Wils. 328.

(10) *Greenway v. Fisher*, 1 C. & P. 190.

(11) *Bloxam v. Sanders*, 4 B. & C. 941. 7 D. & R. 407., ante, 2675.

(12) *Clerk v. Adam*, 1 C. & F. 242.

the right of action does not exist against every person into whose hands the property may have passed subsequently. If G. obtained the goods from the plaintiffs by fraud, and sold them to the defendants, yet, if the defendants were not privy to the fraud, they are not liable to the plaintiffs in trover.

BY WHOM
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OR CANNOT BE
MAINTAINED.

Thus, where G. bought cotton goods of the plaintiffs to the amount of 816*l.*, and they were afterwards sold by R. to the defendants for 589*l.*, but no transactions were shewn between G. and R.:—It was held, that the connexion between the plaintiffs and defendants was too remote to raise a cause of action, unless the jury were convinced, that G. obtained the goods originally by fraud, and that the defendants bought them under circumstances which must have convinced them, that the goods were so obtained. (1)

In a sale of goods there must be a specific right to some particular goods, severed and distinguished from others; and if there remain to be done upon the contract some act to ascertain the quantity or price, the vendee cannot maintain trover until that act be done. (2)

On a sale of goods, there must be a specific right to some specific chattel.

A verbal gift of a chattel, without actual delivery, does not give the property to the donee (3), although it may perhaps give the donee a sufficient special interest to enable him to sue a mere wrong-doer. (4)

Verbal gift of chattel not sufficient to pass property to donee.

Donatio mortis causa is a gift by a person believing himself to be at the point of death, upon the condition, that if the donor die, the donee is to keep the thing given in preference to any other. It is not necessary, that the donor should be actually dying; but it is essential, that the donee should have immediate actual possession of the gift, and uncontrolled dominion over it, subject, however, to the express condition of the gift not passing while the donor lives. (5)

Donatio mortis causa.

An award, that a chattel should be delivered by A. to B., on the former being paid a sum of money, is sufficient, *per se*, to pass the property, and entitle B. to maintain trover, although he tenders the money, it being refused by A. (6)

An award that a chattel shall be delivered by A. to B.

The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bond fide*, cannot recover them from the vendee. Thus, G., the owner of the fittings of a public-house, demised them to D., who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of such agreement. D. afterwards sold the good-will and fittings, without G.'s knowledge or assent, to W., who being told by the landlord that D. was his tenant, bought them *bond fide*, in ignorance of G.'s title, and was accepted by the landlord as tenant in the place of D.:—It was holden, that G. could not maintain trover for the fittings against W., and that the defence was admissible on the plea of "not possessed." (7)

Owner of goods standing by, and voluntarily allowing another to treat them as his own.

(1) *Sheppard v. Shoolbred*, 1 C. & Marsh. 61.

(5) *Spratley v. Wilson (Knt.)*, Holt's N. P. C. 12.

(2) 1 Chitt. Pl. 150.

(3) *Irons v. Smallpiece*, 2 B. & A. 551.

(6) *Hunter v. Rice*, 15 East, 100.

(4) 2 Saund. 47. (a.) *Hunter v. West-*

(7) *Gregg v. Wells*, 10 A. & E. 90.

brook, 2 C. & P. 578.

BY WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

Affirmation of
the acts of a
wrong-doer.

Acting under a
valid and also
under an in-
valid authority.

The first
pawnee of a
chattel against
a second
pawnee, with-
out notice.

Where vendee
does not per-
form his part
of the contract.

Goods to be
delivered ac-
cording to the
custom of
trade.

Owner entrust-
ing goods to
another upon
sale or return.

Goods de-
livered in fur-
therance of an
illegal contract.

Tenant in tail
expectant on
the determina-
tion of an
estate for life.
Trustees of an

A person having once affirmed the acts of another who wrongfully sold his property, cannot afterwards treat him as a wrong-doer, and maintain trover. (1)

A party acting under a valid, and also under an unfounded authority, may protect himself by virtue of the former. (2)

The following case will afford an illustration of the rights of the first pawnee of a chattel against a second pawnee without notice. W., the captain of a ship, pledged his chronometer, then in the possession of the makers, to the defendant, the owner of his ship, in consideration of his advancing him 50*l.* and allowing him the use of the instrument during a voyage on which he was about to depart: after the voyage he placed it at the makers, and there pledged it to the plaintiff, for whom the makers, being ignorant of the pledge to the defendant, agreed to hold it, the money advanced by the defendant not having been repaid: — It was held, that the property in the instrument was in the defendant. (3)

In *Wilmshurst v. Bowker* (4) it appeared, that the defendants sold to the plaintiffs wheat, for which the plaintiffs were to pay by a draft on a London banker; the defendants delivered the wheat to a carrier, and sent the bill of lading to the plaintiffs but took the wheat again, and sold it before it came to the plaintiffs' possession, because the plaintiffs failed to send a draft on a London banker: — It was held, that the plaintiffs could not sue the defendants in trover for the wheat.

Where, by the custom of the trade, a calico printer is bound to take goods damaged in the printing, the mere circumstance of their being damaged confers no such property in them on him, as to authorise him to sell them, unless the owner has elected that he should take them. (5)

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price: B. not being able to sell the goods in India himself, left them with an agent, to be disposed of by him, directing the agent to remit the money to himself in England: — It was held, that A. could not maintain trover against B. for the goods. (6)

Trover does not lie to recover the value of goods delivered by the plaintiff, under or in furtherance of an illegal contract to which he is a party or privy (7): thus, a pawnbroker, who in taking pledges omits to pursue the course required by stat. 40 Geo. 3. c. 99. s. 6, acquires no property in the pledges, and cannot maintain a lien on them against the assignees of a pawner who afterwards becomes bankrupt. (8)

A tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, cannot bring trover for timber, which grew upon and was severed from the estate, for the tenant for life has a right to the trees immediately after they are cut down. (9) And the trustees of an estate *pur autre vie* cannot maintain trover for trees felled upon

(1) *Brewer v. Sparrow*, 7 B. & C. 310.
1 M. & R. 2.

(2) *Stiernel v. Holden*, 4 B. & C. 5. 6
D. & R. 17.

(3) *Reeves v. Capper*, 5 Bing. N. C. 136.

(4) *Ibid.* 541.

(5) *Lacloch v. Towle*, 3 Esp. N. P. C.
114.

(6) *Bromley v. Corwell*, 2 B. & P. 438.

(7) *De Wütz v. Hendricks*, 2 Bing. 314.

(8) *Ferguson v. Norman*, 5 Bing. N. C.
76.

(9) *Pyne v. Dor*, 1 T. R. 55.

the estate, for when felled, the trees belonged to the owner of the inheritance. (1)

By whom
trover can
or cannot be
maintained.

Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession, on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. (2)

estate *pur autre*
vis.

Second mort-
gagee against
mortgagor for
title deeds.

A member of an amicable society, entrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person, who took it from him, because the property in the box was in the society, and the holder had only its mere custody. (3)

Member of an
amicable so-
ciety against
another mem-
ber.

A sale of the whole of a ship by one who is only a part owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the destruction of the subject-matter, mediately or immediately, so as to enable his co-tenant to maintain trover against him for it. (4)

Joint owner of
a ship.

Where one of two tenants in common of a whale refused to deliver a moiety of it to the other, and cut it up, and extracted the oil, it was held, that this was not a destruction which would subject him to an action of trover, for it was an application of the whale to its only profitable purpose. (5) In general, if a tenant insist, that he was tenant in common with the plaintiff in the chattel, he must plead the matter specially. (6)

Tenant in
common.

Where a landlord during the term wrongfully cut down pollards, which were unfit for timber, it was decided that, as the tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not by his own wrong acquire a right to the pollards, and therefore could not, nor could his vendee, sue the tenant for taking them away. (7)

Timber wrong-
fully cut down
by landlord,
during the term
of a tenant.

Trover will not lie at the suit of a landlord for goods which he has distrained. (8)

Landlord for
goods dis-
trained,

Where goods leased as furniture with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease. (9)

or for goods
leased as fur-
niture.

A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C.; A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them: — It was held, that, as some rent was due from A. to B., C. was not liable to A. in an action of trover. (10)

Auctioneer for
excessive dis-
tress.

An auctioneer, receiving from the distrainer for the purpose of sale goods seized as a distress, and who returns them, is not answerable in trover,

Auctioneer for
receiving goods
for sale.

(1) *Blaker v. Anscombe*, 1 N. R. 25.

(2) *Yea (Bart.) v. Field*, 2 T. R. 708.

(3) *Holliday v. Cammell*, 1 *ibid.* 658.

(4) *Heath v. Hubbard*, 4 East, 110. 4 Esp. N. P. C. 205.

(5) *Fennings v. Grenville (Lord)*, 1 Taunt. 241.

(6) *Standcliffe v. Hardwick*, 3 Dowl. P. C. 762.

(7) *Channon v. Patch*, 5 B. & C. 897. 8 D. & R. 651.

(8) *Moneux v. Goreham*, Selw. N. P. 1351.

(9) *Gordon v. Harper*, 7 T. R. 9. 2 Esp. N. P. C. 465.

(10) *Whitworth v. Smith*, 5 C. & P. 250.

By WHOM
TROVER CAN
OR CANNOT BE
MAINTAINED.

Attachment of
property in the
hands of the
garnishee.

Assignees of a
bankrupt.

Bank notes, Ex-
chequer bills,
and Prussian
bonds fraudu-
lently obtained.

GOODS FELONIOUSLY TAKEN.

Stolen goods
purchased in
market overt.

although, while the goods were with him, he had notice that the distress was illegal, and refused to deliver them to the owner. (1)

It seems, that attachment by process from the sheriff's court in London of property in the hands of the garnishee, but which attachment was withdrawn, is not such a conversion as will enable the owner to maintain trover. (2)

Trover does not lie for the assignees of a bankrupt against a creditor who sues out execution under a warrant of attorney not filed within twenty-one days; if the execution be completed before the act of bankruptcy, the remedy is by an action for money had and received, or by a special action on stat. 3 Geo. 4. c. 39. (3)

A. paid a bank of England note to B., who paid it to C., who presented it to the bank, where it was stopped, on the ground, that it had been fraudulently obtained from a former holder:—It was held, that although A. thereupon paid the amount of the note to C. in discharge of the debt due to him from B., A. could not maintain trover for the note against the bank of England. (4)

An Exchequer bill (the blank in which was not filled up), having been placed for sale in the hands of A. B., he, instead of selling, deposited it at his banker's, who made him advances to the amount of its value:—It was held upon the bankruptcy of A. B., that the owner thereof could not maintain trover against the bankers, because the property in such bill passed by delivery, as in the case of bank notes and bills of exchange. (5)

Where the holder of Prussian bonds, issued by the sovereign of that country to secure the payment of a national loan, deposited them with an agent for a special purpose, and the agent pledged them to a third person without fraud on the part of the latter:—It was held, that, as the bonds were made payable "to the bearer," they could not be recovered back in trover by the real owner. (6)

Trover will not lie for goods taken, which upon the facts proved, appear to have been feloniously taken. (7) If a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, without he has done every thing in his power to bring the thief to justice. (8)

The owner of goods stolen prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery, while they were in his possession. (9)

Where goods stolen were purchased in market overt, and sold by the purchaser before the felon was convicted, it was decided, that the owner prosecuting to conviction could not maintain trover against the purchaser under stat. 21 Hen. 8. c. 11., which gave restitution to the owner who prose-

(1) *Whitworth v. Smith*, 1 M. & Rob. 193.

(2) *Mallatieu v. Laugher*, 3 C. & P. 551.

(3) *Brook v. Mitchell*, 6 Bing. N. C. 349.,
vide stat. 2 & 3 Vict. c. 29.

(4) *Benjamin v. England (Bank of)*, 3
Camp. 417.

(5) *Wookey v. Pole (Bart.)*, 4 B. & A. 1.

(6) *Gorgier v. Mievill*, 4 D. & R. 641.

3 B. & C. 45.

(7) *Anon. Lofft*, 601.

(8) *Gimson v. Woodfull*, 2 C. & P. 41.

(9) *Horwood v. Smith*, 2 T. R. 750.

Rex v. Wilkins, 2 Leach, C. C. 586., et vide
Bishoo v. Skillito, 2 B. & A. 329. n.

cuted the felon to conviction, although he gave the purchaser notice of the robbery while they were in his possession, for the property being altered by the sale in market overt, was not revested in the owner until the conviction of the felon, but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods. (1)

But the foregoing statute has been repealed by stats. 7 & 8 Geo. 4. c. 27. s. 1. and 7 & 8 Geo. 4. c. 29. s. 57., which contain various enactments relative to restitution, and extend them to goods obtained by fraud as well as by felony.

If a party be robbed of a negotiable security eight days before it be payable, and he do not give notice of his loss till the end of seven days, and then only to the payer, and no notice be given to the public, he will not have used due diligence, and cannot recover in trover against a party who discounted such security six days after the loss; and in such a case the questions proper for the jury are, first, whether the plaintiff has used due diligence; and then, whether the defendant has acted with due caution; unless there should be reason to suspect, that the defendant knew when he discounted the security, that it had been obtained by means of a felony, in which case the conduct of the plaintiff may be left out of the question. (2)

In an action of trover to recover bank notes belonging to the plaintiffs, which the defendants had taken without using due caution, if it appear, that the plaintiffs' porter had different securities for money to get turned into bank notes and cash, and that he came back with the odd cash, but alleged that the notes, which were the remaining proceeds of the securities, were stolen; it will be for the jury to say, whether the securities were stolen from him before they were cashed, or whether the bank notes were stolen afterwards, and when they were the property of the plaintiffs in his hands: if the latter, it is not material whether the porter purloined the bank notes himself, or was robbed of them. (3)

It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount, and describes any private mark upon it; and if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. (4)

The charterers of the plaintiff's ship for three voyages, on her return home from the second, removed the anchors and cables to the defendants' wharf. Shortly afterwards the ship was seized under an admiralty warrant,

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TROVER CAN
OR CANNOT BE
MAINTAINED.

Stats. 7 & 8
Geo. 4. c. 27.
s. 1. and 7 & 8
Geo. 4. c. 29.
s. 57.

Party robbed
of a negotiable
security guilty
of laches.

Bill of ex-
change impro-
perly delivered
by banker.

Goods removed
to avoid a sale
under an ad-
miralty war-
rant.

(1) *Horwood v. Smith*, 2 T. R. 750., vide etiam *Gimson v. Woodfull*, 2 C. & P. 41.

(2) *Beckwith v. Corral*, 3 Bing. 444. 2 C. & P. 261.

(3) *Snow v. Leatham*, 2 C. & P. 314. If the defendants received notice of the loss, that notice is not to be considered in point of law as a notice for all time; and unless such notice be renewed, it will be for the jury to say whether, if the defendants heard no more of the matter for more than a year, they might not fairly conclude that the notes had been recovered. A clerical error

in the date of one of the notes in such notice, will not avail the defendants, unless they were misled thereby. Nor is it any answer to such action, that the defendants were always in the habit of changing notes for strangers without asking their names, nor even that other country bankers did the same, if the jury are satisfied, that the defendants took the notes under such circumstances as would awaken the suspicions of a reasonable man acquainted with business. *Ibid.*

(4) *Morrison v. Buchanan*, 6 C. & P. 18.

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MAINTAINED.

and sold for debts due on bottomry bonds and the wages of the crew. Four days previously to the sale the plaintiff demanded the anchors, &c. from the defendants, they not being included in the sale account of the ship; but they refused to deliver them:—It was held, that the plaintiff was not entitled to recover the anchors and cables in trover against the defendants, although the jury found, that they had been removed by the charterers to avoid the process of the admiralty court, and not in the ordinary course of business, as the plaintiff had no right of possession until after the sale, and also, that the removal of the articles from the ship to the wharf, was no injury to the plaintiff's reversionary interest. (1)

THE CONVERSION.

GENERALLY.

Conversion essential to support trover.

4. THE CONVERSION.

I. Generally.

A conversion is essential to support trover, and the consideration of which, will be discussed under the following divisions:—the wrongful taking, or assumption of ownership; when a demand is requisite; by whom the demand should be made; upon whom the demand should be made; mode of making the demand; when the demand should be made; the refusal.

THE WRONGFUL TAKING OR ASSUMPTION OF OWNERSHIP.

What is *per se* a conversion.

Taking an assignment of goods from a person who has no right or authority.

Sale of a ship under a defective conveyance.

II. The wrongful Taking or Assumption of Ownership.

The wrongful taking, if followed by a carrying away of the goods of another, who has the right of immediate possession, is of itself a conversion; and so is the compelling a party to deliver goods; and whenever trespass will lie for taking goods of the plaintiff wrongfully, trover will also lie. (2)

The wrongful assumption of property in, or the right to dispose of goods, may be a conversion in itself, and render unnecessary a demand and refusal (3), as well as any tender of charges. (4)

Under the foregoing principles it has been holden, that taking the property of another by assignment, from one who had no authority to dispose of it—as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker, who had purchased it there in his own name for his principal, and refusing to deliver it to the principal after notice and demand by him, none other than the person in whose name it was warehoused being able to take it out—is a conversion. (5)

The sale of a ship, which was afterwards lost at sea, made by the defendant who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. (6) So where a

(1) *Ferguson v. Cristall*, 2 M. & P. 524. 5 Bing. 305.

(2) 2 Saund. 47. (o.) *Bishop v. Montague* (*Viscountess*), Cro. Eliz. 824. 1 Chitt. Pl. 154.

(3) *M'Combie v. Davies*, 6 East, 540. *Jackson v. Anderson*, 4 Taunt. 24. *Summersett v. Jarvis*, 3 B. & B. 2.

(4) *Attersol v. Briant*, 1 Camp. 410.

Solly v. Rathbone, 2 M. & S. 298. *Corlett v. Gordon*, 3 Camp. 472, 473.

(5) *M'Combie v. Davies*, 6 East, 538. *Baldwin v. Cole*, 6 Mod. 212. *Mallison v. Laugher*, 3 C. & P. 552. *Hurst v. Gummup*, 2 Stark. 306.

(6) *Blazam (Knt.) v. Hubbard*, 5 East, 407, 420.

person entrusted with the goods of another, puts them into the hands of a third person without orders, it is a conversion. (1)

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If A. have a box in his possession containing papers belonging to a person deceased, and send the box with its contents to his solicitors, with directions to deliver the box and papers to the executor on his giving an inventory of them and a receipt, trover can be maintained against the solicitors, if they refuse to deliver the box and papers to the executor, although the solicitors may offer to give them up if the executor will give an inventory and receipt (2); because the plaintiff as executor is entitled to their unqualified delivery.

Executors against solicitors.

Where J. F. advised the plaintiffs, that he had remitted to them 1969 dollars, consigned to one Laycock; and Laycock received 4700 dollars, and pledged the bill of lading to the defendant,* who received the price of the dollars at the bank of England, where they were deposited for safe custody, on a sale of them to the bank:—It was holden, that the letter was a sufficient appropriation of the dollars to the plaintiffs—that the plaintiffs and defendant were not joint tenants or tenants in common of the dollars—that notwithstanding no specific dollars had been severed for the plaintiff, yet, as the defendant had converted all the plaintiff's and all his own, trover would lie for the plaintiff's share—that although the dollars remained in the same unaltered custody, yet the delivery by the defendant of the bill of lading, which was the symbol of them, and the receipt of the value, was a conversion. (9)

When property remains in the same unaltered custody, but the symbols of property transferred.

An irregularity in a distress taken damage feasant, may amount to a conversion. (4)

Irregularity in a distress taken damage feasant. Possession acquired under colour of a contract.

If the possession be obtained under colour of a contract, no conversion can be established to support trover (5), unless a case of fraud can be proved.

A bare non delivery of goods is not a conversion (6), unless the goods be in the possession of the carrier, and he refuse to deliver them on demand (7); and the false assertion of a carrier, that he had delivered the goods to the consignee, is not a conversion.

A bare non delivery of goods.

Where the servant of the defendant, a coach-spring maker, received a spring of the plaintiff's to repair, and promised to bring it back by a certain hour; and the defendant subsequently refused to return it without being first paid for the repairs:—It was held not to be a sufficient conversion to support trover; and that the action, if any would lie, should be special *assumpsit*. (8)

An agent selling at an under price (9), or the retention of property under the decree of a court of competent jurisdiction (10), or cutting down trees without removing them, is no conversion. (11)

Agent selling at an under price.

A mere wrongful asportation of a chattel does not amount to a conversion: thus, in an action of trover for two horses, it appeared at the trial, that the defendant was the manager of a ferry from B. to L., and that the plaintiff

Retention of property under the decree of a court.

Cutting down trees without removing them.

When a mere

(1) *Syeds v. Hay*, 4 T. R. 260. 264.

(2) *Cobbett v. Clutton*, 2 C. & P. 471.

(3) *Jackson v. Anderson*, 4 Taunt. 24.

(4) *Bagshaw v. Goward*, Cro. Jac. 148. 7 Bac. Abr. Trover (B.), 795.

(5) *Emanuel v. Dane*, 3 Camp. 299. *Read v. Hutchinson*, *ibid.* 352. *Hill v. Perrott*, 3 Taunt. 274. *Fairman v. Grimble* 2 C. & P. 266.

(6) *Severin v. Keppell*, 4 Esp. N. P. C. 157.

(7) *Dewell v. Moxon*, 1 Taunt. 391.

McCombie v. Davies, 6 East, 540. *Devereux v. Barclay*, 2 B. & A. 704. *Ross v. Johnson*, 5 Burr. 2825. 2 Saund. 47. (f.)

(8) *Fairman v. Grimble*, 2 C. & P. 266.

(9) *Dufresne v. Hutchinson*, 3 Taunt. 117.

(10) *Hossack v. Mason*, 4 Moore, 361.

(11) *Mires v. Solebay*, 2 Mod. 244. Bull. N. P. 44. (b.) 2 Saund. 47. (a.)

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wrongful asportation of a chattel does not amount to a conversion.

embarked on board the defendant's ferry-boat at B., having with him the horses in question, for the carriage of which he had paid the usual fare. When the defendant came on board, it having been suggested, that the plaintiff had behaved improperly on board, he the defendant told the plaintiff he would not carry the horses over the water, and that he must take them on shore. The plaintiff refused to do this, and the defendant took them from the plaintiff and put them on shore, and they were conveyed to an hotel kept by the defendant's brother. The plaintiff remained on board, and was conveyed over the water. On the following day the plaintiff sent for the horses, but they were not delivered up; a message was however afterwards sent to the plaintiff, that he might have the horses on sending for them and paying for their keep, but if he did not send for them they would be sold to pay the expenses. The latter was accordingly done, and this action was brought. The defence set up was, that the plaintiff having miscondacted himself on board, the horses were put on shore to get rid of the plaintiff by inducing him to follow them. The learned judge in summing up told the jury, that the defendant by taking the horses from the plaintiff and turning them out of the vessel had been guilty of a conversion, unless they thought the plaintiff's conduct justified his removal from the steam-boat, and he had refused to go without the horses:—It was held, that this amounted to a misdirection, as a mere wrongful asportation of a chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect, either of destroying or changing the quality of the chattel. (1)

Demand of property by an unauthorised person.

A. brought an action of trespass against B. for taking away a filly; B. justified the taking as the servant of C.; the jury found a verdict for A. with damages, subject to a reference to D., one of the jurors, to ascertain to whom she belonged, which was to depend on whether a scar should appear on a certain part of her body, and in case it should, the verdict for A. was to stand, if not, it was to be entered for B.: the filly was delivered to D. by the consent of all parties, and he made his award, and found her to belong to A., and accordingly ordered the verdict found for him to stand: C., ten days after the award, demanded the filly of D., who refused to deliver her, and a fortnight afterwards he brought an action of trover for her recovery:—It was held, that the detention of the filly by D. did not, under the circumstances, amount to conversion, as C. was no party to the original action, and that it did not appear he was authorised to make the demand by B. to whom alone D. was bound to deliver her, he being only liable for the damages awarded to A. (2)

Forcibly taking possession of a house and fixtures by assignee of a term.

Tender of chattel before issue of the writ.

The forcible taking possession of a house and fixtures by the assignee of a term in the houses, is not a conversion of such fixtures. (3)

Where the defendants had in their possession a boiler belonging to the plaintiffs, which they, the plaintiffs, demanded from the defendants, and who then refused to restore it, but before the issuing of the writ tendered such chattel:—It was held to be no conversion. (4)

(1) *Fouldes v. Willoughby*, 5 M. & W. 840.

(2) *Guntton v. Nurse*, 5 Moore, 259. 2 B. & B. 447.

(3) *Longstaff v. Meagoe*, 4 N. & M. 211.

(4) *Heyward v. Seaward*, 1 M. & Sc. 459.

It has been considered, that a mere seizure by a stranger, who afterwards relinquishes the possession, is no conversion. (1)

The sale of goods under a distress, after service of an irregular notice of a replevy, without removing the goods off the premises, is not a conversion. (2)

If there be a valid distress for rent, but a subsequent irregularity be committed (3), no conversion exists.

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Seizure by a stranger.

Sale of goods without a removal from the premises.

Valid distress for rent, but a subsequent irregularity.

WHEN A DEMAND IS REQUISITE.

Judicious to demand restitution of goods.

Demand and refusal do not necessarily amount to a conversion.

Demand and refusal necessary when defendant became lawfully possessed of the goods, and plaintiff not prepared to prove some distinct actual conversion.

III. When a Demand is requisite.

Upon the abstract principle of expediency, it is always judicious to demand the restitution of the goods, or their value, and the amount of the damages sustained, previously to the commencement of an action of trover.

The demand and refusal do not necessarily amount to a conversion, but are only *prima facie* evidence of it (4); and if it be apparent, that there really was no conversion, the demand and refusal are inoperative. (5)

A demand and refusal are requisite, where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct actual conversion. (6) As where a trader, on the eve of his bankruptcy, made a collusive sale of his goods to the defendant, it was decided, that the assignees could not maintain trover without proving a demand and refusal, for the parties contracting were competent at the time; and if the assignees disaffirm the contract, they should give notice by a demand. (7) So where goods are delivered under a contract, as to do something with them and return them when completed, the mere omission to perform the contract is no conversion, and a demand and refusal must be made in order to support trover. (8)

Where bills of exchange were delivered by a trader, in contemplation of bankruptcy, to a creditor, with a view of giving him a preference, and the amount of the bills was received by the creditor after the bankruptcy, it was held, that a demand and refusal to deliver up the bills before they became due, were necessary to enable the assignees to bring an action of trover for the bills, as the receipt of the money by the creditor was not of itself a conversion. (9)

Bills of exchange.

A demand and refusal are likewise necessary, in order to maintain trover against an excise officer for the detention of goods after the payment of the penalty, for which the goods were levied (10); or against a carrier, who having the goods in his possession, omits to deliver them. (11)

Excise officer.

Carrier.

But where a banker after notice discounted a bill drawn on a customer, and by the acceptance made payable at his bank, after it had been lost by

Banker.

(1) *Samuel v. Morris*, 6 C. & P. 620.

(2) *Cuckson v. Winter*, 2 M. & R. 313., vide *Batchelor v. Vyse*, 1 M. & Rob. 333. where case and not trover is the proper remedy for an excessive levy.

(3) *Wallace v. King*, 1 Hen. Black. 137.

(4) *Le Case del Chancellor, &c. de Oxford*, 10 Co. 56. (b.), 57. (a.) 2 Saund. 47. (e.)

(5) *Mires v. Solebay*, 2 Mod. 244. Bull. N. P. 44. (b.)

(6) 2 Saund. 47. (e.)

(7) *Nixon v. Jenkins*, 2 Hen. Black. 135.

Bloxam (Knt.) v. Hubbard, 5 East, 407. *Lovell v. Martin*, 4 Taunt. 799.

(8) *Severin v. Keppell*, 4 Esp. N. P. C. 156. *Fairman v. Grinble*, 2 C. & P. 266.

(9) *Jones v. Fort*, 9 B. & C. 764. 4 M. & R. 547.

(10) *Hutchings v. Morris*, 6 B. & C. 464. 2 D. & R. 499.

(11) *Dewell v. Moxon*, 1 Taunt. 391.

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the holder, and afterwards debited his customer with the amount of the bill, wrote a discharge on it and delivered it up to the customer as the banker's voucher of his account:—It was held, that the banker was thereby guilty of a conversion, and that the loser of the bill might recover it in trover without a previous demand. (1)

BY WHOM THE DEMAND SHOULD BE MADE.

Demand should be made by the person entitled at the time to receive the goods.

Goods deposited by A. with the authority of B., but bailee receiving no notice of holding the goods on a joint account.

Demand by agent.

IV. By whom the Demand should be made.

The demand should be made by the person entitled at the time to receive the goods; and it seems, that if goods be bailed, and during the bailment are sold, or otherwise become the property of another, the demand on the bailee to create a conversion should be made by the new owner, and the action brought in his name, if, after a proper demand, the bailee improperly refuse to part with them. (2)

When goods are deposited by one person with the authority of another, but the bailee receives no notice, that he held the goods on the joint account, or had not accepted them or any such trust, the party depositing the goods may alone make the demand, although it may have been previously agreed between the parties, that the bailee should receive the goods on their joint account. (3)

The demand may be made by an agent duly authorised. (4) Thus, where the plaintiff sold goods to T. who paid for them, and was to take them away, but the defendant becoming possessed of the place in which the goods were deposited, the plaintiff's attorney accompanied by T. demanded them of the defendant, telling him, that they belonged to the plaintiff, and that he had sold them to T.; to which the defendant replied, that he would not deliver them to any person whatsoever, and afterwards the plaintiff repaid the price of the goods to T. and brought trover against the defendant:—It was held, that this demand and refusal were sufficient evidence of a conversion to support the action, and that no subsequent demand was requisite. (5)

A demand by an agent will not be sufficient, if the defendant *bond fide* refuse to deliver the goods in consequence of his not being reasonably satisfied, that the person who applies is properly empowered to receive them. (6)

If goods are deposited by one person with the authority of another, and received by the bailee to keep on the joint account of the two, a demand by one alone is not sufficient without the authority of the other, so as to maintain trover against the bailee for refusing to deliver the goods. (7)

WHO CANNOT MAKE THE DEMAND.

Agent not properly authorised.

Goods deposited with a bailee on a joint account.

UPON WHOM THE DEMAND SHOULD BE MADE.

Demand should be made upon the party who

V. Upon whom the Demand should be made.

The demand should in general be made upon the party who at the time has the possession of the goods, by himself, or his servant or agent, or the general controlling power over them. If after the party has received the goods, though he legally sell or otherwise part with them tortiously, no

(1) *Lovell v. Martin*, 4 Taunt. 799.

(2) *Philips v. Robinson*, 4 Bing. 106.

(3) *May v. Harvey*, 13 East, 197.

(4) *Mills v. Ball*, 2 B. & P. 457.

(5) *Pattison v. Robinson*, 5 M. & S. 105.

(6) *Solomons v. Dawes*, 1 Esp. N.P.C. 83.
Coore v. Callaway, *ibid.* 115. *Mills v. Ball*, 2 B. & P. 464. n. (a.) *Smith v. Young*, 1 Camp. 439.

(7) 1 Chitt. Pl. 158. *May v. Harvey*, 13 East, 197.

demand is necessary, for his subsequent act is in itself a conversion. If a party, in some way apparently concerned in the detention, be applied to for the restoration of the goods, and by his answer induce the owner to believe that he, the person applied to, has the possession and power to deliver them up, and refuse to do so, and thereby the owner is induced to sue him, he cannot it seems defend at the trial, on the ground that he had not, when applied to, the control and disposition of the goods. (1)

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at the time has the possession of the goods, or the general controlling power over them.

VI. *Mode of making the Demand.*

The demand in trover being only for the purpose of giving the defendant an opportunity, of either restoring the goods in specie, or of making satisfaction to the party to whom they belong (2), no particular form or manner of making the demand is essentially requisite, provided it be distinctly notified to the defendant who is the claimant, and what goods are demanded. Where the plaintiff, the vendor of a house, brought trover for various articles, some of them being goods, and the remainder fixtures, which he had left in the house on delivering it up to the defendant, the vendee, and demanded them all as fixtures, and the refusal was "of the fixtures demanded," this demand was held to be insufficient to enable the plaintiff to recover the articles which were not fixtures, it having been decided upon other grounds that the fixtures were not recoverable. (3) A demand in writing of "the amount of the goods you have disposed of" (4), or a demand of "satisfaction," have been adjudged to be sufficient for this purpose. (5)

MODE OF MAKING THE DEMAND.

Not requisite to adhere to any particular form or manner of making the demand, provided it be distinctly notified to the defendant who is the claimant, and what goods are demanded.

If two distinct demands be made at the same time, one verbally and the other in writing, proof of the verbal demand alone will be sufficient, and no evidence of the written request need be given. (6) A demand in writing, left at the defendant's house, may be sufficient. (7)

If the demand be in writing, notice should be given to produce it in the usual way. (8) If an oral as well as a written demand have been made, it is sufficient to prove the former (9), although both were made at the same time. (10)

A letter demanding the deed sought to be recovered in trover, may be read by the plaintiff as notice to the defendant, although it will not be evidence of any statement therein. (11)

Letter demanding deed in trover may be read by plaintiff as notice to defendant.

VII. *When the Demand should be made.*

The demand, when necessary, must in general be made before the action is brought.

As a demand and refusal do not amount to a conversion, and are but

WHEN THE DEMAND SHOULD BE MADE.

Demand should be made before action brought.

Jury to deter-

(1) *Hall v. White*, 3 C. & P. 136.

(2) *Per Lord Kenyon in Thompson v. Shirley*, 1 Esp. N. P. C. 33.

(3) *Colegrave v. Dias Santos*, 2 B. & C. 76. 3 D. & R. 255.

(4) *Thompson v. Shirley*, 1 Esp. N. P. C. 31.

(5) *Rookby's case*, Clayton, 122. cit. 1 Esp. N. P. C. 31.

(6) *Smith v. Young*, 1 Camp. 439.

(7) *Logan v. Houlditch*, 1 Esp. N. P. C. 22. 1 Chitt. 159.

(8) *Thompson v. Shirley*, 1 Esp. N. P. C. 31. *Logan v. Houlditch*, ibid.

(9) *Smith v. Young*, 1 Camp. 440.

(10) Ibid.

(11) *Whitehead v. Scott*, 2 M. & Rob. 2.

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mine whether a refusal upon a demand made after the action is brought, is not evidence of a prior conversion.

evidence of the fact, a jury may from such evidence presume a conversion on a day previous to the refusal. Where it appeared from the memorandum, that the bill had been filed on the 28th of November, it was held, that a conversion previous to the filing the bill might be presumed from a demand and refusal on the 29th of November. (1)

If there be evidence, that the defendant received or had possession of the goods before the commencement of the action, and the plaintiff shew that the goods were then his property, it is perhaps not an unfair presumption, that the refusal to restore the goods, though after the action brought, was but a re-assertion of a pre-existing adverse claim to them; and therefore, until rebutted, even such refusal may be evidence, that the defendant originally took or held the goods tortiously, or upon a claim of ownership, inconsistent with and opposed to the plaintiff's right.

THE REFUSAL.

After acquittal of defendant for the felonious taking of goods.

A mere qualified refusal.

Refusal to deliver goods, until the payment of a debt.

VIII. The Refusal.

Trover may be supported after an acquittal of the defendant (2):—and in the case of a conversion by wrongful taking, it is not necessary to prove a demand and refusal. (3)

If the defendant, having possession of the plaintiff's goods, absolutely refuse to give them up, and there be no evidence to justify the refusal or to explain it, then the presumption of conversion is a presumption of law, upon which the jury ought to find a conversion. (4)

A mere qualified refusal, alleging special grounds for not delivering the goods, if it afford any evidence of a conversion to be submitted to a jury, raises no legal presumption on which the jury are to find their verdict, independently of their actual belief of a conversion in fact. (5)

A. who was paying his addresses to a lady lost her letters and two memorandum books containing remarks of his own; B. found them and kept them, on the ground that the books contained matter injurious to him, and also shewed them to others; A. sent a person to demand them of B., who at first refused to give them up; but, before the person left, said he would not give them to him, but would deliver them to C. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A. accepted, saying, that he made a sacrifice to obtain the letters:—It was held, that there was a conversion of the whole; but the verdict was only for nominal damages. (6)

If a person who has possession of the goods of another, on being desired by the owner to send them to a particular place, not only refuses to send them to that place, but says generally, that he will not deliver them up unless payment of a debt due from the owner to him is guaranteed, such general refusal is evidence of a conversion, although he might not be bound to send the goods to any particular place. (7)

(1) *Wilton v. Girdlestone*, 5 B. & A. 847., et vide *Morris v. Pugh*, 3 Burr. 1243. 3 Stark. Ev. 3d ed. 1161.

(2) *Crosby v. Leng*, 12 East, 409.

(3) *Baldwin v. Cole*, 6 Mod. 212. Bull. N. P. 44. (a.) *Forsdick v. Collins*, 1 Stark. 173. *Summersett v. Jarvis*, 3 B. & B. 2.

(4) 3 Stark. Ev. 3d ed. 1161.

(5) *Severin v. Koppell*, 4 Esp. N. P. C. 156.

(6) *Clandon v. Dinneford*, 5 C. & P. 18.

(7) *Sharp v. Pratt*, 3 ibid. 34.

Where the hirer of a piano sent it to an auctioneer to be sold, it was held, that he was guilty of a conversion, as well as the auctioneer, who refused to deliver it up, unless the expenses incurred were first paid. (1)

Where the vendor of goods shipped the same on board a ship by the order of the vendee, and the captain by his bill of lading undertook to deliver them to the consignee; and the vendee having become bankrupt, the vendor demanded the goods of the captain; the refusal by the latter, who alleged, that he had signed a bill of lading to deliver the goods to another, was held to be sufficient evidence of a conversion. (2) And where tobacco was pledged by an agent who had purchased in his own name for his principal, the refusal of the pawnee to deliver the tobacco to the principal upon demand made by him was deemed a conversion. (3)

Where A. lent goods to B., who died, and on his death the goods came into the possession of C., who, when the goods were demanded of him, said that he should do nothing but what the law required, and did not afterwards deliver up the goods:—It was held in an action of trover, to be a sufficient conversion by C. (4)

The refusal to deliver goods upon demand thereof, will not necessarily in all cases constitute a conversion, unless the party refusing have it in his power to deliver the detained goods, and that the refusal be made in a distinct and unqualified manner. Where a deed was demanded from the defendant, who said, he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it, this refusal was held not to be sufficient evidence of a conversion; and Lord Ellenborough said, that the defendant would have been guilty of a conversion, if the deed had been in his power, but the intention was not enough. (5)

If the demand be not made personally upon the defendant, but merely left at his house during his absence, a reasonable time and opportunity to restore the goods should be suffered to elapse, before the defendant's non compliance with the demand can be treated as a refusal, amounting to a conversion. (6) The non compliance with the demand after a reasonable opportunity to obey it has been afforded, is tantamount to a refusal, and is presumptive evidence of a conversion, and throws upon the defendant the burthen of rebutting the presumption and explaining, that the omission to deliver up the goods is not in law a conversion—as that being a carrier the defendant lost the goods, &c.

So, likewise, a refusal upon demand is no evidence of conversion, if the party *bonâ fide* and reasonably refuse, on the ground of his not being satisfied, that the party making the demand is the real owner of the goods (7), or properly authorised by the real owner to receive them. (8)

Where the plaintiff's goods, which had been saved from fire, were carried to a warehouse by the servants of an insurance company, of which the defendant, as one of such servants, kept the key, and on his being applied to by the plaintiff to deliver them up to him, refused to do so without an order

Refusal to deliver goods upon demand will not necessarily constitute a conversion, unless the party refusing have it in his power to deliver up the goods detained, and the refusal be distinctly made.

If demand be not made personally upon defendant, a reasonable time to return the goods should be permitted to elapse.

(1) *Loeschman v. Machin*, 2 Stark. 311.
(2) *Thompson v. Trail*, 6 B. & C. 36. 8
D. & R. 31.
(3) 1 Chitt. Pl. 160.
(4) *Davies v. Nicholas*, 7 C. & P. 339.
(5) *Smith v. Young*, 1 Camp. 439.

(6) *Gibbs v. Stead*, 8 B. & C. 535.
(7) *Green v. Dunn*, 3 Camp. 215. n.
Isaack v. Clark, 2 Bulst. 312. *Mills v. Ball*,
2 B. & P. 464.
(8) *Solomons v. Dawes*, 1 Esp. N. P. C.
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from the company:—It was held, that this was not such a refusal as amounted to a conversion. (1)

5. RIGHT OF LIEN. (2)

RIGHT OF LIEN.

In *Legg v. Evans* (3) Mr. Baron Parke stated, "A lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods."

WHEN A LIEN EXISTS.
Defined.

A lien is either general or particular. A general lien is a right to retain for a general balance of account, and its existence may be proved by evidence of an express agreement or mode of dealing between the parties, or by the general usage among persons engaged in the same line of business; and wherever property is held in right of a lien, it cannot be taken in execution. (4)

Goods delivered to a manufacturer.

By the common law, when a party is obliged to receive goods, he is also entitled to retain them for his indemnity: therefore, a tradesman has a lien upon a particular chattel delivered to him in the course of his business for the amount of his charge in respect of labour bestowed upon that particular chattel, or expense incurred in the execution of the purpose for which the chattel was entrusted to him, under which principle he can distrain them; but if there have been an agreement for the price he has no lien, but he must rely on the contract, and be in the same condition with other creditors. (5)

Repairs of property.

And if a party repair and expend labour upon a chattel without the authority of the owner, he has no lien on it for such repairs, as against the owner. (6)

Vendor of goods.

The vendor of goods has a lien on them for the price (7), unless they are sold upon credit, and then he has no lien. (8)

Lost property.

The principles of public policy dictate to civilised and commercial countries not only the propriety, but even the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in the dangerous service of rescuing property from the perils of storms, tempests, and accidents; therefore, a person who by his own labour preserves goods which the owner, or those interested with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law to retain the possession of the goods saved until a proper compensation is made to him for his trouble. (9) But a man who finds the property of another which has been lost or mislaid, and voluntarily puts himself to trouble or expense to preserve it, and to find the owner, has not a lien upon it for the recompense which he may reasonably deserve. (10)

(1) *Alexander v. Southey*, 5 B. & A. 247.

(2) *Vide antè*, 1925—1929. tit. LIEN OF CARRIERS.

(3) 6 M. & W. 42.

(4) *Ibid.* 36.

(5) *Collins v. Ongley*, B. R. E. T. 9 Will. 3. cit. Selw. N. P. 1377.

(6) *Hiscox v. Greenwood*, 4 Esp. N. P. C. 174.

(7) *Townley v. Crump*, 1 H. & W. 564.

4 A. & E. 58.

(8) *Crawshaw v. Homfray*, 4 B. & A. 50.

(9) *Hartfort v. Jones*, 1 Ld. Raym. 393.

2 Salk. 654. *Nicholson v. Chapman*, 2 Hen. Black. 254.

(10) *Nicholson v. Chapman*, 2 Hen. Black.

"Where a person has a simple lien on goods, he cannot sell and dispose of them; but if he has a special property in those goods, in trust for another, subject to a claim of his own, in such case the party may sell, in order to repay himself." (1)

If goods upon which a party has a lien are taken away by undue means, the lien revives on his recovering possession of them. (2)

A lien is not destroyed, though the demand out of which it arises be barred by the Statute of Limitations. (3) If a party who has a lien upon a chattel abuse it, or wrongfully part with it, the owner's right thereto is revived, and he may maintain trover for it against the holder.

Policy brokers have a lien for their general balance (4); and where an English subject in time of war informed the broker, that the property insured was neutral, it was held to be a sufficient indication to the broker, that the party acted as agent. (5)

If a broker having a lien on a policy part with it, his lien revives on re-possession. (6)

Where A. commissioned B. to sell a vessel, and having deposited her register with him for that purpose became bankrupt: — It was holden, that the register acts did not prevent B. having a lien on the register deposited with him. (7) So, where a certificate of registry (8) had been deposited as a security for advances made for the use of the ship.

Attorneys and solicitors have a lien on all papers remaining in their hands and judgments recovered for their costs. (9) Every one, whether attorney or not, has a lien by the common law on the specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an attorney or solicitor. (10)

Bankers (11) have a lien upon the securities of their customers, which come into their hands for the amount of their general balances, unless, that such securities were received under special circumstances. (12)

Insurance brokers have a lien upon policies (13); calico printers have a lien upon the linen in their possession for work done in the course of their business (14); and fullers can likewise exercise the right of lien, in some places. (15) Masters of vessels have a lien on the trunks of persons whom they have conveyed in their vessels, until a reasonable sum has been tendered for their passage (16); packers (17); printers employed to print certain numbers, but not all consecutive numbers, of an entire work, have a

RIGHT OF LIEN.

Goods taken away by undue means.

Statute of Limitations.
Abuse of lien.

Policy brokers.

Ship's register.

WHO CAN EXERCISE THE RIGHT OF LIEN.

Attorneys.

Bankers.

Brokers.
Calico printers.
Fullers.
Masters of vessels.
Packers.
Printers.

- (1) *Cazenove v. Prevost*, 5 B. & A. 78. *Oldfield*, 4 T. R. 123. *Stedman v. Webb*, 4 M. & C. 346.
 (2) *Wallace v. Woodgate*, 1 C. & P. 575. *Hollis v. Claridge*, 4 Taunt. 897.
 (3) *Spears v. Hartley*, 4 Esp. N. P. C. 81. *Scott v. Franklin*, 15 East, 428. *Boland v. Bygrave*, R. & M. 271.
 (4) *Whitehead v. Vaughan*, B. R. T. T. 25. *Davis v. Bowsher*, 5 T. R. 488.
 Geo. 3. *Cooke's B. L.* 566. cit. *Selw.* *Maaness v. Henderson*, 1 East, 335.
 N. P. 1875. *Mann v. Forrester*, 4 Camp. 60.
 (5) *Snook v. Davidson*, 2 Camp. 218. *Weldon v. Gould*, 3 Esp. N. P. C. 268.
 (6) *Levy v. Barnard*, 8 Taunt. 149.
 (7) *Mestaer v. Atkins*, 1 Marsh. 76. 5 Taunt. 381. *Sweet v. Pym*, 1 East, 4., sed vide *Cumpston v. Haigh*, 2 Bing. N. C. 449.
 (8) *Bowen v. Fox*, 10 B. & C. 41. *Wolf v. Summers*, 2 Camp. 631.
 (9) *Stevenson v. Blakelock*, 1 M. & S. 535. *Exp. Deeze*, 1 Atk. 228. *Green v. Farmer*, 1 W. Black. 651. 4 Burr. 2222.

RIGHT OF LIEN. lien upon the copies not delivered for their general balance due for printing the whole of the numbers (1); wharfingers can likewise retain goods in their possession (2); but it is questionable, whether dyers have a general lien. (3) By the common law, when a party is obliged to receive goods, he is also entitled to retain them for his indemnity; under which principle, innkeepers (4), millers (5), and printers (6), have a lien upon the property intrusted to their charge.

Furnished lodging. A house of public entertainment in London, where beds, provisions, &c. are furnished for all persons paying for the same, but which is merely called a tavern and coffee-house, and is not frequented by stage-coaches and waggons from the country, and has no stables belonging to it, is to be considered as an inn (7), and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill; although the guest may not appear to be a traveller, but one who has previously resided in furnished lodgings in London.

Tailors. A tailor has a lien upon cloth delivered to be made up (8); an innkeeper has a lien on the goods of his guest for his bill (9); or upon horses in his stable for their keep (10); and a trainer has a lien for his charges in training and keeping horses. (11) But a livery-stable-keeper has no lien on the horses in his stable, without an express agreement. (12)

Commissioners for taking the acknowledgments of married women. Commissioners for taking the acknowledgments of married women, have a lien for their fees on the deed, certificate of execution, &c. (13); and an owner who remains in possession of a ship has a lien on the goods on board belonging to the charterer, for the freight due under the charter-party. (14)

WHEN NO LIEN EXISTS. A party cannot acquire a lien by his wrongful act. (15) If the defendant is to be considered a mere wrong-doer (16), it is not necessary for the plaintiff to tender him an indemnification for expenses, which have been incurred by him in order to obtain a wrongful possession: so no formal tender is necessary (17), where the defendant is not in a situation to deliver up the goods.

The party claiming a lien must have possession of the goods; and if he obtain possession by fraud or misrepresentation, he cannot enforce his claim of lien, though if the goods had come rightfully into his possession, he might have retained them. (18)

Bankers. Bankers have no lien on muniments casually left in their shops, after having refused to advance money upon them as a security. (19)

Auctioneers. Where a mortgage deed was delivered to A. an auctioneer, for the purpose

(1) *Blake v. Nicholson*, 3 M. & S. 167.

(2) *Naylor v. Mangles*, 1 Esp. N. P. C.

109. *Spears v. Hartly*, 3 ibid. 81.

(3) *Ross v. Hart*, 8 Taunt. 499. *Bennett*

v. Johnson, 2 Chitt. 455.

(4) *Jones v. Thurlow*, 8 Mod. 172.

(5) *Exp. Ochenden*, 1 Atk. 235. *Chace*

v. Westmore, 5 M. & S. 180.

(6) *Blake v. Nicholson*, 3 M. & S. 167.

(7) *Thompson v. Lacy*, 3 B. & A. 283.

(8) *Hussey v. Christie*, 9 East, 433.

(9) *Naylor v. Mangles*, 1 Esp. N. P. C.

109. *Thompson v. Lacy*, 3 B. & A. 283.

(10) *Johnson v. Hill*, 3 Stark. 172. *Forke*

v. Grenough, 2 Ld. Raym. 866.

(11) *Bevan v. Waters*, M. & M. 236.

(12) *Judson v. Etheridge*, 1 C. & M. 743. *Wallace v. Woodgate*, R. & M. 194.

(13) *Exp. Grove*, 3 Bing. N. C. 304.

(14) *Campion v. Colvin*, 2 Hodges, 116.

(15) *Per Lawrence J. in Griffiths v. Hyde*, Dorset Summer Assizes, 1809, cit. Selw. N. P. 1377.

(16) *Lempriere v. Pasley*, 2 T. R. 485.

(17) *Jones v. Cliff*, 1 C. & M. 540. 3 Tyrw. 576.

(18) *Taylor v. Robinson*, 8 Taunt. 648.

Lempriere v. Pasley, 2 T. R. 485. *Maddan*

v. Kempster, 1 Camp. 12.

(19) *Lucas v. Dorrien*, 7 Taunt. 278.

of obtaining payment of the principal and interest due thereon from the mortgagor; and A. made several applications for that purpose:—It was held, that A. had no lien on the deed in respect of the charge for making those applications. (1) RIGHT OF LIEN.

Neither fullers (2) nor a public warehouse-keeper in London have liens. Fullers.

Where the defendants, as brokers, contracted for a quantity of staves to remain on the premises of the vendor, rent free for one month, and after that, at a certain rent to be paid by their principal, who subsequently gave orders for a removal of part, and directed, that the residue should not be removed until further orders from him:—It was holden, that never having in fact been in possession or control of the brokers, they had no lien on the goods for their general balance. (3) Brokers.

A master of a vessel has no lien on his ship for money expended, or debts incurred by him for repairs done to it on the voyage. (4) Nor has he a lien on the freight, for his wages or for his disbursements, on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo. (5) Masters of vessels.

Policy brokers have not a lien for their general balance, when they have notice, that the person who employs them acts merely as an agent. (6) Policy brokers.

In *Brandao v. Barnett* (7) it appeared, that A. in South America made remittances to B., a merchant in London, directing B. to invest the amount in Exchequer bills, and to hold such Exchequer bills when purchased on A.'s account; B. purchased the Exchequer bills in his own name, and deposited them in a box which he kept locked at his bankers; when interest became due, and the bills were to be exchanged for new ones, B. delivered the bills to the bankers for that purpose; which being effected, B.'s account with his bankers was credited with the interest, and in about a week or two B. received the new Exchequer bills and placed them in the box; the bills were not entered in B.'s pass book, nor were they noticed in the bankers' books; after one of these exchanges of Exchequer bills, and before the new bills were received by B. from the bankers, or placed in the tin box, B. overdraw his banking account; the bankers having no notice that these bills belonged to A., or that they were not the property of B.:—It was held, that the bankers had no lien upon the Exchequer bills for the balance of B.'s banking account. When bankers have no lien for Exchequer bills.

A stereotype printer has no general lien on stereotype plates not manufactured by himself, but put into his hands to print from. (8) Stereotype printers.

Neither has a person to whom a horse is delivered to be stabled, taken care of, fed, and kept, a right of lien. (9) And if a horse be distrained in order to compel an appearance in a hundred court (10), the plaintiff after appearance cannot justify detaining the horse until his keep be paid for. Horse keepers.

(1) *Sanderson v. Bell*, 2 C. & M. 304.

(2) *Rose v. Hart*, 8 Taunt. 499. 2 Moore, 547.

(3) *Taylor v. Robinson*, 2 Moore, 730.

(4) *Hussey v. Christie*, 9 East, 426.

(5) *Smith v. Plummer*, 1 B. & A. 575.

(6) *Maanss v. Henderson*, 1 East, 335.

Snook v. Davidson, 2 Camp. 218., vide etiam

Lanyon v. Blanchard, ibid. 597.

(7) 1 M. & G. 908. *Quare*, Whether the

bankers would have had a lien upon the Exchequer bills, supposing them to have been the property of B.? *Ibid*.

Lien may be given in evidence under a plea, that the plaintiff was not possessed. *Ibid*.

(8) *Bleaden v. Hancock*, M. & M. 465.

(9) *Judson v. Etheredge*, 3 Tyrw. 954. 1 C. & M. 743.

(10) *Lenton v. Cook*, Bull. N. P. 45. (a.)

RIGHT OF LIEN.**WAVER OF
LIEN.****Security taken
for the debt.****Broker relying
in his plea upon
a lien.****Party having
a right of lien
causing the
goods to be
taken in exe-
cution.****Lien not waved
by an omission
to state, that
the goods are
claimed as a
lien.**

A general right of detaining a thing until the money due for the work done upon it be paid, may be waved by a special agreement as to the time or mode of payment; but it will not be waved, by a mere agreement for the payment of a fixed sum (1), because a special agreement does not of itself destroy the right to detain, unless it contain some term inconsistent with that right.

Thus, if a security be taken for the debt, for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone. (2) A quantity of iron was imported by A. and landed on the 14th of October at the defendant's wharf; on the 15th of October the plaintiff purchased the iron of A., paid for it, and obtained an order for the delivery, under which, part was delivered at different times until the March following, when A. the importer becoming bankrupt, the remainder of the iron was detained by the defendants claiming a lien on it in respect of their charges for wharfage. The course of dealing proved was, that these charges were usually paid by the merchant importer at the Christmas following the importation, whether the iron had in the meantime been removed or not. It was holden, that the defendants were not entitled to a lien, for at the time the iron was purchased by the plaintiffs, the defendants had not any lien upon it for their charges; Mr. Justice Holroyd observing, that "the wharfage was not payable till Christmas, and by the sale, the plaintiffs had a right to an immediate delivery of the goods, and the subsequent default of the importer to pay the debt due from them would not alter the case." (3)

If a broker have lost by his own act the right to retain property as a lien upon which he relies in his plea, under a particular custom of the city of London, he will not be allowed to desert his plea of lien, and rest his defence upon another and totally distinct ground. (4)

A party waves his right of lien, if upon being applied to deliver up the goods he claims to retain them on a different ground than that, upon which he rests his claim of lien. (5)

If a party having a lien on goods cause them to be taken in execution at his own suit, and purchase them, he thereby loses his lien. (6)

So where A. having repaired a carriage for B., allowed him to take it away from time to time:—It was held, that he could not afterwards detain it for the amount of the repairs, nor upon a claim for standage, without an express contract to pay for standage, unless the owner left it upon the premises beyond a reasonable time after notice. (7)

But a person does not wave his lien by the mere fact of his omitting to state, that he claims to retain the goods in that right, when they are demanded; nor is it sufficient evidence of a waiver of his lien, that he bought these goods with others, which he also refused to deliver up, although he had no lien on them, the sale as to the whole being void. Therefore, where

(1) *Chase v. Westmore*, 5 M. & S. 180. vide etiam *Sanderson v. Bell*, 2 C. & M. 311. *Hutton v. Bragg*, 2 Marsh. 345. 349. 7 Taunt. 25., sed vide *Tate v. Meek*, 8 ibid. 80.

(2) *Cowell v. Simpson*, 16 Ves. 275. recog. in *Hewison v. Guthrie*, 2 Bing. N. C. 759.

(3) *Cruwschay v. Homfray*, 4 B. & A. 50.

(4) E. g. a right to retain the property for a balance due to him on mutual credit, without specially pleading it. *Henriam v. Guthrie*, 2 Bing. N. C. 760.

(5) *Boardman v. Sill*, 1 Camp. 410.

(6) *Jacobs v. Latour*, 5 Bing. 130.

(7) *Hartley v. Hitchcock*, 1 Stark. 408.

the defendant had a lien on cloths purchased from a trader, after an act of bankruptcy, and on their being demanded by the assignees refused to give them up, saying "he might as well give up every transaction of his life:"—It was held, that this was no waiver of his lien, and that it was not merged in the purchase. (1)

Whether goods be divested of a lien by a complete delivery, is a question for the jury. But if several goods belonging to one owner be carried the same voyage, a delivery of part, will not defeat the lien upon the remainder for the whole freight. (2)

But where the plaintiff sold timber to B. felled on land occupied by A., at so much per foot, and the timber was measured, and B. carried away part of the trees and marked the remainder:—It was held, that the plaintiff had no lien on the remaining part for the price of the whole, for the delivery was complete. (3)

To a plea of lien in trover, the plaintiff can reply, that a bill of exchange was taken by the defendant, for the debt in respect of which he had a lien upon the property, and that the bill was not due at the time of the conversion complained of (4); but he cannot reply a set-off, unless it was agreed, that the one debt should be set off against the other, which would be equivalent to payment. (5)

RIGHT OF LIEN.

To a plea of lien in trover the plaintiff can reply, that a bill of exchange was taken in satisfaction.

6. DECLARATION AND PLEADINGS.

Trover is a transitory action, and the venue may be laid in any county. (6)

For a wrongful taking of goods, trover is in general a concurrent remedy with trespass (7); but the converse does not hold, for trover may often be brought when trespass cannot; as where goods are lent or delivered to another to keep, and he refuses to deliver them on demand, trespass does not lie, but the proper remedy is trover. (8) So where the taking is lawful or excusable, trespass cannot in general be supported, but the action must be trover. (9)

Where goods have been sold, or money has been paid by a debtor, in contemplation of his bankruptcy, by way of fraudulent preference to his creditors, it may be safer for the assignees to proceed for the recovery thereof in trover, rather than by action of *assumpsit* for goods sold by the bankrupt, or money had and received to his use; because by adopting the latter form of action, they might enable the defendant to avail himself of his original debt as a set-off (10); but the set-off would not hold against

DECLARATION
AND PLEAD-
INGS.
VENUE.

When trover a concurrent remedy with trespass.

Where the taking is lawful or excusable.

When trover preferable to *assumpsit*.

Goods sold in contemplation of bankruptcy.

(1) *White v. Gainer*, 9 Moore, 41. 2 Eliz. 824. *Darling (Knt.) v. Atkins*, 3 Wils. Bing. 28. 1 C. & P. 324. 33. 2 Saund. 47. (o.)

(2) *Bernal v. Pim*, 1 Gale, 17.

(3) *Tansley v. Turner*, 2 Bing. N. C. 151. 1 Hodges, 267.

(4) *Hewison v. Guthrie*, 2 Bing. N. C. 755.

(5) *Pinnock v. Harrison*, 3 M. & W. 532.

(6) *Brown v. Hedges*, 1 Salk. 290.

(7) *Bishop v. Montague (Viscountess)*, Cro.

(8) *Put v. Rawsterne (Sir William)*, Sir T. Raym. 472. 2 Saund. 47. (p.)

(9) *Cooper v. Chitty*, 1 Burr. 20. *Smith*

v. Mills, 1 T. R. 475. 2 Saund. 47. (p.)

Wyatt v. Blades, 3 Camp. 396. *Stephens v.*

Elwall, 4 M. & S. 260. *Price v. Helyar*, 4

Bing. 597.

(10) *Smith v. Hodson*, 4 T. R. 211.

DECLARATION AND PLEAD- INGS.

When irregular
to declare in
trover.

When a count
in trover and a
count in case
for negligence
should be
joined.

What is sub-
stantially a
count in tres-
pass with a
count in trover.

Where a person
has his election
either to bring
trover or an ac-
tion for money
had and re-
ceived.

Requisites for
the declaration.

Possessory in-
terest of plain-
tiff.

Debtor and
creditor.

Husband and
wife.

a count for goods sold by the assignees as such, or money had and received to their use as assignees after the bankruptcy. (1)

It is irregular to declare in trover after having held the defendant to bail in *assumpsit*. (2)

If it be doubtful, whether the evidence will establish a conversion so as to support a count in trover, a count in case for negligence, &c. should be added, if there be any proof to support it. If there have been a conversion, trover lies, although the goods converted be afterwards restored to the owner, for the restoration only goes in mitigation of damages. (3)

A count in trespass cannot be joined with a count in trover.

In *Weeton v. Woodcock* (4) the first count of the declaration stated, that the plaintiff had demised to T. a certain factory; it then set out a covenant by T. to keep up a steam-engine boiler, and to deliver up the premises at the end of the term with every thing upon them; and alleged, the determination of the term by the bankruptcy of T., and stated as a breach, that the defendants disannexed and removed the boiler, by means whereof, the plaintiff's estate and interest was injured:—It was held, that this was substantially a count in trespass, and could not be joined to a count in trover.

Where a person has his election either to bring trover or an action for money had and received, he may maintain the former, notwithstanding the bankruptcy of the debtor after the cause of action accrued, and that the bankruptcy would be a bar to the latter. (5)

The declaration should state, that the plaintiff was lawfully possessed of the goods in question (6), as of his proper goods and chattels [the omission of these words is fatal after a judgment by default (7), but the defect is cured by verdict (8)], and that being so possessed, he casually lost them, and that they came to the hands and possession of the defendant by finding (9), who afterwards (10) converted (11) them.

The possessory interest of the plaintiff should be described with accuracy. The property in title deeds generally accompanies the ownership of the estate; and therefore the person who was entitled to the estate at the time of the wrongful detention of, or injury to, the deeds, should be the plaintiff (12):—but if a debtor deposit title deeds with his creditor as security for a debt, the interest which the creditor thereby acquires in the deed, may be assigned by him to a third person. (13)

In trover by husband and wife, the declaration ought not to allege the possession in them both (14), nor state the damage to have accrued to them both (15), for, in point of ownership, the whole interest belongs to the husband.

(1) *Thomson v. Frere*, 10 East, 418. *Fair v. M' Iver*, 16 ibid. 135. 1 Chitt. Pl. 147.

(2) *Tetherington v. Golding*, 7 T. R. 80.

(3) *Baldwin v. Cole*, 6 Mod. 212. Bull. N. P. 46. (a.) 7 Bac. Abr. Trover (D.), 806—811. *Wyatt v. Blades*, 3 Camp. 396.

(4) 7 Dowl. P. C. 384.

(5) *Parker v. Norton*, 6 T. R. 695.

(6) 2 Saund. 74. *Nightingale v. Bridges*, Carth. 131. *Harrison v. Bottomley*, 1 Ld. Raym. 1530.

(7) *Swallow v. Aynckiff*, B. R. M. T. 2 Geo. 2. MSS. cit. Selw. N. P. 1367.

(8) *Jones v. Winckworth*, Hardr. 111.

(9) The mode in which the goods came to the hands of the defendant is only inducement, the conversion being the gist of the action. *Isaac v. Clark*, 2 Bulst. 306.

(10) *Tesmond v. Johnson*, Cro. Jac. 428.

(11) *Brown v. Hedges*, 1 Salk. 290.

(12) *Atkinson v. Baker*, 4 T. R. 231.

Phillips v. Robinson, 4 Bing. 106.

(13) *Hobson v. Mellond*, 2 M. & Rob. 342.

(14) *Per Yelverton J. in Draper v. Fuller*, Yelv. 165.

(15) *Buckley v. Collier*, 1 Salk. 114.

Where, in trover against husband and wife, the declaration stated a conversion by both, it was held sufficient after verdict. (1)

It seems, as the conversion is a tort, that the wife may be charged with it in the same manner as with a trespass; that is, the declaration may state, that the husband and wife converted the goods, omitting the words "to their own use." (2)

In trover, as in other actions *ex delicto*, several may be joined as defendants, and one or more may be acquitted, and the rest found guilty.

A party cannot maintain trover against a constable for a wrongful taking of goods under a justice's warrant, without joining the justice as a defendant, if the perusal and copy of the warrant have been given under stat. 24 Geo. 2. c. 44. s. 6. (3)

An action brought to recover a particular sum of money may be described in pleading "as an action for the recovering of the said sum of money," although in form it was an action of trover. (4)

Where in a declaration of trover a deed was described as a certain deed of assignment, purporting to be made between J. S. of the one part and W. R. of the other part, and purporting to be a conveyance from J. S. to W. R. of certain tenements therein mentioned; and, on the production of the deed, it appeared to be a conveyance by lease and release between the same parties:—It was held to be no variance, and that it was sufficiently described in the declaration. (5)

In trover for a seaman's prize-money order, under stat. 49 Geo. 3. c. 123., which was alleged to have been duly made, it was held a fatal variance, where it appeared to have been signed in blank. (6)

In trover for a ship "with the apparel and appurtenances thereto belonging," the plaintiff, having failed as to the ship, cannot set up a distinct title to a new boat and cordage. (7)

Trover will lie for twenty acres of barley, the word "acres" designating the quantity, and not necessarily describing any interest in the land. (8)

The time of the conversion is immaterial, provided it be previous to the commencement of the action. (9) The place is also immaterial: thus, trover lies in England for a conversion in Ireland (10); but a foreigner cannot recover in England in respect of his taking his goods at sea, and bringing them hither by a foreigner of a nation at enmity with his own. (11)

In an action brought against a custom-house officer, the plaintiff declared in trover. Certain questions of law arose in the case, upon which it was agreed, that a special case should be framed for the opinion of the court; one of the questions being, whether the defendant was liable in the action? The cases were exchanged by the parties on the 13th of May, 1837. It was discovered, that similar questions were depending in the court of

DECLARATION AND PLEAD- INGS.

Conversion being a tort, a wife can be charged in the same manner as in trespass.

Several may be joined as defendants.

When a magistrate and a constable should be co-defendants.

Where action brought to recover a particular sum of money.

Deed described as a deed of assignment, instead of a conveyance by lease and release.

Seaman's prize-money order described as duly made, when signed in blank.

For a ship "with the apparel and appurtenances thereunto belonging."

"Twenty acres of barley."

Time of conversion.

Amendment of declaration by substituting a count in tort for one in trover.

(1) *Keyworth v. Hill*, 3 B. & A. 685.

(2) *Draper v. Folkes*, Yelv. 165. *Anon.* 1 Vent. 24.

(3) *Lyons v. Golding*, 3 C. & P. 586., vide *Fletcher v. Wilkins*, 6 East, 283.

(4) *Batchellor v. Salmon*, 2 Camp. 526.

(5) *Harrison v. Vallance*, 7 Moore, 304. 1 Bing. 45.

(6) *Neck v. Dougan*, 2 Stark. 246.

(7) *Shannon v. Owen*, 1 M. & R. 392.

(8) *Joyce v. Hayman*, 1 Alcock & Napier (Irish), 22.

(9) *Wilton v. Girdlestone*, 5 B. & A. 847.

Morris v. Pugh, 3 Burr. 1243.

(10) *Brown v. Hedges*, 1 Salk. 290.

(11) Bull. N. P. 44. (a.)

DECLARATION
AND PLEAD-
INGS.

Queen's Bench upon a similar case, and the plaintiff thereupon suspended his proceedings until that court should have come to a conclusion upon it. In Trinity Term, 1839, that court gave judgment, determining that that action was properly brought in tort for non-feasance, and not in trover. The court of Queen's Bench in Michaelmas Term, 1839, granted a rule nisi on the application of the plaintiff to amend his declaration, by substituting a count in tort for that in trover, which in the following term was made absolute. (1)

PLEADINGS.

"Not guilty" only operates as a denial of the conversion.

The conversion put in issue is a conversion in fact.

The general issue in this action is not guilty.

By a statutory rule of pleading (2), in an action for converting the plaintiff's goods, the plea of not guilty will operate as a denial of the conversion only, and not the plaintiff's title to the goods.

The conversion which is put in issue by the plea of not guilty, since the new rules, is a conversion in fact, and not merely a wrongful conversion. (3) And wherever there has been a conversion in fact, and that the defendant insists that such conversion was lawful, he must confess and avoid it by pleading specially the right or title by virtue of which he was justified in the conversion. (4)

What confesses a conversion.

To an action of trover for several deer, it was pleaded as to the conversion of one deer, that it was wrongfully on the defendant's close doing damage, wherefore the defendant seized it as a distress; which seizing is the same conversion, &c.:—It was held on special demurrer, that the plea was good without the formal commencement of *actionem non*, or prayer of judgment; and that it sufficiently confessed a conversion in fact, and was not bad as amounting to the plea of not guilty, or as an argumentative denial of the plaintiff's possession; and that it was unnecessary to allege, the mode in which the defendant disposed of the distress. (5)

Where there has been no actual conversion, but merely a refusal to deliver on demand.

Where there has been no actual conversion of the goods, but merely a refusal to deliver them on demand, a defendant who pleads not guilty in an action of trover admits thereby only, that the plaintiff has some property in the goods, in respect of which he would be entitled to recover against the defendant; and such admission does not preclude the defendant from shewing, that he is tenant in common with the plaintiff (6), or is otherwise entitled to retain the possession of the goods. And where the defendant in such case has a lien thereon, a doubt has been entertained as to the necessity of his pleading it specially; though, as the lien may be considered as matter of title, the safer way seems to be, to plead it specially, as in the action of detinue. (7)

If the defendant mean to deny the plaintiff's title, he should plead

If the defendant intend to deny the plaintiff's title to the goods, he should plead, that the plaintiff was not possessed of them as of his own property, or as of his own proper goods and chattels as alleged in the declaration; and under this plea it will be incumbent on the plaintiff to prove his title to the

(1) *Legge v. Boyd*, 8 Dowl. P. C. 272.

(2) *Reg. Gen. H. T.* 4 Will. 4. IV. *post*, 2861.

(3) *Tidd's N. P.* 369.

(4) *Stancilffe v. Hardwick*, 2 C. M. & R. 1. 5 Tyrw. 551. 3 Dowl. P. C. 762., *et vide Farrar v. Beswick*, 1 M. & W. 682. *Vernon v. Skipton*, 2 *ibid.* 9.

(5) *Weeding v. Aldrich*, 9 A. & E. 861.

Semble, that if the conversion relied on by the plaintiff was not the seizure, but a subsequent abuse of the distress, he must shew it in reply to the plea. *Ibid.*

(6) *Tidd's N. P.* 369.

(7) *Ibid.* 329. 364. 369., *et vide Tansley v. Crump*, 4 A. & E. 58. *Roscoe's Law Tracts*, 63, 64.

goods, and the defendant may give in evidence any matter tending to disprove it.

If a defendant in trover plead, that the goods "are not nor were the property" of the plaintiff, in manner and form as in the declaration is alleged, (concluding to the country); this will be taken to be an informal plea, traversing the allegation of the declaration, that the plaintiff "was possessed" of the goods "as of his own property;" and therefore, on this plea, it will be a good defence to shew, that the goods, though the property of the plaintiff, had been pledged by him as a security for money. (1)

Where the plaintiff in trover claims under a sale, the defendant, under a plea that the goods are not the plaintiff's property, cannot shew the sale to have been fraudulent; because fraud must be pleaded. (2)

To a declaration in trover by the assignees of a bankrupt, for a policy of insurance, the defendant after stating the existence of mutual accounts between him and the bankrupt, pleaded a lien, by the custom of London, for a general balance due to him as an insurance broker; to which the plaintiffs replied a bill of exchange given and taken as payment for this balance, and not due at the time of the conversion in question; and the court upon demurrer held, that the defendant could not, without pleading it as a defence, rely also on the ground of a mutual credit between the parties to justify the detention of the policy. (3)

Where the declaration in trover stated, that the plaintiff was possessed, as of his own property, of certain cattle, to wit, four horses, which the defendant converted and disposed of to his own use: and the defendant pleaded, first, that they were not the property of the plaintiff; secondly, a judgment recovered against J. F., and that the defendant (a sheriff's officer) seized them under an execution against the said J. F., the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the property of the plaintiff: to which the plaintiff replied, that they were the cattle and property of the plaintiff *modo et forma*; and at the trial it was found by the jury, that they were the property of the plaintiff and J. F. jointly:—the court held, that the issue raised by the defendant was, whether the cattle were the sole property of J. F., and the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover. (4)

In trover for a bill of exchange, the defendant pleaded, that before the conversion A. was lawfully possessed of the bill, and that he indorsed it to B., who indorsed it for a valuable consideration to the defendant; the replication took issue upon the averment of the consideration, which was found for the plaintiff; and the court held, that by this plea the title of the plaintiff was admitted, and that the defendant was not entitled to arrest the judgment, upon the ground, that the title appeared to be in A. (5) They likewise held, that the defendant was not entitled to a repleader. (6)

Where the defendant pleaded, that the goods in dispute were his own property, and that he delivered them to R. R., who delivered them to the

DECLARATION AND PLEADINGS.

that the plaintiff was not possessed.

Plea that the goods "are not nor were the property" of the plaintiff.

Pleading a lien by the custom of London for a general balance.

Where the issue is, whether the goods were the sole property of the plaintiff, but proof of a joint property.

When title of plaintiff admitted to a bill of exchange.

Goods delivered by A. to B., who

(1) *Samuel v. Morris*, 6 C. & P. 620. But whether this plea would not be bad on special demurrer, *quære*?

(2) *Howell v. White*, 1 M. & Rob. 400.

(3) *Hewison v. Guthrie*, 2 Bing. N. C. 755. 5 Scott, 298.

(4) *Farrar v. Benwick*, 1 M. & W. 682.

(5) *Fancourt v. Bull*, 1 Bing. N. C. 681.

(6) *Ibid.* Tidd's N. P. 368.

DECLARATION
AND PLEAD-
INGS.

gives them to
C., but retaken
by A.

Bankruptcy
after cause of
action.

Illusive, but
not fraudulent,
delivery to a
party as owner.

What is put in
issue by a plea,
that the plain-
tiff is not as-
signee.

When the in-
troductory part
of a plea con-
fesses and
avoids the de-
claration.

Justification.

Goods held in

plaintiff, whereupon the defendant took them from the plaintiff, which was the conversion complained of, the plea was holden to be good on special demurrer. (1)

Bankruptcy of the defendant after the cause of action accrued, cannot be pleaded, because the damages in trover are uncertain. (2)

In *Sandys v. Hodgson* (3) it appeared, that the defendant brought trover against D. for a dog, and obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* on the delivery of the dog to the defendant. By the plaintiff's authority D. delivered the dog to the defendant, at the same time demanding it back on behalf of the plaintiff as his property at a time named. Afterwards at the time named the plaintiff demanded the dog, and the defendant refused to deliver it. The plaintiff brought trover, the defendant traversed the plaintiff's property, and also pleaded not guilty, and leave and license; to which last plea the plaintiff replied *de injuriis*: — It was held, that the plaintiff was not precluded from proving his title by having authorised the delivery, and that, on proof of title, he was entitled to a verdict on all the above issues.

In trover by the assignee of a bankrupt, a plea that the plaintiff is not assignee, puts in issue the petitioning creditor's debt and the act of bankruptcy. (4)

To an action of trover by the assignee of a bankrupt for goods of the plaintiff as assignee, laying a conversion by three defendants, G., R., and P., it was pleaded by the defendants R. and P., that, after the act of bankruptcy, and two calendar months before the fiat, the plaintiff as assignee, to wit, by the relation of his title to the act of bankruptcy, though not then appointed assignee, was owner, and entitled to the possession of the goods, and that the bankrupt was possessed of them subject to such title of the plaintiff; that two calendar months before the fiat the defendant R. *bond fide* bought of the bankrupt, who then *bond fide* sold and delivered to R. the said goods at a reasonable price, and that, at the time of the sale, neither of the defendants had notice of any prior act of bankruptcy, whereby R. became possessed of the goods as of his own property, and that he, being so possessed, and P. as his servant, converted them, which is the same grievance, &c. without this, that at the time of the said conversion the goods were the property of the plaintiff as assignee: — It was held on special demurrer to the plea, that the introductory part of it confessed and avoided the declaration, and that the traverse was therefore idle. (5)

Pleas of justification in actions for wrongs are founded on some matter of fact, shewing that the supposed breach of duty or wrongful act was lawful.

In trover the defendant can plead in justification, that he has a special property in the goods, or a lien thereon (6), or a sale in market overt, &c. (7)

The sheriff cannot take in execution goods, which the debtor holds in

(1) *Morant v. Sign*, 2 M. & W. 25. 5 Dowl. P. C. 319. Tidd's N. P. 368.

(2) *Parker v. Norton*, 6 T. R. 695.

(3) 10 A. & E. 472.

(4) *Butler v. Hobson*, 4 Bing. N.C. 290.

(5) *Pearson v. Rogers*, 9 A. & E. 303. *Quare*, Whether the plaintiff might have treated the traverse as immaterial, and pleaded over?

(6) Tidd's N. P. 330. cit. *Alexander v. M'Gowan*, Sitt. after M. T. 3 Geo. 4. *Harrison v. Guthrie*, 2 Bing. N. C. 755.

(7) As to effect of sale in market overt, vide *Horwood v. Smith*, 2 T. R. 755. *Pur v. Humphrey*, 4 N. & M. 430. 2 A. & E. 495.

respect of a lien only ; and when the plaintiff declared in trover, that he was possessed as of his own property of certain goods, &c., to which a justification under a writ of *feri facias* was pleaded ; and the plaintiff replied, that he held the goods in respect of a lien only : — It was held to be no departure. (1)

Where in trover the defendant pleaded, that I. H. was possessed of the goods as of his own property, and that to prevent them being taken in execution, he covinously pretended to sell them to the plaintiff ; and the replication traversed, that I. H. did for the purposes, &c. covinously pretend to sell the said goods : — It was decided, that the replication did not admit, that the goods were the property of How, but that the *onus* was on the defendant of proving a fraudulent sale by How to the plaintiff. (2)

The plea of no property in the plaintiff in trover, means no property as against the defendant. (3)

DECLARATION
AND PLEAD-
INGS.

respect of a
lien.

When replica-
tion does not
admit the right
of property in
a third person.

8. EVIDENCE.

To support trover it is requisite to establish property in the plaintiff, and his right of possession at the time of the conversion by the defendant ; a conversion by the defendant ; and the value of the chattel.

In *Scott v. Lewis* (4), which was an action of trover by the assignees of a bankrupt against the sheriff for goods, it was pleaded, that J. R. sued out a writ of *feri facias* against the bankrupt ; that, it was delivered to the sheriff before the bankruptcy ; that the sheriff seized and sold the goods ; and that no docket had been struck against the bankrupt, neither had the sheriff notice of any act of bankruptcy : to which it was replied, that the judgment was obtained against the bankrupt by *cognovit* in an action commenced by collusion, and that the fiat issued within two months after the seizure : and the defendant rejoined, that the action was commenced adversely : — It was holden, that on these pleadings the plaintiff must begin. (5)

Direct evidence of title in detail consists in the proof of the documents and circumstances, which are essential in point of law ; as by proof of the different steps of bankruptcy, and the assignment, where the suit is by the assignees ; by the probate or letters of administration in the case of an executor or administrator, or by agreement (6) ; by proof of a gift accompanied with a delivery (7), or exchange (8), or sale (9), or pawning of the goods (10), or of an assignment by the owner or his agent having competent authority (11) ; or by sale under an execution (12), or by transfer of a negotiable security. (13)

The possession of land is *prima facie* evidence of title to all minerals under the land. (14)

EVIDENCE.

THE TITLE.

What is requi-
site to support
trover.

RIGHT TO
BEGIN.

Direct evidence
of title.

Possession of
lands.

(1) *Legge v. Evans*, 8 Dowl. P. C. 177.

(2) *Nicolls v. Bastard*, 1 Tyrw. & G. 156.
2 C. M. & R. 659.

(3) *Ibid.*

(4) 7 C. & P. 347.

(5) *Vide ante*, 1798—1805. tit. RIGHT TO
BEGIN AND REPLY.

(6) Bull. N. P. 35. *Flewelling v. Rave*, 1
Bulst. 68.

(7) *Irons v. Smallpiece*, 2 B. & A. 551.

(8) *Hornblower v. Proud*, *ibid.* 327.

(9) *Wilkinson v. King*, 2 Camp. 335.

(10) *Parker v. Patrick*, 5 T.R. 175., *vide*
Horwood v. Smith, 2 *ibid.* 750.

(11) *Ford v. Hopkiss*, 1 Salk. 284. Bull.
N. P. 34. (b.) 35. (a.)

(12) *Payne v. Drews*, 4 East. 523.

(13) *Gill v. Cabitt*, 3 B. & C. 466. *Snow*
v. Peacock, 3 Bing. 406. 3 Stark. Ev. 3d ed.
1149.

(14) *Rowe v. Brenton*, 8 B. & C. 737.

Evidence.

Evidence of possession under a demise of all mines and minerals.

Under a demise of all mines and minerals lying under a large continuous tract of waste land, working under one part of the surface, is evidence of possession of the entire subject of the demise. (1)

Where the plaintiff was in the possession of land in which he had sunk a shaft and raised ore, it was holden in trover against the defendant, who had a shaft in land adjoining, and had taken away the ore so raised by the plaintiff, that it was sufficient *prima facie* evidence of the plaintiff's title to the ore. (2)

Identity of goods.

If doubts exist respecting the possession of the goods in question, it is requisite to shew the plaintiff's title, and to establish the identity of the goods.

When plaintiff has not had actual possession, he must resort to proof of his title.

When the plaintiff has not had actual possession, he must resort to proof of his title in order to shew his right of possession: as by evidence of the transfer of a ship by means of the proper documents (3); or of a title to any other chattel by purchase, where there has been no delivery (4); or of his title as executor under a will, where the conversion was previous to the taking of actual possession, which must be proved by means of the probate (5); or of his title, as lord of a manor, to a wreck or estray which has been converted by the defendant before seizure by the lord. (6)

Conflicting titles.

Where there is a conflict as to the title and right of possession between parties, and that the title of either would prevail in the absence of proof of title and right of possession in the other, it is usually necessary to go into evidence of title, and it is not sufficient to rest upon proof of mere possession: as in cases of disputed titles between vendors and purchasers of personal chattels or their assignees, or between the sheriff and the owner of property, or his assignees under a commission of bankruptcy. (7)

In an action of trover, where the question was, whether goods were the property of the plaintiff alone, or jointly with J. S., it was held, that whether J. S. were admissible to prove this fact or not, yet, as plaintiff and J. S. had made joint orders for the disposition of the goods, the plaintiff alone could not recover. (8)

Possession is *prima facie* evidence of property in negotiable instruments.

Possession is *prima facie* evidence of property in negotiable instruments. Therefore, in trover for a bank note, it is not a *prima facie* case for the plaintiff to prove, that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called to shew his title to the note, without evidence from the other side, that he got possession of it *mala fide*, or without consideration. (9)

In trover for bank notes to prove, that they belonged to the plaintiff, the evidence was, that they had been delivered out by a banker's clerk, (to what person he could not tell) in payment of a check, which was payable to the plaintiff or bearer:—this was held to be *prima facie* evidence of property. (10)

If the plaintiff has never had possession of the chattel, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title unless the plaintiff can prove a better, it is necessary for the latter to

(1) *Taylor v. Parry*, 1 M. & G. 604.

(2) *Rowe v. Brenton*, 8 B. & C. 737.

(3) 3 Stark. Ev. 3d ed. 1146.

(4) *Ibid.*

(5) 2 Saund. 47. (a.) *Hudson v. Hudson*, Latch. 214. cit. *Gordon v. Harper*, 7 T. R. 13.

(6) *Smith v. Miles*, 1 T. R. 480. F.N.B. 91.

(7) 3 Stark. Ev. 3d ed. 1147.

(8) *Nathan v. Buchland*, 2 Moore, 153.

(9) *King v. Milsom*, 2 Camp. 5.

(10) *Greenstreet v. Carr*, 1 *ibid.* 551.

resort to strict evidence of title (1); in fact, proof of the special circumstances is essential in all cases, where the plaintiff claims by virtue of his title, independent of actual possession.

If the action be brought against a mere wrong-doer, the mere fact of possession by the plaintiff is usually sufficient evidence of title, notwithstanding the plaintiff claims under a title which is defective, the possession of property being *prima facie* evidence of ownership (2); and bare possession is *prima facie* sufficient against a mere wrong-doer. Thus, one who finds a jewel may maintain trover against any one who converts it except the owner (3); for the title depending upon possession, however recent, must prevail against a mere wrong-doer who cannot rebut it. So an uncertificated bankrupt may maintain trover for goods acquired since his bankruptcy, against all but his assignees. (4)

The mere possession of a ship by one as owner is sufficient *prima facie* evidence of ownership. (5) Again, where the plaintiff had possession of a ship under a transfer, which was void for want of compliance with the register acts, it was held to be a sufficient title against a stranger, who seized part of the wreck of a ship. (6)

The consignee of goods landed on the defendant's wharf may prove his title by parol, although the bill of lading indorsed to him cannot be received in evidence for want of a stamp. (7)

Where the plaintiff and defendant each claimed a horse, and the former undertook to relinquish his claim, if the latter, who was in possession of the horse, would swear that it was his, which he did: it seems, that this is not conclusive evidence of property. (8)

If a plaintiff in trover, to establish a property, offer written evidence, which he fails in doing, he will not be allowed to recur to and rely on a mere possessory title. (9)

Where issue was joined upon a plea of not guilty in trover, and the plaintiff having proved property, demand, and refusal, and the defendant offered to prove a lien:—It was held, not to be admissible on this issue, under Reg. Gen. Hilary Term, 4 Will. 4.; because such evidence would contradict the inducement in the declaration, alleging, that the plaintiff was possessed. (10)

In an action of trover for household furniture, &c., where the declaration stated, that the plaintiff was possessed of the goods as of his own property, the defendants, who were the assignees of a bankrupt, pleaded 1. that they were not guilty of the conversion; and 2. that the plaintiff was not possessed of the goods as of his own property:—It was held at Nisi Prius, that, in order to admit evidence of the rights of the defendants as assignees, on the ground, that the goods were in the order and disposition of the bankrupt,

EVIDENCE.

Action against a mere wrong-doer.

Consignee of goods can prove his title by parol.

What is not conclusive evidence of property.

Defendant cannot prove a lien under a plea of not guilty.

What is evidence under the plea, that the plaintiff was not possessed of the goods as of his own property. Where title of

(1) 3 Stark. Ev. 3d ed. 1146.

(2) *Webb v. Fox*, 7 T. R. 397. *Sutton v. Buck*, 2 Taunt. 302. *Robertson v. French*, 4 East, 130. *Thomas v. Foyle*, 5 Esp. N. P. C. 88.

(3) *Armory v. Delamirie*, Str. 505. 2 Saund. 47. (a.)

(4) *Webb v. Fox*, 7 T. R. 391. and authorities therein cited. *Fowler v. Down*, 1 B. & P. 44. *Chippendale v. Tomkinson*, Cooke's B. L. 260. *Evans v. Brown*, 1 Esp.

N. P. C. 170. *La Roche (Bart.) v. Wakeman*, Peake's N. P. C. 190. *Silk v. Osborn*, 1 Esp. N. P. C. 140.

(5) *Robertson v. French*, 4 East, 130.

(6) *Sutton v. Buck*, 2 Taunt. 302.

(7) *Davis v. Reynolds*, 1 Stark. 115.

(8) *Garnet v. Ball*, 3 ibid. 160.

(9) *Sheriff v. Cadell*, 2 Esp. N. P. C. 617.

(10) *White v. Teal*, 12 A. & E. 106.

EVIDENCE.

assignees
should be
pleaded.

In trover for
ore.

that defence should have been specially pleaded; but the court of Exchequer were of opinion, that the defence relied upon was evidence under the plea, that the plaintiff was not possessed of the goods as of his own property. (1)

Upon a plea of "not possessed" in trover for ore by the lessees of a mine, it is sufficient for the plaintiffs to prove their occupation of the mine from which the ore was dug, without shewing title in their lessors. Such occupation being proved, it is no objection to the right of the plaintiffs to a verdict on that issue, that the lease was not executed by all the parties named in the lease as lessors; and the objection, if tenable, would only go in reduction of damages. (2)

Lender of
money, sued for
a deed delivered
to him as a se-
curity by his
debtor.

A plaintiff being possessed of the lease of a messuage, by assignment delivered it to F., with authority to raise money on the security of the deed. The defendant who had advanced money which was not repaid, having refused to deliver up the deed, the plaintiff sued him in trover:—It was held, that the defendant might give these facts in evidence under a plea, that the plaintiff was not possessed of the deed as his own property at the time of the action, and that the plaintiff was not entitled to recover. (3)

The fact, that after a fiat had been sued out, certain creditors of the bankrupt delivered up to the assignees goods which they had received from the bankrupt before the fiat, and before the delivery of certain goods by the bankrupt to the defendant, was held not admissible evidence against defendant in an action of trover brought against him by the assignees. (4)

THE CONVERSION.

The plaintiff must prove that, whilst the property was his, it came into the defendant's possession, who converted it to his own use. (5)

A conversion is the gist of the action; the manner in which the goods came into the hands of the defendant is mere inducement, and need not be proved (6); but the circumstances under which the chattels came into the hands of the defendant are material, with a view to evidence of a conversion. If the taking itself was tortious, the taking *per se* amounts to a conversion; but if the original possession was lawful, as by delivery, finding, or bailment, then either direct proof of conversion by evidence of some tortious act, or indirect evidence by a wrongful detention after a demand and refusal, is essential. (7)

Where the plaintiffs sold goods to T., who paid for them, and was to take them away, but the defendant becoming possessed of the place in which the goods were deposited, the plaintiffs' attorney, accompanied by T., demanded them of the defendant, telling him, that they belonged to the plaintiffs, and that they had sold them to T.; to which the defendant answered, that he would not deliver them to any person whatsoever, and afterwards the plaintiffs repaid the money to T., and brought trover against the defendant:—It was held, that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plaintiffs, after they had repaid the money to T., was not necessary. (8)

- (1) *Isaacs v. Belcher*, 8 C. & P. 714. 5 M. & W. 139. (2) *Taylor v. Parry*, 1 M. & G. 604. (3) *Owen v. Knight*, 4 Bing. N. C. 54. (4) *Backhouse v. Jones*, 6 *ibid.* 65. (5) *Horwood v. Smith*, 2 T. R. 750. 2 (6) *Leach*, C. C. 586. *n.*, et vide *Parker v. Pritchard*, 5 T. R. 175. (7) *Bull. N. P.* 32. (*n.*) (8) *Brues v. Roe*, 1 Sid. 364. 3 Stat. Ev. 3d ed. 1156. (9) *Pattison v. Robinson*, 5 M. & S. 105.

A conversion seems to consist in any tortious act, by which the defendant deprives the plaintiff of his goods, either wholly or but for a time (1); when such an act can be proved, evidence of a demand and refusal is unnecessary (2)

EVIDENCE.

Conversion consists in any tortious act.

What act will amount to a conversion when proved is a question of law. The proof is either direct or presumptive: direct, as by evidence, that a carrier broke open a box entrusted to him for carriage (3); or that he sold the goods (4); or that the defendant without authority forcibly took and carried away the goods (5), or injured them (6), or consumed part of them—as that the defendant drew out part of the liquor (7) delivered to him to be carried; or caused the plaintiff to pay money for the release of goods from a wrongful distress (8); or that a carrier delivered goods by a mistake to a third person (9); or that the defendant took cattle by way of trespass and drove them away. (10)

What act will amount to a conversion is a question of law.

A party may be guilty of a conversion in dealing with goods as his own, and preventing the owner from obtaining possession of them, although he has had but a constructive and not an actual possession. Thus, the taking an assignment by way of pledge, of tobacco lodged in the king's warehouse, from a broker who had purchased it there in his own name for his principal, and a refusal to deliver it to his principal after notice and a demand made by him, no other but the person in whose name it is warehoused being able to take it out, is a conversion. (11)

Constructive conversion.

The ordinary presumptive proof of a conversion consists in evidence of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant who has possession of them. (12)

Presumptive evidence.

This proof is always necessary where the goods came lawfully into the defendant's possession, as by finding, or upon a bailment, or delivery by the owner (13); but it is unnecessary, where a tortious taking of the goods can be proved. (14)

Previous to the proof of a demand and refusal, evidence of the possession by the defendant is essential (15); and proof of a possession by the servant of the defendant is insufficient, unless it be proved, that he was his agent for the purpose, or that the agent was employed and the goods delivered in the course of trade. (16) Thus, a delivery to the servant of a pawnbroker in the shop, is evidence of a delivery to a pawnbroker. (17)

In many instances proof of notice of the particular circumstances is ne-

Proof of notice when essential.

(1) *Keyworth v. Hill*, 3 B. & A. 685. *Peter (Lord) v. Heneage*, 12 Mod. 519. Bull. N. P. 45. (b.) 46. (a.)

(2) *Foradick v. Collins*, 1 Stark. 173.

(3) 2 Saund. 47. (a.)

(4) Ibid.

(5) *Baldwin v. Cole*, 6 Mod. 212. *M'Combie v. Davies*, 6 East, 540. Bull. N. P. 44. (a.) 2 Saund. 47. (a.)

(6) 2 Saund. 47. (a.)

(7) *Richardson v. Atkinson*, Str. 576. *Mulgrave v. Ogden*, Cro. Eliz. 219.

(8) *Shipwick v. Blanchard*, 6 T. R. 298.

(9) *Foul v. Harbottle*, Peake's N. P. C. 68. *Dufresne v. Hutchinson*, 3 Taunt. 117. *Syeds v. Hay*, 4 T. R. 260.

(10) *Bruen v. Roe*, 1 Sid. 264., et vide

Baldwin v. Cole, 6 Mod. 212. 3 Stark. Ev. 3d ed. 1157.

(11) *M'Combie v. Davies*, 6 East, 538. 3 Stark. Ev. 3d ed. 1158., vide *Jackson v. Anderson*, 4 Taunt. 24. *Bloxam (Knt.) v. Hubbard*, 5 East, 407.

(12) *Baldwin v. Cole*, 6 Mod. 212., et vide *M'Combie v. Davies*, 6 East, 540. *Bloxam (Knt.) v. Hubbard*, 5 ibid. 407.

(13) *Bruen v. Roe*, 1 Sid. 264. *Nixon v. Jenkins*, 2 Hen. Black. 135.

(14) *Baldwin v. Cole*, 6 Mod. 212. *Beckwith v. Elsey*, Clayt. 112. pl. 191.

(15) Bull. N. P. 44. (a.)

(16) *Jones v. Hart*, 2 Salk. 441.

(17) Ibid. 3 Stark. Ev. 3d ed. 1161.

EVIDENCE.

cessary, in order to shew, that the act of the defendant amounts to a conversion. Thus, where an agent has the goods of his principal in his custody, and delivers them according to the order of the principal, without notice of a previous transfer by the principal, he is not guilty of a conversion. (1)

Sale of a mare under stat. 5 & 6 Will. 4. c. 59. s. 4.

Where a mare was distrained damage feasant by A., and detained in the pound by the pound keeper B. for several days, and B. supplied the mare with food while in the pound, and A. and B. joined in selling the mare for the keep:—It was held, in an action of trover by the owner of the mare against A. and B., that if they *bond fide* and honestly intended to sell the mare under stat. 5 & 6 Will. 4. c. 59. s. 4. (the Cruelty to Animals' Act), they were entitled to notice of action, and to have the venue laid in the proper county; but on these facts the judge would not nonsuit, but left it to the jury to say, whether the defendants meant *bond fide* to act upon the provisions of that statute, and that if they did, the defendants were entitled to their verdict. (2)

Proof of a demand.

In some instances proof of a demand is necessary, in order to shew, that a detention originally legal became illegal. (3)

Collusive sale of goods on the eve of bankruptcy.

The receipt of the money does not amount to a conversion, for, until demand, the defendant may have no reason to consider the plaintiff entitled; and until the demand be made, it is uncertain, whether he may not affirm the transaction. (4) So, likewise, where a trader made a collusive sale of goods on the eve of bankruptcy, it was held, that the assignees in trover against the vendee must prove a previous demand and refusal (5), "because they might either affirm or disaffirm the contract; and if they thought proper to disaffirm it, they ought to have demanded the goods." Where goods have been pawned to secure an advance of money in an usurious contract, the owner cannot recover the goods in trover, without tendering the money and legal interest (6), upon the general equitable principle, that he who seeks equity must do equity. (7)

Conversion of a landau.

In trover for a landau, proof of a demand of the landau, and non delivery in pursuance of it, is evidence of a conversion. (8)

Party having a lien, relying upon a different right.

If one having a lien upon the goods, when they are demanded of him, claim to retain them upon a different ground, making no mention of the lien, trover may be maintained against him without evidence of any tender having been made of the amount of his lien. (9)

Bailor not having any lien upon goods.

Where the captain of a ship who had taken goods on freight, and claimed to have a lien upon them, delivered them to a bailee; and the real owner demanded them of the latter, but who refused to deliver them without the directions of the bailor:—It was held, that the bailor not having any lien upon the goods, the refusal was a sufficient conversion. (10)

Vendor of goods against

In *Thompson v. Trail* (11) it appeared, that a vendor shipped, by order of the vendee, goods which by the bill of lading were consigned to a third

(1) *Sasby v. Wynne*, K. B. H. T. 1825. cit. 3 Stark. Ev. 3d ed. 1160. n. *Ogle v. Atkinson*, 5 Taunt. 789.

(2) *Mason v. Nesland*, 9 C. & P. 575.

(3) *Jones v. Fort*, 9 B. & C. 764. post. 2710.

(4) 3 Stark. Ev. 3d ed. 1160.

(5) Per cur. in *Nixon v. Jenkins*, 2 Hen. Black. 135.

(6) *Fitzroy v. Guillim*, 1 T. R. 133.

(7) *Ibid.*, et vide *Bosquet v. Desbaret*, 22 Vin. Abr. Usury, 315. [Q.]

(8) *Watkins v. Woolley*, Gow's N. P. C. 63.

(9) *Boardman v. Silk*, 1 Camp. 410. n.

(10) *Wilson v. Anderson*, 1 B. & Ad. 480.

(11) 9 D. & R. 31. 6 B. & C. 36. 2 C. & P. 334.

person at a foreign port; before the vessel sailed, the vendee stopped payment, and the vendor thereupon demanded the goods of the captain, without tendering freight or expenses of unshipping; but the captain refused to deliver the goods, because he had signed a bill of lading for the consignee:—which was held to be, sufficient evidence of a conversion to maintain trover at the suit of the vendor.

EVIDENCE.

captain of a vessel.

A defendant received from A. some bacon, the property of a bankrupt, and the messenger under the commission asked him, if he had not got some bacon of the bankrupt's; to which he replied, that he had some belonging to A.; upon which the messenger desired him to take care of it, and not to part with it, as more would be heard of it; afterwards the defendant allowed the bacon to be returned by A. to the person from whom A. had received it:—It was holden, that this was evidence of a conversion. (1)

Property of a bankrupt.

In the case of husband and wife, if the husband alone sue, he must prove a conversion of the goods of the wife after marriage. If the husband and wife join, they can prove a conversion of the goods (which were the wife's sole property) either before or after marriage. (2) In an action against the husband and wife, the plaintiff must prove a conversion by the wife before marriage, or a joint conversion, or a conversion by the wife alone after marriage (3), according to the allegations in the declaration. But proof of a conversion by the husband alone, will warrant a verdict against himself alone, although it be alleged, that they jointly converted the goods to their own use. (4) A declaration against husband and wife for converting the plaintiff's goods, is supported by proof of any joint act by which the plaintiff was deprived of his property. (5)

Conversion by husband and wife.

Proof of demand and refusal by an agent acting in the course of his employment, is evidence of a conversion by the principal. Thus, proof of a demand on, and a refusal by, the servant of a pawnbroker, who answers, that he has lost the goods, is evidence of a conversion by the master. (6) So the sheriff is liable for a conversion by his bailiff, and so are all, who indemnify the sheriff. (7)

Conversion by an agent.

In trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all; therefore, where the plaintiff brought trover for goods against A. and B. bankrupts, and C. and D. their assignees, and proved, that the bankrupts, before the bankruptcy, received and afterwards disposed of the goods by way of pledge, having no authority so to do; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand; and the jury found all the defendants guilty, there being only one count in the declaration:—It was holden, that the evidence did not warrant such finding. (8)

Several defendants cannot be found guilty on the same count, without proof of a joint conversion.

Where A. purchased goods of B. for C., who gave A. his acceptance for their amount; and C. having become bankrupt, A. proved the acceptance under the commission, and afterwards returned the goods to B., on which

(1) *Hawkes v. Dunn*, 1 C. & J. 413. 519. v. *Fulkes*, Yelv. 166. Bull. N. P. 46. (a.)
 (2) 2 Saund. 47. (a.) *Smalley v. Kerfoot*, Str. 1094. Andr. 245.
 (3) Ibid. 3 Stark. Ev. 3d ed. 1163.
 (4) *Draper v. Fulkes*, Yelv. 165. Anon. (6) *Jones v. Hart*, 2 Salk. 441.
 1 Vent. 24. (7) 3 Stark. Ev. 3d ed. 1163.
 (5) *Keyworth v. Hill*, 3 B. & A. 685., (8) *Nicoll v. Glennie*, 1 M. & S. 588.
 vide *Berry v. Nevis*, Cro. Jac. 661. *Draper*

EVIDENCE.**DOCUMENTARY EVIDENCE.**

When not requisite to produce a power of attorney.

Where judgment against assignees of a bankrupt, as well as the writ of execution, must be proved.

Whether a deed of assignment be fraudulent or not, is a question for the jury.

When lease must be produced.

Notice to produce.

Proof of notice.

C.'s acceptance was destroyed ;— it was decided, in an action of trover by the assignees of C., that the jury were warranted in finding, that A. and B. had been guilty of a joint conversion. (1)

Where a written demand in trover made by A. B., stated, that he held the plaintiff's power of attorney ; and the defendants' attorney said, in the presence of the defendants, that he would admit the service of the demand and tender of the charges, but that the defendants declined to deliver the goods, and would leave A. B. to seek such remedy, as the law would give him :— It was held, that it was not necessary on the trial of the cause to produce the power of attorney. (2)

In trover by the assignees of a sheriff against the assignees of a bankrupt, for taking goods which the former claimed under an execution issued against the bankrupt's effects before the bankruptcy :— It was held, that such assignee must prove the judgment against the assignees of the bankrupt as well as the writ of execution, unless it appeared from the record or judge's notes, that the defendants were the assignees of the bankrupt. (3)

If a person, expecting that a *fiery facias* will be sued out against him, make an assignment by deed of his goods to trustees for the benefit of his creditors, and the goods be afterwards taken under the *fiery facias*, and an action of trover for them be brought against the sheriff by the assignees, it will be a question for the jury under all the circumstances, whether the deed was fraudulent or not ; that is, whether it was *bond fide* meant to convey the goods to the trustees for the benefit of the creditors generally, or whether it was a pretext only, and the goods were, notwithstanding the deed, really to belong to the assignor ; and this is a question of fact, and not a question of law. The fact, that a deed of this kind was executed with intent to avoid a particular execution, does not, in point of law, make it void ; neither will the fact of the assignee remaining in possession, according to the terms of the deed, set it up, if the jury think, that the deed was a fraud. (4)

Where the carriage of A. being on the premises of B. was seized by C. for rent due by B. to his landlord D. ; and in an action of trover brought by A. against C., a witness proved, that B. had held the premises of D. for more than a year, but that he had a lease of them :— It was held, that the lease must be produced and given in evidence, and that B.'s acquiescence in the distress would not dispense with such proof. (5)

There is no occasion to give notice to produce a mere notice ; for the copy of a notice is itself deemed an original, and may be given in evidence with proof of service, without notice to produce the counterpart delivered. (6)

In an action of trover it is not necessary to give notice to produce a written demand of the thing for which the action is brought. (7)

In trover for the certificate of a ship's registry, the certificate may be proved

(1) *Robson v. Alexander*, 1 M. & P. 448.

(2) *Leuchart v. Cooper*, 7 C. & P. 119.

(3) *Glasier v. Eve*, 1 Bing. 209. 8 Moore, 46.

(4) *Riches v. Evans*, 9 C. & P. 640.

(5) *Shepherd v. Cafe*, 5 *ibid.* 418.

(6) *Colling v. Tyrewood*, 6 B. & C. 398.

Swire v. Hubbard, 4 Esp. N. P. C. 303.

Gottlieb v. Danvers, 2 *ibid.* 455.

(7) *Hammond v. Plank*, Penke's N. P. C. 232. n.

by the production of the registry from which it was copied, though no notice be given to produce the certificate itself. (1)

EVIDENCE.

If a verbal demand and a demand in writing be made at the same time for the purpose of bringing an action of trover, and the one have no reference to the other, evidence of the verbal demand is sufficient, without the production of the writing. (2)

If the required instrument be in court at the time of the trial, although no notice be given to produce it, the court would, it seems, allow secondary evidence of it, if the party in whose possession it is, refuse to have it given in evidence. (3)

Party refusing to produce an instrument.

In trover for a bond, the plaintiff will be allowed to give parol evidence of it, to support the general description of the instrument in the declaration, without giving notice to produce the original. (4)

Parol evidence of a bond.

And where the plaintiffs sued in trover for goods, of which they alleged they had been deprived by fraud in the defendants' agent, it was held, that they might prove the contract made by the agent, without calling him as a witness, although the defendants were not privy to the fraud. (5)

Contract by agent for goods.

A conversion is, it seems, a presumption which in point of law a jury ought to make from such evidence, unexplained by circumstances; but it is a presumption in law and fact; and if the jury simply find the fact of a demand and refusal, the court cannot infer a conversion. (6)

INSUFFICIENT EVIDENCE OF A CONVERSION.

Where the court cannot infer a conversion.

But it seems, in general, evidence of some tortious act is essential to a conversion, and that it is not sufficient to prove a mere nonfeasance. (7)

Evidence of a tortious act essential.

The mere taking away and destroying a part of the property, which is in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to enable the party entitled to maintain trover for the whole. (8)

Taking away and destroying a part of the property.

Where, in trover for a deed, the evidence of conversion was, that when the deed was demanded from the defendant, he said he would deliver it up; but that it was then in the hands of his attorney, who had a lien upon it:—it was held insufficient. (9)

Deed in the hands of an attorney.

On a demand of goods by the real owner, the defendant refused to deliver them, stating as his reason for the refusal, that they had been attached in his hands by a foreign attachment in a suit against a third party, from whom he had received them as his own, which was the fact:—It was held, that there was no evidence of a conversion. (10)

Goods under an attachment.

Where a defendant in an action of trover stated, that he sold the property in question on the plaintiff's account, it was holden not to be *prima facie* evidence of a conversion. (11)

Selling property on account of another.

In an action of trover against the defendant for not delivering some wine deposited with her by way of security for an advance of money, it was held,

Third party retaining possession.

(1) *Bucher v. Jarratt*, 3 B. & P. 143.

(2) *Smith v. Young*, 1 Camp. 439.

(3) *Roe d. Haldane v. Harvey*, 4 Burr. 2484.

(4) *How v. Hall*, 14 East, 374. *Scott v. Jones*, 4 Taunt. 865. *Colling v. Treweek*, 6 B. & C. 398. *Cowan v. Abrahams*, 1 Esp. N. P. C. 50.

(5) *Irving v. Motly*, 7 Bing. 543. 5 M. & P. 380.

(6) *Mires v. Solabay*, 2 Mod. 242. *Le*

Case del Chancellor, &c. de Oxford, 10 Co. 57. 2 Rol. Abr. Trial. (8.), 693. *Smith v. Milles*, 1 T. R. 478. 3 Stark. Ev. 3d ed. 1161.

(7) *Bromley v. Corwell*, 2 B. & P. 438.

(8) *Philpott v. Kelley*, 3 A. & E. 106.

(9) *Smith v. Young*, 1 Camp. 439.

(10) *Ferrall v. Robinson*, 2 C. M. & R. 495. 4 Dowl. P. C. 242. 1 Gale, 244.

(11) *English v. Charters*, 2 Stark. 30.

EVIDENCE.

that it was not sufficient evidence of a conversion to shew, that her son, who acted as her general agent, refused to give it up; and that it was necessary to prove, that such agent acted under a special direction, in order to make the defendant liable. (1)

Persons representing that they acted by the commands of the defendant.

In trover to recover the value of a quantity of bricks, evidence that men fetched them away, saying, that they were ordered by the defendant so to do, and that his name was painted on the cart in which they were taken, is not evidence to go to a jury to connect the defendant with the taking them away. (2)

Refusal to deliver property to assignees.

Where A., as broker for B., sells goods which are in A.'s custody to C., to be paid for by the acceptance of D.; and upon the insolvency of D., A. obtains from C. an order to sell the goods and apply the proceeds to meet the acceptance; and C. becomes bankrupt; and A. delivers the goods to B. who subsequently returns them to A., after which they are demanded by the assignees of C.; the jury or the court, upon a special case, may infer the adoption by B. of the act of A. in obtaining the order, and neither the delivery of the goods to B., nor the refusal to deliver them to the assignees, amounts to a conversion. (3)

Receipt of bills of exchange.

Where bills of exchange were delivered by a trader in contemplation of bankruptcy to a creditor, with a view of giving him the preference, and the amount due on the bills was received by him after the bankruptcy:—It was holden, in an action of trover by the assignees to recover the bills, that the receipt of the money was not a conversion, and therefore it was necessary for them to prove a demand and refusal before the bills became due. (4)

Papers in the hands of an attorney.

The widow and administratrix of an insolvent, being applied to by his assignees for some papers that, had been in his possession at the time of his decease, answered, that they were in the hands of her attorney:—It was held, not to be sufficient evidence of a conversion to sustain an action of trover. (5)

COMPETENCY OF WITNESS. (6)

In *Ward v. Haydon* (7) it was ruled by Lord Kenyon at Nisi Prius, that the defendant in an action of trover, who had suffered judgment by default, was a competent witness for his co-defendant who had pleaded not guilty; and his lordship observed, that by reason of the judgment by default, the cause was at an end with regard to the witness, that he was not liable to the costs of the issue tried against the other defendant, and was not himself released, whatever might be the event of that issue. (8)

Witness to prove property in himself.

In *Ward v. Wilkinson* (9) it was decided, in an action of trover for goods in the defendant's possession, which were claimed by the plaintiff, that a witness was competent to prove, that the goods belonged to him, and had been fraudulently obtained from him by the plaintiff, because the verdict could not be evidence for or against the witness in any subsequent action.

Assignees of bankrupt.

In an action of trover by assignees of a bankrupt for goods in the possession of the defendant, who had obtained them under a sale from the bankrupt (the validity of which transaction the plaintiffs disputed), a third

(1) *Pothonier v. Dawson*, Holt's N.P.C. 383.

(2) *Everest v. Wood*, 1 C. & P. 75.

(3) *Bailey v. Culverwell*, 2 M. & R. 564.
8 B. & C. 448.

(4) *Jones v. Fort*, 9 B. & C. 764. 4 M. & R. 547.

(5) *Canot v. Hughes*, 2 Bing. N. C. 448.

(6) *Ante*, 1711—1792. tit. EVIDENCE.

(7) 2 Esp. N. P. C. 553. *Ward v. Foster*,
Peake's Add. Cas. 126., and vide *ante*, 1711—1792. tit. EVIDENCE.

(8) Vide etiam *Chapman v. Green*, 3 Camp. 333, 334. n.

(9) 4 B. & A. 410.

person was held competent for the defendant to prove, that the goods belonged neither to the plaintiff nor to the defendant, but to himself. (1)

EVIDENCE.

Where a party, who had been employed by the plaintiff to procure a bill of exchange to be discounted, lodged it instead with the defendant, as a security for a debt due to the defendant, he was held to be a competent witness for the plaintiff in an action of trover brought by the plaintiff for the recovery of the bill. (2)

Party employed to procure the discounting of a bill.

In an action of trover for goods, the party who sold them to the plaintiff, on an understanding, that if they were not paid for, they were to be returned, is a competent witness for the plaintiff, although he has not been paid, and the plaintiff's succeeding in the action will enable him to have them back. (3)

Vendor of goods.

In *Nix v. Cutting* (4) it was decided in an action of trover for a horse alleged to be the plaintiff's property, that a witness was competent to prove, on the part of the defendant, an agreement between the plaintiff and the witness, that the latter should take the horse as a security for a sum of money due to him from the plaintiff, and should sell it, if the money were not repaid on a certain day; and that, on default of payment, the witness sold the horse to the defendant. An objection was taken against the witness, that, by selling the horse, he had warranted it to the defendant to be his property, to whom he would be liable over, if the plaintiff succeeded in the action:—But Chief Justice Mansfield observed, "I cannot possibly see any objection to his proving it, for as between the witness and the plaintiff, or the witness and the defendant, the verdict which is obtained upon his testimony in this cause, will be of no avail to him."

In trover for a deed, which defendant admitted he detained at the request of J. S., and in the detention of which the latter was actually interested:—It was held, that the declarations of J. S. in favour of plaintiff's claim were admissible in evidence, but that he was properly rejected as being an incompetent witness. (5)

Declaration of the person ordering the property to be retained.

In trover, damages are the sole object of the action; but special damages are not recoverable, if not laid in the declaration. (6)

DAMAGES.

Damages the object of the action.

"The general rule in trover (7) is, that the damages are measured by the value of the thing taken;" and if the defendant only plead, that he did not convert the goods, his counsel will not be allowed to cross-examine the plaintiff's witnesses, to shew in mitigation of damages, that the goods taken really belonged to a third person. (8)

In trover the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages, the value at a subsequent time, in their discretion. (9)

Jury not limited to find as damages, the mere value of the property, at the time of the conversion.

By stat. 3 & 4 Will. 4. c. 42. s. 29. "the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover."

Stat. 3 & 4 Will. 4. c. 42 s. 29.

(1) *Ward v. Wilkinson*, 4 B. & A. 410.
Nix v. Cutting, 4 Taunt. 18. Doe d. *Bath v. Clarke*, 3 Bing. N. C. 429.

(5) *Harrison v. Vallance*, 1 Bing. 45. 7 Moore, 304.

(2) *Fancourt v. Bull*, 1 Bing. N. C. 681.

(6) *Evans v. Lewis*, 3 Dowl. P. C. 820.

(3) *Banks v. Kain*, 2 C. & P. 597.

(7) Per Patteson J. in *Fisch v. Blount (Bart.)* 7 C. & P. 478.

(4) 4 Taunt. 18.

(8) *Ibid.*

(9) *Greening v. Wilkinson*, 1 *ibid.* 695.

EVIDENCE.

Acceptance of
part does not
wave the tort.

Deterioration
of property
while detained
by defendant.

Unstamped
guarantee.

Lost bank
note.

Bill of ex-
change.

Coal mines.

Disbursements
by auctioneer.

The acceptance of part does not affirm the taking so as to wave the tort, but the amount received will go in reduction of damages. (1)

In an action of trover, the plaintiff cannot it seems recover damages for the deterioration of the property while detained by the defendant. (2) Special damage, however, may be recovered in trover, if laid in the declaration. Therefore, where in trover for a horse it was laid, as special damage, that the plaintiff was obliged to hire other horses, it seems, that the amount of the damages should be the value of the plaintiff's horse when taken, and the sum he paid for hire, deducting what would have been the expense of keeping his own horse for the time. (3)

In trover for an unstamped guarantee mutilated by the defendant, the plaintiff is entitled to such damages, as he might have recovered in an action on the guarantee. (4)

A. having been bail for D. went, accompanied by B. and C., to the lodgings of D., telling her that B. and C. were sheriff's officers, who would take her to jail if she did not give him security for his debt. B. and C. were not officers, and had no authority to take D. D. gave A. a number of articles, and signed a paper stating, that the articles were deposited with A. for security, and that he might sell them if he was not paid in forty-two days: — It was held, that D. might recover the value of the articles in trover; and that as B., C., and D. acted in concert, the verdict must pass against all three, although it appeared, that C. and D. never had any of the goods. (5)

In trover for a lost bank note, the acceptance of part of the produce does not affirm the taking, so as to wave the tort, but the amount received, will go in reduction of damages. (6) And where A., as a cloak for an usurious loan, purchased malt of B. for ready money, which he immediately resold to B. at an advanced price payable in bills, the malt to be held by A. as a security; and B. having demanded the malt, without paying the bills, the court held, that he might recover in trover the full value of the malt, without deduction or recouper of the money received by him upon the simulated sale. (7)

In trover for a bill of exchange, the damages are to be calculated according to the amount of the principal and interest due upon the bill at the time of the conversion. (8)

Where the owner of adjoining land had worked coal mines within the land of the plaintiff, it was holden (9), that the plaintiff being entitled to the coals as chattels, the proper estimate of damages was the value of the coals when procured without deducting the expense of acquiring them.

In an action of trover by the assignees of a bankrupt against an auctioneer who sold the bankrupt's property, the auctioneer should be allowed any sum that he has paid for rent, and also a reasonable sum for the expenses of the sale, but not any part of the expense of removing the goods from the premises. (10)

(1) *Burn v. Morris*, 4 Tyrw. 485. 2 C. & M. 579.

(2) *Quailey v. Edwick*, 9 Leg. Obs. 75, 76. Tidd's N. P. 526.

(3) *Davis v. Oswell*, 7 C. & P. 804.

(4) *M'Leod v. M'Ghie*, 2 M. & G. 326.

(5) *Bloomfield v. Blake*, 6 C. & P. 75.

(6) *Burn v. Morris*, 4 Tyrw. 485. 2 C. & M. 579.

(7) *Hargreaves v. Hutchinson*, 4 N. & M. 11. 2 A. & E. 12.

(8) *Mercer v. Jones*, 3 Camp. 477.

(9) *Martin v. Porter*, 5 M. & W. 331.

(10) *Grimshaw v. Atterwell*, 8 C. & P. 6.

The price at which goods are sold at a sheriff's sale is not necessarily the measure of damages in trover, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods, if they had come to him, juries are often induced to find a verdict for no more than the sum, at which the sheriff actually sold. (1)

If, after an act of bankruptcy, a sheriff seize and sell goods in trover by the assignees, the jury may deduct, in their estimate of the damages, the expenses of the sale. (2)

Where a defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs (assignees of a bankrupt), after an action of trover had been commenced by them; and the plaintiffs accepted the goods without condition: — It was held, that they could not recover in the action more than nominal damages; at all events, not without alleging special damage in the declaration. (3)

EVIDENCE.

Price at which goods are sold at a sheriff's sale, not necessarily the measure of damages.

Where nominal damages only recoverable.

8. ARREST IN TROVER — LIMITATION OF ACTION — NEW TRIAL — PAYMENT OF MONEY INTO COURT AND RESTORATION OF GOODS — COSTS — JUDGMENT — EXECUTION.

In trover the defendant cannot be holden to bail without a judge's order. (4)

An affidavit must not only be direct and positive as to the existence of the debt, or other cause of action, but must also shew a sufficient cause of action for which the defendant may be holden to bail for the amount stated (5); therefore, an affidavit that the defendant "is indebted to the plaintiff in trover" is insufficient (6); and when it did not appear from the affidavit, that the goods ever were in the possession of the defendant, the court discharged him on entering a common appearance. (7)

An affidavit to hold to bail in trover should state, that the plaintiff was possessed of the goods, their value, and a conversion by the defendant, either express or implied. (8) An affidavit, "that the defendants possessed themselves of divers goods belonging to the plaintiff, and had refused to deliver them up, and that they or some of them had converted and disposed of them to their own use," has been deemed sufficient (9); and an affidavit, that the defendant was indebted to the plaintiff in 103*l*. for goods, which the defendant converted to his own use, is also sufficient. (10) In trover for a bill of exchange, it seems, the affidavit must allege, that the bill remains unpaid. (11)

An affidavit stating circumstances, shewing that the plaintiff was damaged to a certain amount, was holden sufficient, although it improperly stated

ARREST IN TROVER — LIMITATION OF ACTION — NEW TRIAL — PAYMENT OF MONEY INTO COURT AND RESTORATION OF GOODS — COSTS — JUDGMENT — EXECUTION.

ARREST IN TROVER. When allowed. Affidavit of debt.

Requisites in an affidavit to hold to bail.

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| (1) <i>Whitehouse v. Atkinson</i> , 3 C. & P. 344. | (6) <i>Hubbard v. Pacheco</i> , 1 Hen. Black. 218. |
| (2) <i>Clarke v. Nicholson</i> , 1 C. M. & R. 724. 5 Tyrw. 233. | (7) <i>Woolley v. Thomas</i> , 7 T. R. 550. |
| (3) <i>Moon v. Raphael</i> , 2 Scott, 439. 7 C. & P. 115. 2 Bing. N. C. 310. | (8) <i>Molling v. Buchholz</i> , 2 M. & S. 563. Chitt. Forms, 31. |
| (4) Reg. Gen. H. T. 48 Geo. 3. 9 East, 325. 1 Taunt. 203. Chitt. Forms, 31, 32. Archb. by Chitt. 134. Archb. C. Att. Prac. 31. | (9) <i>Charter v. Jaques</i> , Cowp. 539. |
| (5) <i>Cooke v. Dobree</i> , 1 Hen. Black. 10. <i>Jacks v. Pemberton</i> , 5 T. R. 552. | (10) <i>Emerson v. Hawkins</i> , 1 Wils. 335. |
| | (11) <i>Clarke v. Cawthorne</i> , 7 T. R. 321. Archb. C. Att. Prac. 33. |

**ARREST IN
TROVER, &c.****LIMITATION OF
ACTION.**

Defendant can
plead stat. 21
Jac. 1. c. 16.
s. 3.

Trover does
not lie, if six
years have
elapsed since
the conversion.

User before the
demand, is
neither a con-
version nor any
evidence of it.

the defendant to be indebted to that amount. (1) Swearing as to belief has in some cases of this kind been permitted. (2)

By the Statute of Limitations (3), all actions of trover must be commenced and sued within six years next after the cause of action, and not after.

This statute is a bar to the action commenced more than six years after the conversion (4), although the plaintiff did not know of the conversion until within that period, the defendant not having practised any fraud to prevent the plaintiff from obtaining that knowledge at an earlier period. Where an executor several years before, had left some goods in the house, by the consent of the heir (5), who used them afterwards, and within six years of the commencement of the action the executor demanded the goods, and the heir refused to deliver them, whereupon trover was brought and the Statute of Limitations pleaded:—It was holden, that the user before the demand was neither a conversion, nor any evidence of it, for it was with the consent of the executor until that time; and the demand being within six years, the refusal, which ensued it, and which was the only evidence of a conversion in the case, was within the six years; and if a trover be before the six years, and a conversion after, the statute cannot be pleaded.

To support a plea of the Statute of Limitations in trover, by shewing a conversion more than six years before action brought, the defendant must either prove an actual conversion in fact, or give evidence of a positive and absolute demand and refusal before that period. (6)

The demand and refusal necessary to afford evidence of a conversion in trover must be absolute and unqualified. (7)

A letter written to a bailee by the bailor's attorney, within six years before action brought, in which he stated, that the bailor had instructed him to commence the necessary proceedings for the recovery of the goods, which were deposited with the bailee, and demanded as long ago as on a day named (more than six years before action brought), and threatening to commence proceedings if the goods were not delivered within a week, is evidence of a demand and refusal (more than six years before action brought), proper to be submitted to the jury under a plea of the Statute of Limitations to trover for the goods. (8)

NEW TRIAL.

A new trial was refused in trover for goods which had been delivered, and damages had been given. (9)

Where the plaintiff sued in trover to recover damages for the detention of papers which he had deposited with the defendant in furtherance of a fraudulent purpose, and the jury having found a verdict for the defendant, the court refused to grant a new trial. (10)

Where in trover for goods, the defendant pleaded payment of money into court, to which the plaintiff replied, that he had sustained more damages:

- (1) *Imley v. Ellefsen*, 2 East, 453.
- (2) *Allen v. Barry*, cit. 1 Chitt. 168. Archb. C. Att. Prac. 32.
- (3) Stat. 21 Jac. 1. c. 16. s. 3. post, 2897.
- (4) *Granger v. George*, 5 B. & C. 149.
- (5) *Montague v. Sandwich (Lord)*, 7 Mod. 99: cit. by Lawrence J. in *Topham v. Brad-dick*, 1 Taunt. 577. *Philpott v. Kelley*, 3 A. & E. 106 4 N. & M. 611.
- (6) *Philpott v. Kelley*, 4 N. & M. 611. 3 A. & E. 106. 1 H. & W. 134.
- (7) *Ibid.*
- (8) *Philpott v. Kelley*, 3 A. & E. 106. 4 N. & M. 611.
- (9) *Loeat v. Parsons*, Comp. 61.
- (10) *De Wüts v. Hendricks*, 2 Bing. 314. 9 Moore, 586.

and the defendant paid into court the cost price of the goods, having offered the goods in specie to the plaintiff two days only after they ought to have been delivered; but the plaintiff proved, that he had sustained inconvenience and loss by not having the goods delivered at a proper time: — the jury having found for the defendant, the court refused to set aside the verdict. (1)

ARREST IN
TROVER, &c.

In trover the defendant cannot of course pay money into court (2), but the defendant can obtain a rule or order to pay in the money, as being within stat. 3 & 4 Will. 4. c. 42.; and in some cases the court have allowed the defendant to bring into court the article for which the action was brought and costs (3), upon an affidavit, that the goods were in the same plight and condition as when taken. (4)

PAYMENT OF
MONEY INTO
COURT AND
RESTORATION
OF GOODS.

Money can be
paid into court
under stat. 3
& 4 Will. 4.
c. 42.

In *Cooke v. Holgate* (5) the goods being ponderous, the court granted a rule to shew cause, why, on the delivery of the goods to the plaintiff, and on payment of costs, the proceedings should not be stayed.

If in trover the declaration enumerate a number of articles, and the defendant pay money into court, and plead, that the plaintiff has sustained no greater damages, the plaintiff must shew, what articles the defendant has converted; and a declaration in trover being general, the defendant by this plea does not admit any thing beyond his payment into court; and in such a case, the proper measure of damages is the value of the articles which the plaintiff proves, that the defendant has taken and kept; but, if in trover for stonemason's tools, the plaintiff prove, that the defendant took and used some of the tools and returned them, this is a conversion, but one for which the jury ought to give small damages, and not the value of the tools so used. (6)

When plaintiff
must shew,
what articles
the defendant
has converted.

After a plaintiff had recovered damages, under a writ of inquiry in trover, for the conversion of his title deeds, the court permitted satisfaction of the damages to be entered on the roll, on the terms of the defendant's delivering up the deeds and paying all the costs, as between attorney and client, incurred by the plaintiff in the cause, and placing the plaintiff in as good a situation as he stood in, before the cause of action accrued. (7)

Title deeds.

Where trover was brought by the assignees of a bankrupt for a steam engine, &c., the court of King's Bench made a special rule for staying the proceedings, on delivering to the plaintiff a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up. (8)

Steam engine.

In trover, the court will on application of the defendant stay proceedings on delivery of a portion of the goods, and payment of costs, and any damage; and in the event of the plaintiff refusing such terms, the court will permit the defendant to deliver up the goods, the plaintiff to pay the costs incurred subsequently to such delivery, in the event of his not recovering in respect

Delivery of
portion of the
goods.

(1) *Evans v. Lewis*, 3 Dowl. P. C. 819.

(2) *Squire v. Archer*, Str. 906.

(3) Archb. by Chitt. 1017.

(4) *Watts v. Phipps*, Bull. N. P. 49. (a.)

Fisher v. Prince, 3 Burr. 1363., vide etiam

Olivant v. Berino, 1 Wils. 23. *Whitten v.*

Fuller, 2 W. Black. 902. *Tucker v. Wright*,

3 Bing. 601. 11 Moore, 500. *Gibson v.*

Humphrey, 1 C. & M. 544. 2 Tyrw. 588.

Makinson v. Rawlinson, 9 Price, 460.

(5) *Barnes*, 281. Bull. N. P. 49. (a.)

(6) *Cook v. Hartle*, 8 C. & P. 568.

(7) *Coombe v. Sansom*, 1 D. & R. 201.

(8) *Brunsdon v. Austin*, Tidd, 545.

ARREST IN
TROVER, &c.

of some other articles than those delivered up, or more than nominal damages in respect of those delivered up. (1)

In trover for a packet of letters, the defendant was allowed to stay the proceedings as to one of the letters, upon delivering it up and paying costs. (2)

ENTRY OF
VERDICT.

Where the defendant is entitled to have the issue entered distributively.

Where a plaintiff in trover succeeds as to part of his claim only, the defendant is entitled to have the issue entered distributively. (3)

By stat. 3 & 4 Vict. c. 24. if in any action of trespass on the case, the plaintiff recover less damages than 40s., he will not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever. (4)

COSTS.

If A. bring trover against B., C., D., and E.; and recover a verdict against B., but has a verdict against him as to the other three defendants, the costs of those three defendants will not be set off against the costs and damages recovered by A. against B. (5)

JUDGMENT.

In the case of a verdict for the plaintiff, the judgment is, that he recover his damages and costs. Or if the verdict be for the defendant, then that the plaintiff take nothing by his writ, and that the defendant go thereof without day, and also that the defendant recover against the plaintiff the costs and charges he has expended in his defence.

EXECUTION.

The writ of execution for the plaintiff is for damages and costs.

For the defendant, the execution is for the costs.

If a defendant be liable in trover for taking goods, and pay rent due from the plaintiff on the premises whence they are taken, the execution may be limited to the excess of the verdict in trover beyond the rent paid. (6)

(1) *Peacock v. Nichols*, 8 Dowl. P. C. 367.

(2) *Earle v. Holderness*, 4 Bing. 462. 1

M. & P. 254.

(3) *Williams v. The Great Western Railway Comp.* 1 Dowl. P. C. N. S. 16.

(4) *Vide* stat. 3 & 4 Vict. c. 24. *ent. 28.*

(5) *Tomney v. Milliken, Crawford & Co* (Irish), 10.

(6) *Plevin v. Henshall*, 2 Dowl. P. C. 713. 10 Bing. 24.

USE AND OCCUPATION.

1. GENERALLY, pp. 2718—2725.

WHEN DEBT CAN BE MAINTAINED — *Tenant holding under a lease not by deed — Mesne profits — Tenant holding over after the expiration of the landlord's notice to quit — WHEN ASSUMPSIT CAN BE MAINTAINED — Stat. 11 Geo. 2. c. 19. s. 14. — The landlord recovers, not the rent, but an equivalent for the rent — Stat. 11 Geo. 2. c. 19. s. 4. only gives assumpsit when there is no demise by deed — Where premises have been demised for a term — Tenant quitting previously to the demise being determined — Essential that the relation of landlord and tenant should exist — An actual contract, either express or implied, must exist — Occupation of premises under an agreement for a lease — CONSTRUCTIVE POSSESSION — When actual occupation not requisite — Payment of rent upon a distress — EVIDENCE — Taking possession of premises on the death of a former tenant — Underletting — When general refusal tantamount to a waiver — Payment of poor's rates — ILLEGAL OR IMMORAL CONTRACTS — PREMISES NOT TENANTABLE — Where an occupation never existed — ENTRY AND EVICTION BY LANDLORD — DENIAL OF TITLE — Lessee cannot deny his lessor's title — Actual possession abandoned, but the tenancy undetermined — When there is a derivative title in the plaintiff from the first lessor, the doctrine of estoppel does not apply — Fraud or misrepresentation — Payment of rent to the assignor of the reversion — Where interest of landlord has expired — Determination of tenancy.*

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WRITTEN OR VERBAL CONTRACT — *Generally — Where the contract is not a lease, but an agreement — If tenancy be established, defendant must shew its determination — Parol evidence cannot be given of a written agreement — When memorandum a mere unaccepted proposal — If there be a written agreement, the plaintiff must declare upon it — When written instrument must be produced — Defendant cannot shew by cross-examination, that a written agreement exists — Premises demised by an unstamped agreement — When unstamped memorandum will be evidence — Where agreement evidence to prove a consideration for a promise to repair — When production of agreement will not be required — When an oral contract has been proved, the production of an unstamped agreement is immaterial — "Lady Day" — Verbal letting of land on the same terms as under an expired lease — DAMAGES — Where landlord has distrained goods for the full value of the rent — When payment should be pleaded — Lessee taking possession under an unsigned instrument — Profit accruing from the cultivation — Liability for rent notwithstanding the unproductiveness of the land — Liability for a year's rent — After recovery in ejectment rent may be recovered to the time of the demise — Rent due antecedently to plain-*

tenant's legal title — *When a tenant by holding over becomes a tenant from year to year* — COMPETENCY OF WITNESS — JUDGMENT IN A FORMER ACTION.

6. STATUTE OF LIMITATION — NEW TRIAL — AFFIDAVIT — PAYMENT OF MONEY INTO COURT — JUDGMENT BY DEFAULT — WRIT OF INQUIRY — COSTS, pp. 2737, 2738.

GENERALLY.

WHEN DEBT CAN BE MAINTAINED. (1)

Tenant holding under a lease not by deed.

Mesne profits.

Where rent is in arrear by a tenant who holds under a lease not by deed, as under a writing without deed, or a parol demise, the action of debt will lie for use and occupation. (2)

A lessor in ejectment can waive the trespass, and recover the mesne profits in an action for use and occupation (3): but this election must be limited to the profits accruing antecedently to the time of the demise in the ejectment; for the action for use and occupation is founded on contract, the action of ejectment upon wrong, and they are therefore wholly inconsistent with each other when applied to the same period of time, since in the one action the plaintiff treats the defendant as a tenant, and in the other as a trespasser. (4)

Tenant holding over after the expiration of the landlord's notice to quit.

Where, however, a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt under stat. 4 Geo. 2. c. 28. (5) against the tenant, for double the yearly value of the premises during the time the tenant so holds over, for the double value is given by way of penalty, and not as rent. (6)

WHEN ASSUMPSIT CAN BE MAINTAINED.

Assumpsit can also be brought to recover remuneration for the use and occupation or beneficial (7) enjoyment of a fishery, a watercourse (8), or a pew, or for tolls, &c., or other incorporeal hereditaments, although in strictness, as being incorporeal matters, there could not have been a sufficient demise or contract otherwise than by instrument under seal. (9) So, *indubitatus assumpsit* lies for the antecedent use and occupation of a messuage, together with incorporeal hereditaments, or of the latter alone, although a special count setting out a contract for letting the same, would be void, because not under seal, and therefore invalid at common law. (10)

To support *assumpsit* for use and occupation, the plaintiff must prove an occupation by the defendant, that such occupation was by permission of the defendant, and the value of the premises in question.

Stat. 11 Geo. 2. c. 19. s. 14.

Assumpsit for "use and occupation" was given by stat. 11 Geo. 2. c. 19. s. 14., by which it is enacted, that it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants in an action on the case for the

(1) *Vide ante*, 1088—1093. tit. COVENANT; 1222—1233. tit. DEBT; 1317—1330. tit. DISTRESS; 1371—1497. tit. EJECTMENT.

(2) *Wilkins v. Wingate*, 6 T. R. 69. *Egley v. Marsden*, 5 Taunt. 25. Woodfall by Harrison, 613.

(3) *Goodtitle v. North*, Doug. 584. *Doe d. Cherry v. Batten*, Cowp. 243.

(4) *Birch v. Wright*, 1 T. R. 378.

(5) *Vide ante*, 1478—1482. tit. EJECTMENT.

(6) *Timmins v. Rowleson*, Barr. 1603.

(7) *Carmarthen (Mayor of) v. Lewis*, 6 C. & P. 608.

(8) *Davis v. Morgan*, 4 B. & C. 8. 6 D. & R. 42.

(9) *Bird v. Higginson*, 2 A. & E. 636. 1 H. & W. 61. 4 N. & M. 505.

(10) 1 Chitt. Pl. 345.

use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered.

In this action, therefore, the landlord "recovers not the rent, but an equivalent for the rent, a reasonable satisfaction for the 'use and occupation' of the premises, which have been holden and enjoyed under the demise; and it is provided on his behalf, that if the demise be produced against him, it shall not defeat his action, as it would have done before the statute; but the fixed rent shall only be used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated." (1) The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. (2)

This statute only gives *assumpsit* where there is no demise by deed. (3) But where there were articles of agreement under seal, by which A. agreed to let and make a lease to the defendant, Lord Kenyon held, that the defendant might be charged in *assumpsit* for his use and occupation of the premises, because he did not hold under the deed, it being merely an agreement for a lease. (4) And so, where a lease by deed has expired, and the tenant holds over, the landlord may recover for the subsequent occupation of the lessee or his antecedent occupation in an action of *assumpsit*. (5)

Where premises have been demised for a term, the landlord may recover in an action for use and occupation the rent accruing after the premises are burnt, and no longer inhabited by the tenant; for, as long as the term continues, the landlord cannot enter to rebuild, and the tenant must therefore be taken still to hold the land, which is sufficient to satisfy the words of the statute. (6) So, use and occupation lies when the tenant quits the premises without any regular determination of the demise. And where in an action for the use and occupation of apartments in the plaintiff's house during half a year, it appeared, that the rent was claimed in consequence of the defendant having neglected to give a notice to quit, and the defence set up, that the plaintiff after the defendant had quitted, had put up a bill at the window, Lord Kenyon observed, "that [the defence] would afford no answer to the plaintiff's action. It was for the benefit of the defendant that the apartments should be let; nor would he infer from the circumstance of the party's endeavouring to let them, that the contract was put an end to; that there must be other circumstances to shew it, and not an act of so equivocal a kind; that as the plaintiff had proved the taking of the premises, and the payment of the rent, it was incumbent on the defendant to prove that tenancy put an end to by express evidence." (7)

A party can be charged for use and occupation, so long only as the plaintiff treats him as his tenant; for if the owner treat the occupier as a tres-

GENERALLY.

The landlord recovers not the rent, but an equivalent for the rent.

Stat. 21 Geo. 2. c. 19. s. 4. only gives *assumpsit* when there is no demise by deed.

Where premises have been demised for a term.

Tenant quitting previously to the demise being determined.

Essential that the relation of landlord and

(1) *Per Eyre C. J. in Naish v. Tatlock*, 2 Hen. Black. 323.

(2) *Ibid.*

(3) *Dungey v. Angove*, 2 Ves. jun. 307. Chitt. L. & T. 379.

(4) *Elliott v. Rogers*, 4 Esp. N. P. C. 59. *Bannister v. Ubborne*, Peake's Ev. 254.

(5) *Harding v. Crothorn*, 1 Esp. N. P. C. 57.

(6) *Baker v. Holtzaffell*, 4 Taunt. 45.

(7) *Redpath v. Roberts*, 3 Esp. N. P. C. 325. Chitt. L. & T. 389, 390.

GENERALLY.
tenant should
exist.

An actual con-
tract either ex-
press or implied
must exist.

passer, he cannot claim rent of him ; and therefore, if he recover the lands in ejectment, he cannot claim rent of him ; and cannot afterwards charge the defendant for use and occupation previously to the day of the demise in the ejectment. (1)

Assumpsit for use and occupation can only be maintained, where there is an actual contract either express or implied ; and if a purchaser take possession of premises under a contract of sale, which on account of a defect in the vendor's title fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation. (2) Thus, where a person was in possession of premises under an agreement for a lease, which was never executed by reason of a default of the lessor, and afterwards gave up the possession : — It was held, that he was not liable in use and occupation, although he had received rent from the under-tenants during the period of his occupation. (3)

So, also, where a man agrees to purchase premises on an assurance, that the person of whom he purchases has a long term in them, and on the faith of such assurance, at a considerable expense, enters into the possession of them, he cannot, on his refusing to complete his purchase (on account of the seller having a shorter term), be charged in an action for use and occupation. (4)

But where a party is let into possession of land under a contract of purchase, which afterwards goes off, he is liable to an action for use and occupation at the suit of the vendor for the period during which he continues in possession after the contract went off. (5)

In *Hull v. Vaughan (Clerk)* (6) where it appeared, that the owner of an estate contracted to sell it to another, who thereupon sold part of the property so contracted for by auction to a third person, who obtained possession, and the original vendor afterwards refused to perform his contract ; on which a suit in equity was brought, pending which, the original vendor obtained possession from the sub-vendee, on a demand to be restored to it, it being rumoured, that the original purchaser had failed in the suit instituted for specific performance : — It was held, that, if in fact the plaintiff should ultimately succeed in that suit, and that the estate should in consequence be conveyed to the purchaser under a decree of the court of Chancery, the sub-vendee could maintain an action for use and occupation against the original vendor, for the time during which he held the possession so obtained from the second purchaser.

In *Banister v. Usborne* (7) it appeared, that there was an agreement to grant a lease to S., when S. should have erected certain buildings on the premises to be demised ; but there was no covenant to pay rent before the execution of the lease : — It was holden, that S., after the buildings were erected, held the premises subject to the terms in the lease, but was liable in *assumpsit* for use and occupation.

A. let premises to four persons, B., C., D., and E., for a year certain ending at Midsummer, 1839, with a proviso, that if, a month at least before

(1) *Birch v. Wright*, 1 T. R. 378. *Carmier v. Mercer*, cit. *ibid.* 387., et vide *Doe d. Cheney v. Batten*, Cowp. 243.

(2) *Kirtland v. Pounsett*, 2 Taunt. 145. cit. in *Keating v. Bulkely*, 2 Stark. 420., sed vide *Hearn v. Tomlin*, Peake's N. P. C. 253.

(3) *Rumball v. Wright*, 1 C. & P. 590.

(4) *Hearn v. Tomlin*, Peake's N. P. C. 253.

(5) *Howard v. Shaw*, 8 M. & W. 118.

(6) 6 Price, 157.

(7) Peake's Add. Cas. 76.

Occupation of
premises under
an agreement
for a lease.

the termination of the year, a request were made to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint-stock bank, and occupied the premises for the purpose of its business. B. ceased to be a director in January, and C. in March, 1839. On the 31st of May, the solicitor of the directors applied to A. to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On the 20th of June, the solicitor applied for a renewal of the agreement for a quarter of a year; to which the plaintiff on the 23d replied, "that he should consider of it." Nothing further passed between the parties; but at the Michaelmas following, the premises were delivered up to A.:—It was held, that the four original lessees were liable to A. in an action for use and occupation, for the rent of the quarter from Midsummer to Michaelmas. (1)

GENERALLY.

The terms of the statute may seem, in strictness, only to include those cases in which the relation of landlord and tenant exists. But the courts have given a wide and liberal construction to it; and it now appears to be settled, that wherever one party occupies by the permission of another, although no agreement for such occupation was in contemplation between the parties, the fact of the one having occupied by the sufferance of the other, is sufficient to raise an implied *assumpsit* by the occupier, to pay for his occupation. (2)

CONSTRUCTIVE POSSESSION.

Actual occupation is not necessary to maintain use and occupation, if a party hold premises under a contract or agreement. (3)

When actual occupation not requisite.

Payment of rent as rent (4), or the occupier of a house submitting to a distress for rent, stated in the notice of distress to be due from him as tenant to the distrainer, are acknowledgments of tenancy. (5)

Payment of rent upon a distress.

Where the plaintiff came into occupation under one who had paid rent upon a distress by the defendant, it was held, that, after proof of this fact, the plaintiff was estopped from disputing the defendant's title to the rent notwithstanding the defendant inadvertently put in evidence a document which shewed, that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger. (6)

EVIDENCE.

Where a defendant took possession of premises on the death of a former tenant, and an action of ejectment was brought against him without giving notice to quit; and he, to defend himself from that action, produced a letter from the plaintiff, treating him as tenant, and claiming rent:—It was held, to be conclusive evidence of his tenancy to the plaintiff, in an action for use and occupation, though he alleged, that he produced it only for the purpose of shewing, that he was tenant in possession. (7)

Taking possession of premises on the death of a former tenant.

Where the defendant, under an agreement to take the premises for a term, put up a board in order to underlet them, it was held to be an assertion of the right of possession, and sufficient evidence of occupation. (8)

Underletting.

Where the defendant, in the expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the

- (1) *Christy v. Tancred*, 7 M. & W. 127. *ants of the Holy Trinity*), 7 B. & C. 611.
 (2) *Kirtland v. Pounsett*, 1 Taunt. 570. 1 M. & R. 144.
 (3) *Pinero v. Judson*, 3 M. & P. 497. 6
 Bing. 206.
 (4) *Rex v. Kingston-upon-Hull* (*Inhabit-*
ants of the Holy Trinity), 7 B. & C. 611.
 (5) *Panton v. Jones*, 3 Camp. 372.
 (6) *Cooper v. Blandy*, 1 Bing. N. C. 45.
 (7) *Townsend v. Davis*, Forrest, 120.
 (8) *Sullivan v. Jones*, 3 C. & P. 579.

GENERALLY.

When general refusal tantamount to a waiver.

tenants, and received rent from others, he was held liable for use and occupation. (1)

In an action for recovering arrears of a yearly consideration for permissive occupation, and giving up all claim to possession of land, actual possession by the defendant was held sufficient proof of the necessary averment of previous performance by the plaintiff of his part of the agreement, as a condition precedent, in having abandoned and given up &c., where no common assurance had been executed or offered, otherwise than by sending to the defendant a draft lease for his approbation, and proof of his refusal to take any lease, such general refusal being held to be tantamount to a waiver. (2)

Payment of poor's rates.

But payment of a poor rate, assessed on the occupier of a house, is not of itself evidence of occupation by the party so paying. (3)

ILLEGAL OR IMMORAL CONTRACTS. (4)

If the premises be let for illegal purposes, or for prostitution (4), or for any act *contra bonos mores*, an action for "use and occupation" cannot be maintained (5):—thus, where a lodging was under a weekly tenancy, and it did not appear, that the premises had been originally let for the purpose of prostitution, it was held, that the plaintiff could not recover the weekly rent which accrued, after he was fully informed of the defendant's mode of life. (6)

But the action will lie, if the woman merely lodge upon the demised premises, and receive her visitors elsewhere (7); and the defendant being an infant and a prostitute is no bar to the action, because both an infant and a prostitute must have lodging. (8)

PREMISES NOT TENANTABLE.

To maintain an action for use and occupation it must appear, that the occupation has been beneficial to the defendant. Thus, in *Salisbury v. Marshal* (9) it was held, if an agreement under which a party holds a house state, that he "agrees to become tenant by occupying," it will be an answer to a claim for rent if he shew, that the house was not in such a reasonable and decent state of repair as to be fit for comfortable occupation. (10)

So likewise a tenant of a house, bound by agreement to keep it in tenantable repair, may quit without notice in the course of his term, if the premises become unwholesome to reside in, not from any default or neglect of his own, but from something over which he had no control, and cannot be rendered inhabitable except at an extravagant or unreasonable expense. (11)

In *Cowie v. Goodwin* (12) a party actually occupied premises which had been let to him under a written agreement; in the course of his tenancy a nuisance occurred, which put an end to the comfortable occupation of the premises; this nuisance was not remedied by the landlord, and the tenant quitted as soon as he could obtain other premises:—It was held, that he

(1) *Neal v. Swind*, 2 C. & J. 377. 2 251., et vide *Lloyd v. Johnson*, 1 B. & P. Tyrw. 464. 340.

(2) *Wilson v. Williams*, 1 Price, P. C. 14.

(3) *Rex v. Burton*, Woodfall by Harrison, 645.

(4) *Vide ante*, 249—251. tit. ASSUMPSIT.

(5) *Crisp v. Churchill*, cit. 1 B. & P. 340. *Girard v. Richardson*, 1 Esp. N. P. C. 13.

(6) *Jennings v. Throgmorton*, R. & M.

(7) *Appleton v. Campbell*, 2 C. & P. 347.

(8) *Crisp v. Churchill*, cit. 1 B. & P. 340.

(9) 4 C. & P. 65.

(10) Et vide *Edwards v. Etherington*, 7 D. & R. 117. R. & M. 268.

(11) *Collins v. Barrow*, 1 M. & Rob. 112.

(12) 9 C. & P. 378.

was not liable to rent for the period between the time of the occurrence and that at which he quitted the premises.

GENERALLY.

It may perhaps be questionable, whether use and occupation is maintainable where there has not been any occupation by the defendant: in one case Chief Justice Gibbs laid it down, that the action might be maintained upon an occupation which the defendant might have had, if he had not voluntarily abstained from it, as well as upon an actual occupation. (1)

Where an occupation never existed.

Use and occupation cannot be maintained where the party had a mere entry and eviction, provided it be such a tortious entry and expulsion as to prevent an enjoyment or beneficial occupation of the premises.

ENTRY AND EVICTION BY LANDLORD.

Thus, if premises be let at an entire rent, an eviction from part, if the tenant thereupon give up possession of the residue, is a complete defence to an action for use and occupation. (2)

Eviction from part of premises let at an entire rent.

But if the tenant, after the eviction, continue in possession of the residue, he is liable upon a *quantum meruit*. (3)

In *Wainwright v. Ramsden* (4) it appeared, that the defendant was the tenant from year to year of a house and premises, at a rent payable half yearly on the 1st of April and the 1st of October. The premises being required for the purposes of a railway, the railway company, under their act of parliament, gave the defendant six months' notice to quit, which expired in the middle of a half year, viz. on the 28th of July. The defendant gave up possession to the company accordingly at the expiration of the six months, without obtaining or requiring compensation for his interest in the premises, which he was entitled to under this act:—It was holden, that he was liable for the rent of the half year ending on the following 1st of October.

If a landlord, in the middle of a quarter, accept from his tenant the key of the house demised, under a parol agreement, that upon her then giving up the possession the rent shall cease, and she never afterwards occupies the premises, he cannot recover, in an action for use and occupation of the house, for the time subsequent to his accepting the key. (5)

Landlord accepting possession of the premises in the middle of a quarter.

In *Grimman v. Legge* (6) it appeared, that A. demised rooms of a house to B. for a year, at a rent payable quarterly; during the current quarter, in consequence of disputes, B. told A. that he would leave; A. assented, and, on B.'s leaving, accepted possession of the rooms:—It was held, that A. could recover neither the whole quarter's rent, nor rent *pro rata* for occupation for any period short of the quarter; because, where parties have made one contract for themselves, the court will not imply another.

Where a tenant from year to year, at a rent payable half yearly, quitted at the end of a current year without giving notice, and the landlord relet the premises before the end of the next half year to another tenant:—It was holden, that the landlord having evicted the first tenant, could not maintain use and occupation against him for any rent subsequent to the period when he quitted. (7)

Landlord reletting premises after the departure of his tenant.

Where lands have been let to one who underlets to others, and the latter Under-tenant

(1) *Whitehead v. Clifford*, 5 Taunt. 519. Woodfall by Harrison, 630.

(2) *Smith v. Raleigh*, 3 Camp. 513.

(3) *Stokes v. Cooper*, ibid. 514. n.

(4) 5 M. & W. 603.

(5) *Whitehead v. Clifford*, 5 Taunt. 518.

(6) 8 B. & C. 324. 2 M. & R. 348. cit. *Slack v. Sharpe*, 8 A. & E. 374.

(7) *Hall v. Burgess*, 8 D. & R. 67.

GENERALLY.

receiving notice to quit from original landlord.

receives a notice to quit from the original landlord, in consequence of which one of them does so, and the lands occupied by him remain unlet for a year, and are then let by the original tenant, the original landlord cannot recover in use and occupation for the rents of the unoccupied premises; such circumstances amount to an eviction, and may be pleaded to the whole demand. (1)

DENIAL OF TITLE.

Lessee cannot deny his lessor's title.

Use and occupation is founded on contract; and it seems, wherever the defendant enjoys by permission of, or demise from, the plaintiff, he is liable in such action, and cannot be allowed to question the plaintiff's title. Thus, in *Balls v. Westwood* (2) it was holden, that where the defendant has come in under the plaintiff, he cannot shew, that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. (3)

Where a house was devised to a trustee, in trust for a devisee, for her sole and absolute use, and she afterwards married B., who let part of it, under a written agreement signed by himself only, to the defendant as a yearly tenant, and afterwards granted a lease for years of the whole of the house to the plaintiff, which the wife refused to execute, although she was named therein; and the defendant had notice of the lease, and was required to pay any rent that might subsequently accrue to the plaintiff:—It was held, in an action for use and occupation, that the defendant was liable to the plaintiff, and that he could not impeach his title, as he must be taken to stand in the same situation as B., whose title as landlord the defendant had acknowledged by occupying and enjoying the premises under him. (4)

When tenant cannot allege that his landlord has only an equitable title.

The defendant cannot prove, that the plaintiff was mere tenant at will; or that he had previously demised the premises to a third person, whose interest has not expired (5); or that he had no title to the premises (6); or where the defendant occupied the premises, and paid rent to the apparent proprietor as his landlord, he cannot, when sued by him for the use and occupation, allege, that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action, although the plaintiff, at the trial, discloses that fact in proving his own case (7); or where the defendant has paid the plaintiff rent for glebe lands, he cannot prove, that the presentation of the plaintiff to the living was simoniacal. (8)

Actual possession abandoned, but the tenancy undetermined.

The defendant cannot shew, that he has abandoned the actual possession, if the tenancy remain undetermined. Thus, if a tenant from year to year neglect to give notice that he will quit, he will be liable to an action for use and occupation after the end of the year, although he actually

(1) *Burn v. Phelps*, 1 Stark. 94. It has been questioned, whether the service of a declaration in ejectment upon one of the several sub-tenants of a lessee, followed up by judgment against the casual ejector, and executed against that sub-tenant, is evidence of an election on the part of the lessor to avail himself of a clause of re-entry contained in the lease. *Long v. Bilke*, 1 M. & G. 87.

(2) 2 Camp. 11.

(3) In debt for rent on an indenture of lease, the declaration not shewing the deed, the defendant could not, under the plea of *nil debet*, give in evidence, that the plaintiff had no estate in the tenements; because, if he had pleaded that specially, the plain-

tiff might have replied the indenture and estopped him (1 Chitt. Pl. 482. *Trevinn v. Lawrence*, 1 Salk. 277. *Blake v. Foster*, 4 T. R. 487.); and the tenant is seemingly estopped from disputing the title, though the demise was by parol. 1 Chitt. Pl. 482. *Fenner v. Duplock*, 2 Bing. 10. *Alchorn v. Gomme*, *ibid.* 54.

(4) *Rennie v. Robinson*, 7 Moore, 539. 1 Bing. 147.

(5) *Morgan v. Ambrose*, Peake's Ex. 242. *England d. Syburn v. Slade*, 4 T. R. 682.

(6) *Morgan v. Ambrose*, Peake's Ex. 242.

(7) *Dolby v. Hes*, 11 A. & E. 335.

(8) *Cooke (Clerk) v. Loxby*, 5 T. R. 4.

quitted at the end of the year (1); and although the plaintiff, upon the abandonment of the premises by the defendant, advertised them to be let by putting up a bill in the window (2): and it is no defence, that the plaintiff has brought an ejectment to recover the same premises, and has laid the demise on the day when the alleged tenancy commenced. (3)

When there is a derivative title in the plaintiff from the first lessor, the doctrine of estoppel does not apply, and it is open to the tenant to shew, that no title passed: thus, where the occupier of a house paid rent to churchwardens, and the latter afterwards demised the house by lease for a term to A., with notice to the tenant that he must consider A. as his landlord:—It was held, in an action for use and occupation, that the tenant might impeach the lease, and shew, that the lessee had derived no title from the churchwardens. (4)

If the occupation of the premises originated in fraud or misrepresentation, and that the defendant has derived no benefit from such occupation, as by entering in the capacity of vendee, and giving up the possession on discovering, that the vendor had no title, it will be an answer to the action (5); or where the action is brought by the assignee of the reversion for the plaintiff, the defendant can shew, that he paid the rent to the assignee previous to the notice. (6)

If the plaintiff's interest was but temporary and it has since expired (7), as that he has, since the demise, mortgaged the premises to another, who has given the defendant notice to pay his rent to him, it will be a defence (8); or when the defendant was not let into possession by the plaintiff he can dispute his title, notwithstanding an acknowledgment of his title (9), which is not in itself binding.

The defendant can prove, that the tenancy has been determined (10); but the delivery of the keys of the house by an agent of the tenant to a female servant at the house of the landlord, is not sufficient to prove a determination of the tenancy, the female servant not having been called, and it not appearing, that the keys had ever reached the plaintiff and had been accepted by him. (11)

The defendant can likewise prove that, subsequently to the determination of the tenancy, he had ceased to occupy the premises, from the tenancy having been determined by a regular notice to quit (12); or by mere lapse of time according to the terms of the original agreement; or that the term had been surrendered actually or in law (13); or that the premises had been actually delivered up to the plaintiff, who had taken possession under the agreement to put an end to the tenancy (14); or that he had become bankrupt, and that his assignees had accepted the lease or agreement, or that they had declined it, and he had delivered it to his lessee within fourteen days. (15)

GENERALLY.

When there is a derivative title in the plaintiff from the first lessor, the doctrine of estoppel does not apply.

Fraud or misrepresentation.

Payment of rent to the assignor of the reversion.

When interest of landlord has expired.

Determination of tenancy.

(1) *Redpath v. Roberts*, 3 Esp. N. P. C. 225.

(2) *Ibid.*

(3) *Cobb v. Carpenter*, 2 Camp. 13. n.

(4) *Phillips v. Pearce*, 5 B. & C. 433.

(5) *Hearn v. Tomlin*, Peake's N. P. C. 192. 3 Stark. Ev. 3d ed. 1183.

(6) 3 Stark. Ev. 3d ed. 1183.

(7) *Morgan v. Ambrose*, Peake's Ev. 242. *England d. Syburn v. Slade*, 4 T. R. 682.

(8) *Holmes v. Pontin*, Peake's N. P. C. 135.

(9) *Cornish v. Searell*, 8 B. & C. 471. 2 Stark. Ev. 3d ed. 1181.

(10) *Harland v. Bromley*, 1 Stark. 455. *Harding v. Crethorn*, 1 Esp. N. P. C. 57. *Ward v. Mason*, 9 Price, 291.

(11) *Hurland v. Bromley*, 1 Stark. 455.

(12) 3 Stark. Ev. 3d ed. 1181.

(13) *Ibid.*

(14) *Whitehead v. Clifford*, 5 Taunt. 518.

(15) Stat. 6 Geo. 4. c. 16. s. 75.

WHO CAN OR
CANNOT MAIN-
TAIN USE AND
OCCUPATION.

Corporations
aggregate.

Tenants in
common.

2. WHO CAN OR CANNOT MAINTAIN USE AND OCCUPATION.

A corporation aggregate can maintain *assumpsit* for the by-gone use and occupation of buildings, or land, or tolls, although they did not grant the tolls to the occupier by any instrument under their common seal. (1)

Where the action was for use and occupation of a house, it appeared, that the house was the property of six several tenants in common, to all of whom, except the plaintiff, the defendant had paid his rent, and this action was for his share of the whole rent. It was objected, that one tenant in common alone could not bring this action, but that all ought to join; but Lord Mansfield overruled the objection, and the plaintiff recovered. (2)

Lessees of the
seats of a Jew-
ish synagogue.

If several persons rent premises to be used as a Jewish synagogue, the seats in which are let out by an officer appointed annually, who receives the rents, and applies them, partly in the payment of the rent for the premises, and partly for general purposes connected with the Jewish religion, the lessees may maintain an action for the rent due from an occupier of a seat. (3)

Grantee of a
reversion.

The grantee of a reversion stands in the place of the lessor, and, when he has given notice to the tenant of the conveyance, may call upon him for payment of his rent from the time of the notice; and where the demise has been without deed, may maintain use and occupation against the tenant (4); and the same holds of a mortgagee after notice to the tenant.

It seems use and occupation does not lie, on a parol demise by the assignee of the reversion, against the lessee, for the occupation which took place prior to the assignment of the reversion. (5)

Landlord and
tenant.

Where the relation of landlord and tenants exists, *assumpsit* can be maintained: thus, where premises had been let to B. for a term determinable by a notice to quit, and pending such term, C. applied to A., the landlord, for leave to become the tenant instead of B., and upon A.'s consenting, agreed to stand in B.'s place, and offered to pay rent:—It was held, that (though B.'s term had not been determined either by a notice to quit, or a surrender in writing), A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defence to that action. (6)

When trustees
can support the
action without
attornment.

An action for use and occupation is maintainable without attornment, upon the stat. 4 & 5 Anne, c. 16. ss. 9 & 10., by the trustees of one whose title the tenant (defendant) had notice of, before he paid over his rent to his original landlord, though the tenant had no notice of the legal title being in the plaintiffs on the record. (7)

Assignees of a
bankrupt.

The assignees of a bankrupt having entered into possession of land in the middle of a quarter, which the bankrupt had agreed to take upon a building lease, on the terms of paying the rent half yearly:—It was held, that an

(1) *Carmarthen (Mayor of) v. Lewis*, 6 C. & P. 608. *Stafford (Mayor of) v. Till*, 4 Bing. 75. 12 Moore, 260. 1 Chitt. Pl. 106. *Southwark Bridge Comp. v. Sills*, 2 C. & P. 371., et vide *East London Water Works Comp. v. Bailey*, 4 Bing. 283.

(2) *Kirkman v. Newstead*, Westm. Sitt. M. T. 1776, cit. 1 Esp. N.P. 145.

(3) *Israel v. Simmons*, 2 Stark. 356.

(4) *Birch v. Wright*, 1 T. R. 378.

(5) *Mortimer v. Preedy*, 3 M. & W. 602.

(6) *Phipps v. Sculthorpe*, 1 B. & A. 50.

(7) *Lumley v. Hodgson*, 16 East, 99.

action for use and occupation would lie against them for the whole year, though they had not occupied during all the time. (1)

WHO CAN OR
CANNOT MAIN-
TAIN USE AND
OCCUPATION.

Previous to stat. 6 Geo. 4. c. 16. s. 75. (2) it was held, that *assumpsit* for use and occupation could be maintained against a lessee from year to year, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and that the occupation of his assignees during part of the time for which the rent accrued, was pleaded in bar. (3)

Infants cannot sue in use and occupation; but infancy seems to be no defence to an action for use and occupation, because it falls within the fair liability, which the law imposes on infants, in being bound for necessities. (4)

Infants.

By stat. 11 Geo. 2. c. 19. s. 15., "where any tenant for life shall happen to die, before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, &c. which determined on the death of such tenant for life, the executors and administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant, if such tenant for life die on the day on which the same was payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due."

Executors and
administrators.
(5)

The personal representatives of a tenant, if they take possession of the premises, stand exactly in the same situation as their testator or intestate; they are liable for rent due before the decease in their representative character, to the extent of the assets they have in hand, whether they take possession or not; and they are liable for rent accruing due afterwards in their individual capacity, if they take possession of the premises. (6)

When execu-
tors and ad-
ministrators
stand in the
same situation
as their tes-
tator.

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non repair, to say, that the premises yield no profit. (7)

In an action for use and occupation, charging the defendant in his own character, who was an administrator of the original lessee, for rent due after the intestate's death:—It was holden, that although the defendant had taken possession, yet, having proved, that the premises had been productive of no profit to him, and that eight months after the death of the intestate he had offered by parol to surrender them to the plaintiff, such proof constituted a good defence to the action. (8)

Where lessee for a term of years under-leased for a term longer than his own, the under-lessee covenanting to pay rent to the lessee:—It was held, that the executor of the lessee might sue the under-lessee for rent accruing during the continuance of the lessee's term (9)

Where one of two executors of a deceased tenant for a term of years entered into the demised premises:—It was held, that such entry did not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation. (10)

An action for use and occupation cannot be maintained by a grantee of an annuity, after a recovery in ejectment, against a tenant who was in pos-

Grantee of an
annuity.

(1) *Gibson v. Cowthorpe*, 1 D. & R. 205.

(6) *Woodfall by Harrison*, 632

(2) *Vide antè*, 595. tit. BANKRUPTCY.

(7) *Tremere v. Morison*, 1 Bing. N. C. 89.

(3) *Boot v. Wilson*, 8 East, 311.

(8) *Remnant v. Bremridge*, 2 Moore, 94.

(4) *Hands v. Slaney*, 8 T. R. 578.

(9) *Baker v. Gostling*, 1 Bing. N. C. 19.

(5) *Vide antè*, 1825—1915. tit. EXECUTORS AND ADMINISTRATORS.

(10) *Nation v. Tozer*, 1 C. M. & R. 172.
4 Tyrw. 561.

WHO CAN OR
CANNOT MAIN-
TAIN USE AND
OCCUPATION.

Husband and
wife.

Lessor of a
second lease,
first lease out-
standing.

Tenant never
having taken
possession.

Where the
title is dis-
puted.

When A. is
seised in trust
for B. and C.

Existing ten-
ant cannot be
charged for an
antecedent oc-
cupation.

Legal estate in
trustees for an
outstanding
term.

session under a demise from year to year after the day of the demise in the ejectment, because the landlord has treated the tenant as a trespasser. (1)

A. having an equitable title to a house, under an agreement for a lease, permitted his mistress to occupy it, and it was agreed between them, that she should take up bills of exchange which he had accepted in part payment of the purchase money, and that the lease should be assigned to her; she continued in possession, but did not take up the bills, and afterwards married the defendant, who occupied the house:—It was held, that A. could not recover against him in an action for use and occupation. (2)

An action of *assumpsit* for the use and occupation of a house is not maintainable against the husband alone, if his wife held under a yearly tenancy before marriage, the rent being payable half-yearly, where part of such rent was due from the wife *dum sola*, and the remainder accrued after the coverture. (3)

Where a party was sued whilst there was a lease to another person, which it was proved had never been assigned or surrendered:—It was held, that he was not liable. (4)

A tenant who agrees to take furnished lodgings, but does not enter, is not liable in an action for use and occupation. (5)

The action of *assumpsit* for use and occupation does not lie where the title is in dispute, for the courts will not try the title by such an action, the proper remedy being ejectment. (6)

Where a person having title to land, sued A. for use and occupation; A. having received possession from a third person:—It was held, that the declaration of A., "I don't consider the land as yours, but prove the right, and I'll pay you rent," would not support *assumpsit* for use and occupation. (7)

If A. be seised in trust for B. and C., neither B. nor C. can maintain use and occupation, &c. in his own name against the tenant as principal, treating A. as his agent. (8)

The landlord cannot charge the tenant for the antecedent occupation of the person from whom he received the premises.

If a tenant from year to year of a house at a yearly rent become a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year, the lessor cannot maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy during the time that elapsed before the bankruptcy. (9)

In *Harris v. Booker* (10) the plaintiff obtained judgment against E. C., whereupon an *elegit* was issued, to which the sheriff returned an inquisition, finding that E. C. was seised for life of a certain farm, which the jury found to be a true moiety of the lands of E. C. in his bailiwick. In an action for use and occupation brought by the tenant by *elegit* against the occupier of the farm, the latter proved, that the legal estate was in trustees for an outstanding term, though E. C. was by the sufferance of the trustees in receipt

(1) *Birch v. Wright*, 1 T. R. 378.

(2) *Kenting v. Bulkely*, 2 Stark. 419.

(3) *Richardson v. Hall* 3 Moore, 307. 1 B. & B. 50.

(4) *Hyde v. Moakes*, 5 C. & P. 42.

(5) *Edge v. Stafford*, 1 C. & J. 391.

(6) *Anon.* Woodfall by Harrison, 637.

(7) *Cripps v. Blank*, 9 D. & R. 480.

(8) *Moryell v. Paul*, 2 M. & R. 303.

(9) *Naish v. Tuslock*, 2 Hen. Black. 330.

(10) 12 Moore, 283.

of the rents and profits, he having a joint equitable interest:—It was held, that the action was not maintainable.

Use and occupation cannot be maintained by the lessor of a tenancy from year to year against the trustees under a deed of assignment for the benefit of creditors, upon an occupation by them for the purpose of disposing of the insolvent's property, unless they have actually occupied as tenants. (1)

The question, whether the acts of the trustees shew an intention to become tenants, which was acted upon by the lessor, is a question for the jury (2); and it is no misdirection in such a case to submit the case upon all the facts to the jury, to say, whether the acts of the trustees amounted to a contract to become tenants of the premises; that is, whether they meant to become tenants, or if not, whether they so acted, as that the lessor was induced to believe, and did believe, that they meant to become his tenants. (3)

Where a tenant, at a rent payable half yearly, against whom a fiat of bankruptcy issues during a current half year, delivers up possession of the premises to his landlord according to stat. 6 Geo. 4. c. 16. s. 75., he is not liable to be sued for use and occupation for the portion of the half year prior to the fiat. (4)

WHO CAN OR
CANNOT MAIN-
TAIN USE AND
OCCUPATION.

Trustees under
a deed of as-
signment.

Landlord
against tenant
after delivery
of property
under stat.
6 Geo. 4. c. 16.
s. 75.

3. DECLARATION AND PLEADINGS IN ASSUMPSIT. (5)

The venue is transitory (6), except when the demise was not to the defendant, when perhaps it may be local, the same as an action of covenant against the assignee of the lessee. (7)

The declaration in *assumpsit* for use and occupation is framed in the common *indebitatus* form, and alleges, that the defendant was indebted to the plaintiff for the use and occupation by the defendant of premises of the plaintiff, and by his sufferance and permission.

When the action is brought on a special agreement, the declaration commences by alleging such preliminary matter as may be necessary, from the nature of the circumstances, to explain the relative situation of the parties at the time of making the contract. It then states the contract itself by setting out the agreement, or that part of it to which the particular breach applies (8), it being sufficient, if the part omitted do not qualify that which is stated, if the declaration shew so much of the terms beneficial to the plaintiff in the contract, as comprehend the point for the failure on which the plaintiff sues. (9) The declaration then alleges mutual premises—shews the breach—and concludes by alleging the nature of the damage sustained by the plaintiff. (10)

It seems, that where a count in *assumpsit* to recover a rent reserved by parol demise by the plaintiff to the defendant of an incorporeal hereditament,

DECLARATION
AND PLEADINGS
IN ASSUMPSIT.
Venue.

Rent of an in-
corporeal here-

(1) *How v. Kennett*, 5 N. & M. 1. 1 H. & W. 391.

(2) *Ibid.*

(3) *Ibid.*

(4) *Slack v. Sharp*, 3 M. & P. 390., *vide antè*, 595. tit. BANKRUPTCY.

(5) *Vide antè*, 364—401. tit. ASSUMPSIT.

(6) *Egler v. Marsden*, 5 Taunt. 25. *Davies v. Edwards*, 3 M. & S. 380.

(7) 1 Saund. 241. n. 5. 2 Chitt. Pl. 36.

(8) *Ward v. Smith*, 11 Price, 19.

(9) *Tempest v. Rawling*, 13 East, 18. *Cotterill v. Cuff*, 4 Taunt. 285.

(10) *Vide* Woodfall by Harrison, 639. *Bird v. Higginson*, 4 N. & M. 505. 1 H. & W. 61.

**DECLARATION
AND PLEADINGS
IN ASSUMPSIT.**

demise reserved by a
parol demise.

When the
agreement
should be de-
clared on spe-
cially.

Local situation
of the property.

Possessor's
title.

PLEADINGS.

Effect of plea
of non *assump-*
sit.

states, that the defendant actually occupied under such demise, the plaintiff may recover for the use and occupation. (1)

But where a count, upon a parol demise of a messuage, and the right to hunt, &c. over a manor, stated merely, that the defendant entered and became and was possessed of the messuage, right, liberties, and premises so to him granted as aforesaid:—It was held, that the plaintiff could not recover for the use and occupation. (2)

A declaration stated, that, in consideration, that the plaintiff would demise to the defendant furnished lodgings for a certain term, to wit, two years, the defendant promised, &c., and alleged by way of performance, that the plaintiff did demise, &c. for the said term of two years; the evidence was, that the defendant agreed to take the lodgings for two or three years:—It was held, that the consideration for the promise was not truly stated, and that the allegation of performance rendered the term stated material, notwithstanding, it was laid under a *videlicet* in setting forth the consideration; but that it would be otherwise, on a count on a consideration executed. (3)

The assignees of an insolvent tenant, in consideration of being allowed to move certain fixtures, agreed to pay to the landlord 7*l.* for the last quarter's rent:—It was held, that the sum could not be recovered on a count in an account stated, there having been no use and occupation by the defendants, and that the agreement should be declared on specially. (4)

In *assumpsit* for use and occupation, it is not necessary to state in what parish the premises are situated; and if the parish be described by a wrong name it is immaterial, at least if it be described by a name generally known, and which could not therefore mislead the defendant. (5)

In an action by a surviving owner for use and occupation of premises, it is not sufficient to allege, that the defendant held the premises by the sufferance and permission of the surviving owner only, where they were, in fact, held under two jointly. (6)

In an action for use and occupation by a dean and chapter, if the name of the present dean be mentioned at the beginning of the declaration, and it be afterwards laid, that the occupation was by the permission of the said dean and chapter, and if it appear in evidence, that the defendant occupied only in the time and by the permission of a former dean, it would be a fatal variance. (7)

The same pleas may be in all cases pleaded to *assumpsit* for use and occupation, which may be pleaded to any other *indebitatus assumpsit*. (8)

Where the plaintiff had mortgaged the premises before the defendant came into possession, and the mortgagee had given notice to the defendant, not to pay the plaintiff any rent becoming due after such notice:—It was holden (9), that, under non *assumpsit*, the defendant might give these facts in evidence, for the effect of the notice was, that a new tenancy was created between the occupier and the mortgagee; and the notice was evidence that

(1) *Bird v. Higginson*, 4 N. & M. 505. 1 H. & W. 61. (2) *Ibid*. (3) *Edge v. Strafford*, 1 C. & J. 391. (4) *Clarke v. Webb*, 2 Dowl. P. C. 671. (5) *Kirtland v. Pounsett*, 1 Taunt. 570. Doe d. *Tollet v. Salter*, 13 East, 9. 2 Chitt. Pl. 36., sed vide contra *Wilson v. Clark*, 1 Esp. N. P. C. 273. *Guest v. Croswell*, 3 Camp. 235. (6) *Israel v. Simmons*, 2 Stark. 356. (7) *Rochester (Dean of) v. Piers*, 1 Camp. 466. (8) *Vide ante*, 364—401. tit. *ASSUMPSIT*. (9) *Waddilove v. Barnett*, 2 Bing. N. C. 538.

the subsequent holding was not by permission of the plaintiff, as alleged in the declaration, but by permission of the mortgagee. Obedience to the mortgagee's notice as to rent due before the notice must be specially pleaded.

DECLARATION
AND PLEADINGS
IN ASSUMPSIT.

Where the plaintiff's title has expired, as in the case of *indebitatus assumpsit* for use and occupation, to which the defendant pleads the general issue, and insists, that the plaintiff had parted with his title to the property before the period of the occupation in question, such plea appears to be proper. (1)

By Reg. Gen. H. T. 4 Will. 4. s. 5. (2) counts upon demise, and for use and occupation of the same land for the same time, are not to be allowed; but where the first count of a declaration was framed on stat. 11 Geo. 2. c. 19. s. 18. for the recovery of double rent, and the second count was for use and occupation, the court refused a rule to strike out one of the two counts. (3)

Counts for
double rent
under stat. 11
Geo. 2. c. 19.
s. 18., and for
use and occu-
pation.

In an action of *assumpsit* for use and occupation of lodgings by A. H., the defendant's wife, at his request, the defendant cannot plead that A. H. was not his wife, as such plea would amount to the general issue, as well as tender an immaterial issue. (4)

In an action for use and occupation, where a plea stated, that the plaintiff before action took and detained, as a distress for rent, goods of value sufficient to satisfy the same: — It was held on special demurrer, that it was bad, for not shewing, that the rent was satisfied. (5)

4. DECLARATION AND PLEADINGS IN DEBT. (6)

The venue is transitory.

DECLARATION
AND PLEADING
IN DEBT.
Venue.

It has been previously stated (7), that in debt for use and occupation the plaintiff may declare generally for the use and occupation of divers messuages, lands, and tenements, without specifying where they are situate (8), and the declaration need not set forth the particulars of the demise. (9)

But if the particulars of a demise be alleged, they must be proved; therefore, in an action for double rent on stat. 11 Geo. 2. c. 19. s. 18., where the declaration stated a lease for three years, but on the evidence it appeared, that the lease for three years was void under the Statute of Frauds, and that the defendant was only tenant from year to year, though this was sufficient for the action, yet a lease for three years having been laid, and not proved, the plaintiff was nonsuited. (10)

Where it was alleged that the defendant, being tenant to the plaintiff, cut down and destroyed trees on the premises, "and otherwise used the said premises" "in so untenant-like and improper a manner," that they became and were, and are, dilapidated, and in bad and untenable condition: — It was holden, that the plaintiff could not recover for permissive waste. (11)

(1) Roscoe's Law Tracts, 27, 28. cit. Tidd's N. P. 344.

(2) *Post*, 2855.

(3) *Thornton v. Whitehead*, 1 Tyrw. & G. 313. 1 M. & W. 14. 4 Dowl. P. C. 747. Tidd's N. P. 217.

(4) *Sinclair v. Hervey* (Hon. T.), 2 Chitt. 642.

(5) *Lear v. Edmonds*, 1 B. & A. 157. S. C. nom. *Deare v. Edmunds*, 2 Chitt. 301.

(6) *Vide antè*, 1180—1186. tit. DEBT.

(7) *Vide antè*, 1228. tit. DEBT.

(8) *King v. Fraser*, 6 East, 348. 2 Smith, 462. 2 Chitt. Pl. 36.

(9) *Wilkins v. Wingate*, 6 T. R. 62.

(10) *Woodfall by Harrison*, 617.

(11) *Martin v. Gilham*, 7 A. & E. 540.

DECLARATION
AND PLEADINGS
IN DEBT.

For use and occupation, *nil habuit in tenementis* is not a good plea, as it would be upon a lease at common law, because there an interest is supposed to have passed from the lessor; but in use and occupation it is assumed, that there was an express promise; and therefore, if the plaintiff had an equitable title or no title at all, yet if the defendant have enjoyed by permission of the plaintiff, it is sufficient, and it is not necessary for the plaintiff to say that it is his house, any more than in *assumpsit* for goods sold to say, that they were the goods of the plaintiff. (1)

EVIDENCE.

WRITTEN OR
VERBAL CON-
TRACT.

Generally.

5. EVIDENCE.

The statute 11 Geo. 2. c. 19. contemplates the relation of landlord and tenant (2), the plaintiff must therefore prove an occupation by his permission of the premises by the defendant. This may be proved directly by the production and proof of a written agreement, if any has been entered into, in the usual way, by the evidence of the attesting witness, if there was one, or if not, by proof of the signature of the defendant; but with respect to mere collateral conditions, a party can shew by parol proof, who is to perform those acts concerning which, nothing is mentioned in the written document.

Where there is an agreement in writing, expressing the amount of rent, or the duration of the term, evidence of a parol agreement to annul or substantially vary the written contract is inadmissible, otherwise the Statute of Frauds would be eluded, and the same uncertainty introduced by supplementary or explanatory evidence, which that statute has suppressed in respect of the principal object (3): therefore, in one case it was held, that although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol evidence, without proving such written agreement. (4)

"Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years." (5) If the instrument be so far prospective in its operation, as to express the intention of the parties respecting the terms of a future lease, it is an agreement only, although it contain a contract for present possession, unless it also provide as to the terms of such possession in the interval, or contain actual words of present demise (6); but where the terms are doubtful, the effect must depend upon the intention of the parties, as collected

(1) *Lewis v. Willis*, 1 Wils. 314. *Curtis v. Spilly*, 1 Bing. N. C. 15. 4 M. & Sc. 554.

(2) 3 Stark. Ev. 3d ed. 1177.

(3) *Preston v. Merceau*, 2 W. Black. 1249.

(4) *Rex v. Kingston-upon-Hull (Inhabitants of the Holy Trinity)*, 7 B. & C. 611. 1 M. & R. 444.

(5) 4 Bac. Abr. Leases and Terms for Years (K.), 816.

(6) *Doe d. Coore v. Clare*, 2 T. R. 739. *Tempest v. Rawling*, 13 East, 18. *Goodtitle d. Estwick v. Way*, 1 T. R. 735. *Doe d. Bromfield v. Smith*, 6 East, 530. *Doe d. Walker v. Groves*, 15 ibid. 244. *Pool v. Bentley*, 12 ibid. 168. *Sturgeon v. Painter*, Noy, 128. *Fenny d. Eastham v. Child*, 3 M. & S. 255. *Roe d. Jackson v. Ashburner*, 5 T. R. 163.

from the whole instrument. (1) If the instrument be merely a prospective agreement for a lease, it must be stamped as an agreement; and if the agreement contain words of present demise, it must be stamped as a lease.

Where a contract (dated April 28.) was as follows:—A. agrees to execute to B. a lease of all that messuage, &c. *habendum* to B., his executors, &c. for seven years, from 24th June next, at the yearly rent of 105*l.* payable half yearly; the lease to contain covenants to pay rent and to repair, with proviso for re-entry on non performance of covenants; B. agrees to accept such lease, and execute a counterpart; and B. further agrees, when the dwelling houses on each side of the messuage hereby agreed to be demised shall be tenanted, to pay an additional yearly rent of 15*l.* during the residue of the seven years; A. agrees on or before June 24. to erect eight pannels, &c. (several works to be done by A. were then specified, as to paper certain rooms, fix a range and stoves, hang bells, lay on water, &c.); and it is agreed that, by the said lease hereby agreed to be granted, the rent reserved shall be 120*l.*, and that, by a separate deed, to bear date the day after such lease, A. shall release to B. the annual sum of 15*l.* out of such rent of 120*l.*; B. to prepare the lease at his own cost, to be approved of by A.'s solicitor; A. to have the option of making the lease fourteen years; and B. entered and paid rent to A. as first mentioned, and no lease was executed:—It was held, that the contract was not a lease, but an agreement merely. (2)

A. having, after execution of the contract, mortgaged the premises and become bankrupt, of which the mortgagee gave B. notice:—It was held, that the mortgagee might bring an action of use and occupation against B. for the rent accruing in the half year during which the notice was given. (3)

If a tenancy be established by the plaintiff in an action for use and occupation, it is incumbent on the defendant to shew, that the tenancy was afterwards determined, or that the landlord had accepted another person as tenant. (4)

Where, in an action by a landlord against his tenant for use and occupation, the tenant offers in evidence a document shewing, that the landlord's title has ceased, the document is admissible, because the property has passed to another who has a right to sue him for the same use and occupation; but when it appears that, under the document in question, the property would have passed from the plaintiff before the time of the use and occupation for which he sued, the document is not admissible, on the usual legal maxim, that a tenant cannot deny his landlord's title. (5)

A document indorsed in the plaintiff's handwriting, and which the plaintiff had directed a witness to give to the defendant, is good evidence on the part of the defendant, although the instrument be not between the parties on the record. (6)

Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession. (7)

EVIDENCE.

Where the contract is not a lease but an agreement.

If a tenancy be established, defendant must shew its determination.

Parol evidence cannot be given of a written agreement.

(1) *Morgan d. Dowding v. Bissell*, 3 Taunt. 65. *Dunk v. Hunter*, 5 B. & A. 322. *Clayton v. Burtenshaw*, 5 B. & C. 41. *Hope v. Booth*, 1 B. & Ad. 498.

(2) *Rawson v. Eicke*, 7 A. & E. 451.

(3) *Ibid.*

(4) *Ward v. Mason*, 9 Price, 291.

(5) *Agar v. Young*, 1 C. & Marsh. 78.

(6) *Ibid.*

(7) *Doe v. Harvey*, 8 Bing. 239. 1 M. & Sc. 374.

EVIDENCE.

When memorandum a mere unaccepted proposal.

If there be a written agreement, the plaintiff must declare upon it.

Where written instrument must be produced.

Defendant cannot shew by cross-examination that a written agreement exists.

Premises demised by an unstamped agreement.

When unstamped memorandum will be evidence.

Where agreement evidence to prove a consideration for

Where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did: — It was held, that the memorandum was a mere unaccepted proposal, and need not be produced, but that the terms of the letting might be proved by parol evidence. (1)

If, on the cross-examination of the plaintiff's witnesses, it appear that there is a written contract, the plaintiff, not having grounded his action upon it, must be nonsuited; and there is no occasion to produce the document. (2)

If one party prove a contract, without its appearing, either upon the examination in chief or upon cross-examination, that the contract was reduced into writing, and if the adverse party prove, that the contract was reduced into writing, it is incumbent upon such adverse party to produce, or to procure the production of the written instrument. (3)

In ejectment, one of the witnesses stated, on cross-examination, that he had prepared an agreement or lease in writing between the plaintiff and A. T. relative to the premises sought to be recovered, and that he had heard the latter say, that he held the premises under the plaintiff, but not that he held under an agreement: — It was held, that, nevertheless, the plaintiff was bound to produce the agreement, as its existence was shewn by one of his own witnesses. (4)

In an action of use and occupation, the defendant cannot shew, by the cross-examination of the plaintiff's witnesses, that the premises are held under a written agreement, but if it afterwards appear by the evidence of the defendant's witnesses, that the premises are so held, the plaintiff is not bound to put in the written agreement. (5)

Where premises have been demised by an agreement in writing, but not on stamped paper, the plaintiff is bound to give the writing in evidence; and if not stamped at the trial, the plaintiff will be nonsuited, and will not be allowed to go for use and occupation generally. (6)

Where a witness deposed, that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent: — It was holden, that an unstamped memorandum, written afterwards by himself, but not signed by any body, was admissible in evidence as a mere proposal to shew, that the settled draft was not the final agreement between the parties. (7)

Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between B. and C., and A. afterwards agreed by parol, that B. should have the lands upon the terms proposed: — It was held, in an action for a breach of the agreement, that the original proposal was receivable in evidence without a stamp. (8)

Where a tenant occupied premises under an agreement containing a proviso to keep the premises in tenantable repair, and the landlord declared generally, that "the defendant became tenant of the premises, and in con-

(1) *Doe d. Bingham v. Cartwright*, 3 B. & A. 326.

(2) *Damer v. Langton*, 1 C. & P. 168. *Reed v. Deere*, 7 B. & C. 261. 2 C. & P. 624.

(3) *Rex v. Padstow (Inhab. of)*, 1 N. & M. 9. 4 B. & Ad. 208., et vide *Rex v. Merthyr Tydfil (Inhab. of)*, 1 ibid. 29.

(4) *Fenn d. Thomas v. Griffith*, 4 M. & P. 299. 6 Bing. 533.

(5) *Marston v. Dean*, 7 C. & P. 13.

(6) *Brewer v. Palmer*, 3 Esp. N. P. C. 213.

(7) *Hawkins v. Warre*, 5 D. & R. 512.

(8) *Drant v. Brown*, ibid. 582. 3 B. & C. 665.

sideration thereof undertook to repair, without setting out the agreement:”—It was held, that such agreement was admissible in evidence to prove the fact of the tenancy, as the consideration for the promise to repair. (1)

In ejectment, where the landlord had proved payment of rent by the defendant, and half a year's notice to quit given to him; but his witness also proved, on cross-examination, that an agreement relative to the land in question was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, the contents of which the witness did not know, no notice having been given by the defendant to produce that paper, it was held not to be admissible evidence; for though it might be an agreement relative to the land, it might not affect the matter in judgment, nor even have been made between these parties. (2)

After the plaintiff has proved by witnesses a case of implied or oral contract, he cannot be nonsuited by the defendant's producing an unstamped written instrument purporting to contain the terms of a contract. (3)

Where rent was to be payable by a parol demise from the Lady-day following, evidence of the custom of the country is admissible to shew, that by “Lady-day” Old Lady-day was intended. (4)

In an action for rent of land verbally let on the same terms as the former tenant's lease, such lease must be produced properly stamped. (5)

Reasonable satisfaction for the use and occupation is the thing intended to be given by stat. 11 Geo. 2. c. 19. Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages; and where there is no express agreement, the plaintiff must prove the value of the premises occupied, and the plaintiff is entitled to recover for use and occupation, notwithstanding a recovery in ejectment, up to the day of the demise laid in the declaration. (6)

It seems to be no defence, that the landlord has distrained goods to the full value of the rent, if he has parted with them for a less sum. If he has sold them at too low a rate, the tenant's remedy is by action (7); and it is no defence, that the tenant quitted without giving notice, in consequence of fearing a distress on the part of the superior landlord. (8)

In an action for use and occupation since the new rules, it cannot be left to the jury to say, whether the evidence produced by the defendant does not amount to an admission, by the plaintiff, that he has been paid, and that nothing is due, without a plea of payment or settlement; and such evidence is inadmissible under a plea of set-off for money due on an account stated between the parties. (9)

Where the lessee took possession of a farm under an agreement, which he did not sign, the terms of which, the lessor had partly failed to fulfil:—It was held, that the jury might ascertain the value without regard to the rent specified in the agreement (10); for the rent reserved by an agreement

EVIDENCE.

a promise to repair.

When production of agreement will not be required.

When an oral contract has been proved, the production of an unstamped agreement is immaterial.

“Lady-day.” Verbal letting of land on the same terms as under an expired lease.

DAMAGES.

Where landlord has distrained goods for the full value of the rent.

When payment should be pleaded.

Lessee taking possession under an unsigned instrument.

(1) *Colley v. Streetton*, 3 D. & R. 522. 2 B. & C. 273.

(2) *Doe d. Wood (Sir Mark) v. Morris*, 12 East, 237., et vide *Doe d. Shearwood v. Pearson*, *ibid.* 238. n.

(3) *Fielder v. Ray*, 3 M. & P. 659. 6 Bing. 332. 4 C. & P. 61.

(4) *Doe d. Hall v. Benson*, 4 B. & A. 588.

(5) *Turner v. Power*, 7 B. & C. 625. M. & M. 131.

(6) *Birch v. Wright*, 1 T. R. 378.

(7) *Efford v. Burgess*, 1 M. & Rob. 23.

(8) *Rickett v. Tullick*, 6 C. & P. 66.

(9) *Linley v. Polden*, 3 Dowl. P. C. 780.

(10) *Tomlinson v. Day*, 2 B. & B. 680. 3 Stark. Ev. 3d ed. 1184.

EVIDENCE.	is evidence of amount in those cases only where the defendant has enjoyed the premises according to the agreement. But though a parol agreement for the use and occupation of land be void under the Statute of Frauds, recourse may be had to it to ascertain the amount of rent. (1)
Profit accruing from the cultivation.	Although in use and occupation evidence is given of the annual value of the property whilst occupied by the defendant, no inquiry is made as to the profit accruing from the cultivation, or as to the property having been cultivated. (2)
Liability for rent, notwithstanding the unproductiveness of the land.	If A. agree to purchase B.'s equitable interest in lands for a term of years at a specified rent, and A. pay the rent for several years, and acknowledge that a further sum was due, he cannot resist B.'s claim for such further rent in an action on the agreement, by shewing, that he has not been able to use the lands; but it seems, that B. might have recovered in an action for use and occupation. (3)
Liability for a year's rent.	The defendants took certain premises of the plaintiff for nine months at a rent certain, with the option, at the end of that time, of taking a lease for seven, fourteen, or twenty-one years; before the expiration of the nine months, the defendants let the premises to a company for six months, who actually occupied them for that period:—It was held, that, at the end of a year from the expiration of the nine months, the defendants were liable to the plaintiff in an action for use and occupation for a year's rent. (4)
After recovery in ejectment, rent may be recovered to the time of the demise. Rent due antecedently to plaintiff's legal title.	After a recovery of possession of the premises by ejectment, the plaintiff may maintain use and occupation for the rent to the time of the demise, but not after. (5) When the tenant has not obtained possession under the plaintiff, the plaintiff can only charge him for use and occupation from the time at which he became seised of the legal estate, although he may have had an equitable estate long before. Thus, where premises came into the defendant's possession through J. S., who afterwards mortgaged to W. S., and assigned the equity of redemption to the plaintiff:—It was held, that he could only recover rent from the time when he acquired the legal estate from W. S. (6)
When a tenant by holding over becomes a tenant from year to year.	Where a lease of premises for a term of years expired at Midsummer, 1821, and the tenant refused to give up possession at that time, and insisted that he was entitled to a notice to quit, and continued in possession until Christmas following, and paid rent to that time, when he tendered the keys of the premises to his landlord, which the latter refused to accept:—It was held, that such continuing in possession by the tenant did not amount to a holding over by him, but was conclusive evidence of a tenancy from year to year, which entitled the landlord to maintain an action for the use and occupation of the premises, to recover the amount of a quarter's rent which became due at Lady-day, 1822. (7)
COMPETENCY OF WITNESS.	In an action for use and occupation of lodgings, a witness, who was the only person who had occupied them, was called to prove, that the defendant

(1) *De Medina v. Polson*, Holt's N. P. C. 47.

(2) *Attwood v. Taylor*, 1 M. & G. 312. n.

(3) *Conolly v. Baxter*, 2 Stark. 525.

(4) *Waring v. King*, 8 M. & W. 571.

(5) *Doe d. Cheny v. Batten*, Cowp. 246.

(6) *Cobb v. Carpenter*, 2 Camp. 13. n.

(7) *Bishop v. Howard*, 3 D. & R. 293. 2 B. & C. 100., sed vide *Doe d. Hollingsworth v. Stennett*, 2 Esp. N. P. C. 717.

had taken them of the plaintiff, and had put her in them:—It was held, that she was a competent witness without a release. (1)

EVIDENCE.

Where a witness was called by the plaintiff, who stated, that he held the premises of one of the plaintiffs, it was held, that he could not be asked whether he had not given them up to the defendant without being released, and that stat. 3 & 4 Will. 4. c. 42. ss. 26, 27. did not apply. (2)

In an action for use and occupation, a judgment in a former action for use and occupation between the same parties, given in favour of the plaintiff, is evidence of the defendant's having occupied, but is not conclusive; and the jury ought to take into their consideration all the circumstances under which that judgment was obtained. (3)

JUDGMENT IN A
FORMER AC-
TION.

6. STATUTE OF LIMITATIONS — NEW TRIAL — AFFIDAVIT — PAYMENT OF MONEY INTO COURT — JUDGMENT BY DEFAULT — WRIT OF INQUIRY — COSTS.

STATUTE OF
LIMITATIONS —
NEW TRIAL —
AFFIDAVIT —
PAYMENT OF
MONEY INTO
COURT — JUDG-
MENT BY DE-
FAULT — WRIT
OF INQUIRY —
COSTS.

Where the tenant has not occupied the premises, paid rent, or done any act from which a tenancy can be inferred for six years, the Statute of Limitations is a good defence, though a notice to quit has never been given. (4)

STATUTE OF
LIMITATIONS.
NEW TRIAL.

In *Evans v. Evans* (5) it appeared, that lands were let by auction, subject to certain conditions of sale, that a memorandum of the terms was signed by the auctioneer and the tenant, and that underneath there was a signature of approval by the owner, and a direction, to pay the rent into the hands of the auctioneer. In an action for use and occupation brought by the auctioneer against the tenant, in which a verdict had been found for the plaintiff, the court granted a new trial, upon the ground, that the case had been left as an entire question of fact, without the attention of the jury having been called to the legal effects of the memorandum: — but it seems, that, under such circumstances, the auctioneer could not maintain use and occupation. (6)

To an affidavit, that the defendant was indebted to the plaintiff, "for the use and occupation of a certain dwelling-house, &c. of the plaintiff, held and enjoyed by the defendant, as tenant thereof," an objection was made, that, after the words "as tenant thereof," it omitted as tenant to the plaintiff, or that the defendant held at his request; but the court held it to be sufficient. (7)

AFFIDAVIT.

Payment of money into court in an action for use and occupation admits the contract, and precludes the defendant from questioning the plaintiff's title, or alleging the non joinder of another as co-plaintiff, although the defect may appear on the plaintiff's case. (8)

PAYMENT OF
MONEY INTO
COURT.

Suffering judgment by default, in an action for use and occupation, amounts to an admission, that the defendant held a house of the plaintiff,

JUDGMENT BY
DEFAULT.

(1) *Harman v. Holbrook*, 1 Gale, 176.

(2) *Hodson v. Marshall*, 7 C. & P. 16.

(3) *Jones v. Reynolds*, *ibid.* 395.

(4) *Leigh v. Thornton*, 1 B. & A. 625.

(5) 3 A. & E. 132. 1 H. & W. 239.

(6) *Ibid.*

(7) *Lee v. Sellwood*, 9 Price, 322. *Boston v. White*, *cit.* Archb. by Chitt. 142.

(8) *Dolly v. Hes*, 3 P. & D. 287.

**STATUTE OF LI-
MITATIONS, &c.**

who need not shew that it was his house; and it lies on the defendant to prove, that he did not occupy the particular house to which the attention of the jury has been directed. (1)

**WRIT OF IN-
QUIRY.**

When from the nature of the contract the amount of damage must of necessity be uncertain, then, though the action be in debt, there must be a writ of inquiry to reduce it to a certainty (2): thus, in an action of debt for use and occupation on a *quantum meruit*, after judgment by default, a writ of inquiry was held to be necessary before signing final judgment. (3)

COSTS.

If the plaintiff obtain a verdict, he is entitled to costs, unless the damages given by the jury be under 40s., and even in that case, unless the judge, before whom the cause was tried, certify under stat. 43 Eliz. c. 6. that such damages were under 40s. This certificate may be granted out of court at any time, between the verdict and judgment. (4)

(1) *Davis v. Holdship*, 1 Chitt. 644. n.

(3) Archb. by Chitt. 743.

(2) *Vide per* Bayley J. in *Weald v. Brown*,
2 C. & J. 673

(4) Sayer on Costs, 18. Woodfall by
Harrison, 646.

WAGER.

1. GENERALLY, pp. 2739—2741.

Wagers when allowed — Where the judge has a discretionary power, whether he will proceed with the cause — It is essential, that the event of a wager be contingent — Judgment of Lord Mansfield in Jones v. Randall — Children wagering upon the longest life of their respective parents — Person laying a wager upon his own age.

2. ILLEGAL TRANSACTIONS, p. 2741.

Wager must not be a cover to an illegal transaction, as to conceal bribery, &c. — Money lent for gaming — No demand can be enforced, which cannot be established but through the medium of an illegal bargain.

3. IMMORAL AND INDECENT TRANSACTIONS, p. 2742.

4. INCONSISTENT WITH PUBLIC POLICY, pp. 2742—2745.

Wagers tending to diminish the public revenue — Creating an interest in the life of a foreign enemy — Restraint of marriage — Leading to a public inquiry into the mode of playing an illegal game — Tendency to influence the course of justice — Future price of foreign funds — Stats. 16 Car. 2. c. 7. ss. 2. & 3., 9 Anne, c. 14. s. 1., and 5 & 6 Will. 4. c. 41. in restraint of gaming — Stats. 13 Geo. 2. c. 19., 18 Geo. 2. c. 34., and 3 & 4 Vict. c. 5. respecting horse racing — Stats. 19 Geo. 2. c. 37. and 14 Geo. 3. c. 48. ss. 1 & 2. prohibiting wagering policies.

5. STAKEHOLDER, pp. 2745, 2746.

6. DECLARATION AND PLEADINGS, pp. 2746, 2747.

7. EVIDENCE AND AMENDMENT OF RECORD, p. 2747.

1. GENERALLY.

GENERALLY.

In *Da Costa v. Jones* (1) Lord Mansfield observed, "Indifferent wagers upon indifferent matters, without any interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of parliament" (2): thus, a wager that A. has purchased a waggon of B. would not be void, either at common law or under stat. 14 Geo. 3. c. 48.

In *Good v. Elliott* (3), where the wager was, Whether one S. T. had not bought a certain waggon of one D. C.? It was, after a verdict for the plaintiff, moved in arrest of judgment;—that all wagers were void at common law, where the party had no interest in the subject, except that created by the wager; and that wagers came within stat. 14 Geo. 3. c. 48. as wagering policies;—but it was held by Mr. Justice Buller, that an interest in the subject-matter was not necessary to enable the party to maintain this

(1) Cowp. 729.

Esp. N. P. C. 285. *M^r Allester v. Haden*, 3(2) *Vaughan v. Whitcomb*, 2 N. R. 413.Camp. 438. *Hussey v. Crichton*, 3 Camp.*Micklefield v. Heppin*, 1 Anst. 133.168. *Jones v. Randall*, Cowp. 37.*St. Leger*, 1 Salk. 344. *Bulling v. Frost*, 1

(3) 3 T. R. 693.

GENERALLY.

Where the judge has a discretionary power, whether he will proceed with the cause.

It is essential that the event of a wager be contingent.

Judgment of Lord Mansfield in *Jones v. Randall*.

Children wagering upon the longest life of their respective parents.

action which might be on indifferent matters, and that wagers were not within stat. 14 Geo. 3. c. 48., which was confined to policies of insurance and written instruments only. (1)

In an action founded on a wager, it rests with the judge at the trial to say, whether he will or will not proceed with the cause. (2) And in one case (3) the chief justice discharged the jury from giving any verdict in an action for a wager deposited with a stakeholder, to be paid over to the winner on the event of a dog fight, and which was not demanded of the stakeholder until after the event was determined; and in another (4), he would not try an action for money had and received to recover back a deposit paid to abide the event of a wrestling match, which had not taken place. But where an action was brought against a stakeholder to recover the amount of a wager upon a cricket match, the judge at Nisi Prius, in the exercise of his discretion, thought proper to try the cause. (5)

It is essential to a fair wager that it be contingent, and the event unknown to the parties at the time of laying the wager; for if either side have a certainty of winning, the wager is void.

In *Jones v. Randall* (6) where the wager was, that a decree of the court of Chancery would be reversed in the Lords on appeal, and the plaintiff had a verdict, and upon moving to arrest the judgment Lord Mansfield said, the question is, Whether this wager is against principles of morality, or contrary to sound policy? It must not be against principles of sound policy, for many contracts, which are not against morality, are still void as against the maxims of sound policy. "With respect to the first question, Whether it is against morality? This contract is equal between the parties; they have each of them equal knowledge or equal ignorance; and it is concerning an event which, reasoning by the rules of predestination, is to be sure so far certain, that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties, whether the House of Lords would be of the same or of a different opinion with the chancellor; the presumption, if any, rather against the person betting in opposition to the chancellor's judgment." "The second question is, Whether this contract is against sound policy? And, supposing it clear of all the circumstances before mentioned, such as its being upon equal terms, without fraud, and with a view only of securing something to the appellant, in case the decision went against him, I profess that, even independent of those circumstances, I see no objection to it in sound policy. From my own memory of this cause, if there ever was uncertainty in any case, it was in this."

Where the wager was between two young men on the longest life of their respective fathers, and it appeared that, at the time when the wager was laid the defendant's father was dead, he having died the same day on which the wager was made, but at such a distance, that the event could not

(1) See *vide Hussey v. Crickitt*, 3 Camp. 168. *March (Earl of) v. Pigot*, 5 Burr. 2802. *Allen v. Hearn*, 1 T. R. 56. The grounds on which Mr. Justice Buller dissented were, first, that two persons shall not be permitted by means of a voluntary wager to try any question upon the right or interest of a third person; and secondly, that all wagers, whether in the shape of a policy or not, between parties

not having any interest, were prohibited by stat. 14 Geo. 3. c. 48.

(2) *Tharnton v. Thackray*, 2 Y. & J. 165.

(3) *Per Abbott C. J. in Egerton v. Fursman*, R. & M. 213. 1 C. & P. 613.

(4) *Kennedy v. Gad*, 3 C. & P. 376. M. & M. 225.

(5) *Walpole v. Saunders*, 7 D. & R. 130.

(6) *Cowp.* 39.

be known for some days after; and the defendant refused to pay, on the ground that it was impossible he could win, his father being dead when the wager was made; and consequently, as he could not win, he was not bound to pay:—It was held, that the event being unknown at the time when the wager was laid, that it was a fair wager, and the plaintiff had judgment for its amount. (1)

GENERALLY.

But a person who lays a wager cannot set it aside on the ground, that at the time when it was laid the opposite party had received information, that he was mistaken; but it is too late for him on his discovering his mistake to countermand the authority of the stakeholder to pay over the money betted. (2)

A person can lay a wager upon his own age (3), and there is no illegality in betting a rump and dozen. (4)

Person laying a wager upon his own age.

2. ILLEGAL TRANSACTIONS.

ILLEGAL TRANSACTIONS.

The ground of the wager must not be a cover to an illegal transaction, as to conceal bribery, simony, or usury. (5)

Wager must not be a cover to an illegal transaction, as to conceal bribery, &c.

Where the wager was between two voters on the event of an election then depending, it was adjudged, that the action would not lie, for so it might be made a means of bribery at an election. But had the persons not been voters it might have been otherwise. (6)

And *à fortiori*, wherever the wager is itself illegal, or arises from an illegal transaction, it is not recoverable:—such are the cases of wagering policies.

So, where the wager was on a race, but the sum run for was under 50*l*., and was consequently illegal under stat. 13 Geo. 2. c. 19., it was resolved, that the plaintiff could not recover; for the race, which was the subject of the wager, being illegal, so also was the wager. (7) But it may be here observed, that the provisions of stat. 13 Geo. 2. c. 19., which relate to horse racing, have been repealed by stat. 3 & 4 Vict. c. 5.

Stat. 13 Geo. 2, c. 19.

Stat. 3 & 4 Vict. c. 5.

Money lent for the purpose of gaming, and of playing at an illegal game, such as hazard, cannot be recovered back. (8)

Money lent for gaming.

That no demand can be enforced, which cannot be established but through the medium of an illegal bargain, is illustrated by *Simpson v. Bloss* (9), where the plaintiff laid and won, an illegal wager with B., the defendant taking a part in the bet; and it was expected, that B. would pay on a certain day, before which, the plaintiff at the defendant's request, because he was going to a distance, advanced to the defendant his share of the winnings; and B. died insolvent before the day, and the bet never was paid:—It was holden, inasmuch as the plaintiff could not establish his case without the aid of the illegal wager in his proof, in which all were concerned, he could not recover.

No demand can be enforced, which cannot be established, but through the medium of an illegal bargain.

(1) *March (Earl) v. Pigot*, 5 Burr. 2803. recog. in *Mead v. Davison*, 3 A. & E. 307., see vide *Hussey v. Crickitt*, 3 Camp. 172. *Bland v. Collett*, 4 ibid. 157.

(2) *Bland v. Collett*, 4 Camp. 157.

(3) *Hussey v. Crickitt*, 3 ibid. 168.

(4) *Ibid.*

(5) *Jones v. Randall*, Cowp. 38.

(6) *Allen v. Hearn*, 1 T. R. 56.

(7) *Johnson v. Bann*, 4 ibid. 1.

(8) *M^cKinnell v. Robinson*, 3 M. & W. 434.

(9) 7 Taunt. 246.

**IMMORAL AND
INDECENT
TRANSACTIONS.**

The wager
must not be
immoral or in-
decent.

3. IMMORAL AND INDECENT TRANSACTIONS.

The ground of the wager must not be an immoral or indecent transaction, for such cannot be recovered; nor involve any question by which the peace or character of others may be affected (1): thus, a wager is void, the subject being, whether an unmarried female had a child or not. (2) So, also, where the wager was upon the sex of Mademoiselle d'Eon; the action was held not to lie, first, because it afforded an opening to indecent and improper evidence; secondly, because the peace and character of a third person might be materially injured by an inquiry in which such person was not concerned, by the voluntary acts of uninterested persons. (3)

4. INCONSISTENT WITH PUBLIC POLICY.

**INCONSISTENT
WITH PUBLIC
POLICY.**

Wagers tending
to diminish the
public revenue.

The wager must not be on a question which it is inconsistent with the sound policy of the state to enter into the discussion of.

Thus, an action for the amount of a wager respecting the amount of the hop duties of Canterbury, was adjudged, not to be maintainable, because it then became the interest of one of the parties to diminish the public revenue, and was communicating to foreigners the internal resources of the kingdom, and drawing that into discussion, which should only be canvassed in parliament. It was, therefore, a matter which in sound policy ought not to be brought into question (4); under which principle, wagers upon the contingency of peace between this country and another with which we are at war are illegal. (5)

Creating an in-
terest in the
life of a foreign
enemy.

Where it was agreed to pay certain sums per day as long as Buonaparte lived:—It was holden illegal, inasmuch as it had a tendency to create an interest in the plaintiff in the life of a foreign enemy, and which in the case of invasion might induce him to act contrary to his allegiance, and likewise, that the party suffering under such a contract might be induced to compass and encourage the horrid practice of assassination, in order to get rid of a life so burdensome to him. (6)

Restraint of
marriage.

And upon this principle, where the plaintiff betted the defendant 50 guineas, that he would not marry for six years, and the six years having expired, and he being unmarried, then brought his action, it was adjudged, that no action could be maintained, for it operated in restraint of marriage, and was consequently contrary to good policy to support, there being no circumstances to shew, that such restraint in the particular instance was prudent or proper. (7)

Leading to a
public inquiry

Any wager which leads to a public inquiry into the mode of playing an illegal game (8), *e. g.* hazard, by which the by-standers may acquire a know-

(1) *Jones v. Randall*, Cowp. 38. *Da Costa v. Jones*, *ibid.* 729.

(2) *Ditchburn v. Goldsmith*, 4 Camp. 152.

(3) *Da Costa v. Jones*, Cowp. 729. *Roe-buck v. Hammerton*, *ibid.* 737.

(4) *Atherfold v. Beard*, 2 T. R. 610. *Shirley v. Sankey*, 2 B. & P. 130.

(5) *Lacauseade v. White*, 7 T. R. 535. *Foster v. Thachery*, *cit.* 1 *ibid.* 57. *Aubert v. Walsh*, 3 Taunt. 277.

(6) *Gilbert (Clerk) v. Sikes (Sir Mark)*, 16 East, 150.

(7) *Hartley v. Rice*, 10 *ibid.* 22.

(8) *Brown v. Leeson*, 2 Hen. Black. 43.

ledge of it, is contrary to good morals and the policy of the law, and therefore not a ground on which an action can be maintained.

If a wager have a tendency to influence the course of justice, it will be illegal, as being against public policy: thus, a wager respecting the conviction or acquittal of a prisoner upon a criminal charge is illegal. (1)

It also seems, that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of those carriages, and no other, is illegal. (2)

In *Morgan v. Pebrer* (3) it was holden, that a wager on the future price of foreign funds is not void or illegal, either by stat. 7 Geo. 2. c. 8. or at common law.

By stat. 16 Car. 2. c. 7. s. 2. the winner of any money or other valuable thing by deceit, in playing at cards, dice, tables, tennis, bowls, kittles, shovel board; or in cockfightings, horse races, dog matches, foot races, or other games; or by bearing a part in the stakes, or by betting on the sides of such as play, ride, or run, are liable to forfeit treble the value.

And all securities and promises given or made for the payment of sums exceeding 100*l*., which have been lost at one time, by playing at any one of the said games, or by betting on the player, are declared void, and the winner shall forfeit treble the value of the money or other thing won above 100*l*.

This statute being to suppress the practice of excessive gaming, has always been construed in the most extensive manner, that could answer that end; and the statute not only avoids securities given for money lost at play, but also where the contract is precedent (4); in fact, wherever a contract is founded on the illegal and tortious winning, and only secures the payment of that money, it is within the statute. (5)

By stat. 9 Anne, c. 14. all notes, bills, bonds, judgments, mortgages, conveyances, or other securities given by any person, where the whole or any part of the consideration of such securities shall be for money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, or other games (6), or by betting on the sides of such as game at any of the aforesaid games, or for repaying any money knowingly lent for such gaming or betting, or lent at the time and place of such play to any person that shall play or bet, shall be void. (7)

But by stat. 5 & 6 Will. 4. c. 41. s. 1. notes, bills, or mortgages, which under the foregoing acts would have been absolutely void, are only to be deemed as having been given for an illegal consideration.

Although by stat. 9 Anne, c. 14. s. 5. all written securities given to secure the payment of money won at any game were rendered void (8), yet it has been held under such statute, that the wager must arise from play, or be laid on a person playing at some game prohibited by the statute.

For where the wager was, that one Clarke would not run four miles in

INCONSISTENT
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into the mode
of playing an
illegal game.

Tendency to
influence the
course of jus-
tice.

Future price of
foreign funds.

STAT. 16
CAR. 2. c. 7.
s. 2.

Stat. 16 Car. 2.
c. 7. s. 3.

Stat. 9 Anne,
c. 14. s. 1.

Stat. 5 & 6
Will. 4. c. 41.
s. 1.

(1) *Evans v. Jones*, 5 M. & W. 77.

(2) *Eltham v. Kingsman*, 1 B. & A. 683.

(3) 3 Bing. N. C. 457.

(4) *Hedgeborough v. Rosenden*, 1 Vent. 253. *Edgebury v. Rosindale*, 2 Lev. 94.

(5) *Hussey v. Jacob*, 1 Salk. 344. Carth. 356.

(6) These words apply to games of chance and skill (*Sigel v. Jebb*, 3 Stark. 1.), to horse races (*Goodburn v. Marley*, Str. 1159. *Blas-*

ton v. Pye, 2 Wils. 309. *Clayton v. Jennings*, 2 W. Black. 706.), to foot races (*Lynall v. Longbotham*, 2 Wils. 36. *Brown v. Berkeley*, Cowp. 281.); *semble*, game at cricket. *Jeffreys v. Walter*, 1 Wils. 220.

(7) Vide *Sigel v. Jebb*, 3 Stark. 1.

(8) *Ibid.* *Jeffreys v. Walter*, 1 Wils. 220. *Lynall v. Longbotham*, 2 *ibid.* 36. *Shirley v. Sankey*, 2 B. & P. 190., *sed vide* stat. 5 & 6 Will. 4. c. 41. s. 1.

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WITH PUBLIC
POLICY.

twenty-one minutes; this was adjudged not to be within the statute, for the person by whose means the wager was won was not playing, though it was admitted, that a foot race was a game prohibited under stat. 9 Anne, c. 14., and that if it had been laid and proved, that Clarke was playing at a game called a foot race, that the wager would not be recoverable; but that did not appear, as Clarke might be running for exercise or amusement, and know nothing of the wager, and so could not be said to be playing. (1)

Steeple chase.

A steeple chase is not illegal under stat. 18 Geo. 2. c. 34. s. 11. (2) But an action of *assumpsit* will lie to recover money won at play at a legal game not amounting to 10*l*. (3)

Cock matches or wagers upon them are illegal (4); so are wagers on the result of a sparring exhibition (5), cricket match. (6)

Where the wager was, how many different ways there were of nicking seven the main at the game of hazard — the court held, that such a cause should not be entertained in court, for the game of hazard being prohibited by law, it would be admitting the discussion in a court of justice of a subject founded on an illegal transaction. (7)

"At any one
time or sitting."

In the construction of the words "at any one time or sitting," it has been adjudged, that where a sum above 10*l*. had been won and paid after a continuance at play, except an interruption during dinner time, it was to be considered as won at one and the same sitting. (8)

STATS. 13
GEO. 2. c. 19.,
18 GEO. 2.
c. 34., AND 3 &
4 VICT. c. 5.
HORSE RACING.

The stats. 13 Geo. 2. c. 19. and 18 Geo. 2. c. 34. were made to legalise horse races where the stake was 50*l*. or upwards, or 25*l*. deposited by each party, and accordingly wagers in such matches would under such statutes be recoverable in *assumpsit* (9); but that part of stat. 13 Geo. 2. c. 19. which relates to horse racing has been repealed by stat. 3 & 4 Vict. c. 5.

In *Whaley v. Pajot* (10) it was held, that the horse race must be a "horse race," in the common understanding of that term, and therefore did not extend to a race against time, or that one horse performed a given distance in less time than two placed at different places of the distance to be run, for such was not properly a horse race; and the court there said, that the case of *Ximenes v. Jaques* (11), which was, that a certain distance could be performed in a given time in a chaise and pair of horses, was decided on the same ground.

Newmarket and Black Hambleton are excepted, where a race may be run for any sum or stake less than 50*l*. But though such horse races are legal, yet it has been determined, that they are games within stat. 9 Anne, c. 14., and consequently wagers above 10*l*. upon a lawful horse race are illegal. (12)

Though the owners of horses may run them for a stake of 50*l*. or more

(1) *Lynall v. Longbotham*, 2 Wils. 36. *Ximenes v. Jaques*, 6 T. & R. 499.

(2) *Evans v. Pratt*, 1 Dowl. P. C. N. S. 505.

(3) *Bulling v. Frost*, 1 Esp. N. P. C. 235.

(4) *Squires v. Whisken*, 3 Camp. 140.

(5) *Hunt v. Bell*, 1 Bing. 1. 7 Moore, 212.

(6) *Jeffreys v. Walter*, 1 Wils. 220.

(7) *Brown v. Leeson*, 2 Hen. Black. 43.

(8) *Bones v. Booth*, 2 W. Black. 1226.

The writ of *certiorari* at the instance of a defendant is taken away by stat. 25 Geo. 2. c. 36. s. 10. in the case of an indictment

for keeping a gaming house. *Res v. Fox*, 5 Dowl. P. C. 242.

(9) *McAlister v. Haden*, 2 Camp. 438. *Good v. Elliott*, 3 T. R. 705. *Goodburn v. Marley*, Str. 1159. *Blaxton v. Pye*, 2 Wils. 309. *Clayton v. Jennings*, 2 W. Black. 706. *Bidmead v. Gale*, 4 Burr. 2433. *Johnson v. Bann*, 4 T. R. 1. *Whaley v. Pajot*, 2 B. & P. 51. Stat. 9 Anne, c. 14.

(10) 2 B. & P. 50. *Johnson v. Bann*, 4 T. R. 1.

(11) 6 T. R. 499.

(12) *Clayton v. Jennings*, 2 W. Black. 706. *Goodburn v. Marley*, Str. 1159.

at a proper place for a horse race, yet it has been held, if they run them upon the highway, the wager is illegal. (1)

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An agreement by which the defendant sold the plaintiff a horse for 200*l.* if he trotted eighteen miles within the hour, but for one shilling if he failed—was held ill on arrest of judgment. (2)

A wager of 50*l.* to 1*l.* that a certain horse had not won a by-gone horse race is lawful; for such a wager neither accompanies any thing then in a course of being done, nor contemplates any thing then remaining to be done, and therefore is not within the stat. 9 Anne, c. 14. (3)

If the wager be not upon the event of the game played at, but on a collateral matter, it is not affected by stat. 9 Anne, c. 14. (4) Thus, where the question was, whether one of the players was bound to move a man at backgammon, not in the play; it was adjudged, that the amount of wager might be recovered in *assumpsit*. (5)

Cases not with-
in stat. 9 Anne,
c. 14.

The provisions and effect of stat. 19 Geo. 2. c. 37. have been previously discussed. (6)

Stat. 19 Geo. 2.
c. 37.

By stat. 14 Geo. 3. c. 48. insurances made on the life of any person, or any other event, wherein the person for whose use such policy shall be made shall have no interest, or by way of wagering or gaming, is void; and in all policies on lives or other events, the names of the persons interested must be inserted.

14 Geo. 3.
c. 48. ss. 1 & 2.

In *Mollison v. Staples* (7), where a policy was made in the event of there being an open trade between Great Britain and the province of Maryland on or before July 6. 1778, Lord Mansfield said, "It was clear the plaintiff could not recover."

In *Paterson v. Powell* (8), recognising the foregoing case, and *Roebuck v. Hammerton* (9), it was holden, that an engagement in consideration of 40 guineas to pay 100*l.* in case Brazilian shares should be done at a certain sum on a certain day, subscribed by several persons, each for themselves, was holden to be a policy of insurance and void within stat. 14 Geo. 3. c. 48. (10)

5. STAKEHOLDER.

A stakeholder is bound to retain the money till one of the party is clearly entitled to receive it; and if he unduly pay it over to either party not entitled to it, he will be liable to repay the stake. (11)

STAKEHOLDER.

If a wager be laid and the money deposited in the hands of a stakeholder, though the subject-matter of the wager be illegal, the stakeholder cannot justify holding the money from either of the parties on that ground. And, under such circumstances, if either party give notice to the stakeholder not to pay over the money, and bring his action against him

- (1) *Whaley v. Pajot*, 2 B. & P. 51.
- (2) *Brogden v. Marriott*, 3 Bing. N. C. 88.
- (3) *Pugh v. Jenkins*, 1 G. & D. 40.
- (4) *Hawk. b. i. c. 92. s. 47.*
- (5) *Pope v. St. Leger*, 1 Salk. 344.
- (6) *Vide antè*, 2111. tit. INSURANCE.
- (7) *Marshall on Insurance*, 118. Park on Insurance, 640. n.

- (8) 9 Bing. 320. 2 M. & Sc. 399.
 - (9) *Cowp.* 737.
 - (10) *Vide Good v. Elliott*, *antè*, 2740.
 - (11) *Burrough v. Skinner*, 5 Burr. 2639.
- Bate v. Cartwright*, 7 Price, 540. *Hastelow v. Jackson*, 8 B. & C. 221. *Aubert v. Walsh*, 3 Taunt. 282. *Smith v. Bickmore*, 4 *ibid.*

STAKEHOLDER. for the money so deposited in his hands before it be paid over, he can recover it. (1)

But where the stakeholder of the money bet on an illegal wager had paid it over to the winner, with the consent of the loser, it was adjudged, that the latter could not bring an action against the former to recover it back because *in pari delicto potior est conditio possidentis*. (2)

Although a judge has a right to exercise his discretion, whether he will try an idle and frivolous wager cause, it seems, that if one of the parties to an illegal or frivolous wager, demand his deposit from the stakeholder before the event has been determined, or before the money has been paid over, he has a right to insist that the cause shall be tried in order to recover back his money. (3)

An agent who is authorised only to contract illegal debts, cannot, if he lose, pay the winner without an express direction so to do. (4)

6. DECLARATION AND PLEADINGS.

DECLARATION AND PLEAD- INGS.

Indebitatus assumpsit will not lie to recover a wager (5), because it only lies where debt can be maintained: but a special *assumpsit* will lie to recover a wager fairly won; if it arise, as previously stated, on a contingency, the event of which is then unknown to both parties. It must not be a blind to an illegal or an immoral transaction, or to conceal simony, or usury, or bribery; nor must it be inconsistent with the sound policy of the state to support it (6); and all securities for an illegal wager are void. (7)

If money be paid on an illegal consideration, it can be recovered back by the party who has so improperly paid it. (8)

If a dinner be ordered at a tavern by the authority of two persons, who have laid a wager of a rump and dozen, if the winner pay the bill, he may maintain an action against the loser for money paid, to recover the amount. (9)

In an action against the loser of a wager, the special circumstances should be stated (10); but the stake may be recovered from the stakeholder upon a common count for money had and received. (11)

In the declaration against the loser, mutual promises should in general be stated; and though it has been usual to allege, that a discourse was had &c., as in the case of feigned issues (12), that form is unnecessary; and it is sufficient to state as inducement, the expectation of the event upon which the parties betted, and then to shew the agreement, &c. of the parties, with other proper averments of the events on which the right of the action depends. If a man agree to ride without whip or stick, or other arms, an allegation, that he rode without whip and stick, or other arms is

(1) *Cotton v. Thurland*, 5 T. R. 405.

(2) *Rex v. Perry*, 6 ibid. 575. *Vandych v. Hewitt*, 1 East, 96. *Williams v. Hedley*, 8 ibid. 381. *Lacause v. White*, 7 T. R. 535.

(3) 2 Chitt. Pl. 127. *Bate v. Cartwright*, 7 Price, 540. *Hastelow v. Jackson*, 8 B. & C. 221. 6 D. & R. 28. *Squires v. Whisken*, 3 Camp. 140. *Thornton v. Thackray*, 2 Y. & J. 156.

(4) *Clayton v. Dilly*, 4 Taunt. 165.

(5) *Bovey v. Castleman*, 1 Ld. Raym. 69.

Hard's case, 1 Salk. 23. *Jackson v. Colgrave*, Carth. 338. *Good v. Elliott*, 3 T. R. 704.

(6) *Per Lord Mansfield*, Cowp. 38.

(7) *Shirley v. Sankey*, 2 B. & P. 130. 9 Anne, c. 14.

(8) *Lacause v. White*, 7 T. R. 535. *Hewson v. Hancock*, 1 Esp. N. P. 29.

(9) *Hussey v. Crickitt*, 3 Camp. 168.

(10) 2 Chitt. Pl. 138.

(11) *Smith v. Aicry*, 6 Mod. 128.

(12) *Good v. Elliott*, 3 T. R. 693.

a sufficient averment of performance; at least, it is good after verdict. (1) As a general rule it would seem, that where an agreement has been formally stated, there seems to be no occasion also for the statement of mutual promises. (2)

Pleas, alleging the consideration of a debt to be money lent for the purposes of gaming; and money lost at play, may be pleaded to the same declaration without the imposition of a condition, that different matters of defence shall be given in evidence under them. (3)

De injuriâ is a good replication on general demurrer to a plea, in an action on a cheque, that it was given for a gambling debt. (4)

DECLARATION
AND PLEAD-
INGS.

Where pleas
may be pleaded
without the
condition, that
different matter
of defence shall
be given in
evidence under
them.

De injuriâ.

7. EVIDENCE AND AMENDMENT OF RECORD.

If a person be a witness to a wager, upon which an action is brought, or if he have laid a wager on the same matter at the same time, he will not be admissible as a witness; but if the wager be laid by the witness afterwards, he will be a good witness, because public justice became previously interested in his testimony. (5) So, on an indictment for an assault, where it was proved, that the prosecutor had laid a wager, that he would convict the defendant:— he was held to be a good witness, though it went to his credit (6), as it would be against public policy to allow a witness, by any such gratuitous act, to exclude himself from giving evidence.

In *assumpsit* by indorsee against the maker of a promissory note, it was pleaded, that the note was made for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration; to which it was replied, that the plaintiff had no notice of the illegality of the consideration, and that he gave value:— It was held, that upon those pleadings it was incumbent on the defendant to give some evidence of the illegal consideration of the note before the plaintiff could be called upon to prove he gave value. (7)

EVIDENCE AND
AMENDMENT
OF RECORD.

EVIDENCE.
Competency of
witness.

Illegal con-
sideration.

In *Martin v. Smith* (8) the defendant took a share of 50*l.* in a wager made by O. in an illegal horse race, and disposed of his interest in 20*l.* out of the 50*l.* to the plaintiff; the defendant having received the 50*l.* from O., who won the wager, refused to pay the 20*l.* to the plaintiff, who thereupon sued him for that amount in an action for money had and received:— It was held, that the defendant could not, under the general issue, set up the illegality of the wager as an answer to the action.

When illegality
of the wager
cannot be set
up under the
general issue.

In *assumpsit* on a wager, that a railroad would be completed for the general conveyance of passengers to A. and B. within six years; it was averred, that it was completed for the general conveyance of passengers to A. and B. within six years; to which there was a plea traversing the averment:— It was held, that, under stat. 3 & 4 Will. 4. c. 42. s. 23., the judge at Nisi Prius might amend the record agreeably to the evidence, by striking out the words, "for the general conveyance of passengers," in the declaration and plea. (9)

AMENDMENT
OF RECORD.

(1) *Burgess v. Bracker*, 2 Ld. Raym. 1366. 2 Chitt. Pl. 138.

(2) *Ibid.*

(3) *Temple v. Keily*, 9 Dowl. P. C. 62.

(4) *Curtis v. Headfort (Marquess)*, 6 *ibid.* 496.

(5) *Barlow v. Vowell*, Skin. 586.

(6) *Rex v. Fox*, Str. 652.

(7) *Edmunds v. Groves*, 5 Dowl. P. C. 775.

(8) 4 Bing. N. C. 436.

(9) *Evans v. Fryer*, 10 A. & E. 609.

WATER AND WATERCOURSES.

1. GENERALLY, pp. 2748—2752.

The water of a running stream is publici juris — How a public right to the use of water may be extinguished — An actual grant or license must exist to support an absolute right to water — Stat. 2 & 3 Will. 4. c. 71. s. 2. — After a right has been acquired to use water for one purpose, the owner has a right to use the same extent of water to another purpose — In the absence of a special custom, artificial watercourses are not distinguished in law from natural ones — Water diminished by drains — Omission of tenant to appropriate the water during his tenancy — Diversion of water without a waste — When and by whom a stream can be restored to its ancient course — An erection of a permanent character cannot be made, which is incompatible with the rights of another — Right to pen back water for the purpose of repairing a mill — Permanent obstruction of a navigable drain, but which had been choked up with mud for sixteen years — License to take water at a particular place — Oral license — Where defect occasioned by the plaintiff's tenant — Where a channel cannot be filled, if it damage the house of another — ABATEMENT OF OBSTRUCTIONS.

2. WHO CAN OR CANNOT MAINTAIN THE ACTION, pp. 2752, 2753.

3. DECLARATION AND PLEADINGS, pp. 2753—2755.

4. EVIDENCE — DAMAGES — COSTS — JUDGMENT, pp. 2755—2757.

Direct evidence to prove a right to water — When record of former action admissible — Declarations of a former tenant — When mere possession sufficient — Whether a river be navigable or not, is a question for the jury — Insufficient evidence of diversion or obstruction — Incompetency of witness — DAMAGES — COSTS — JUDGMENT.

GENERALLY.

The water of a running stream is *publici juris*.

The water of a running stream is *publici juris*, which each successive proprietor has a right to use in passing, but which is the property of no one; but if one of such owners appropriates the water by applying it to a particular purpose, he has a right to do so, provided he does not thereby prejudice any other owner in his previous use and appropriation of the water to other purposes. (1) These principles accord with the civil law, "*Plerosque scio prorsus flumina avertisse alveosque mutasse dum prædiis suis consulunt; oportet enim in hujusmodi rebus utilitatem et tutelam facientis spectari sine injuriâ accollarum.*" (2)

But although a right to the use of water flowing in a stream and *publici juris* becomes private by appropriation, it may become again *publici juris* by relinquishment. (3)

How a public right to the use of water may be extinguished.

A public right to the use of water for navigation may be extinguished either by an act of parliament, or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by

(1) 3 Stark Ev. 3d ed. 1249.

(2) Dig. tit. *Ne quid in Flumine*.

(3) *Liggins v. Inge*, 7 Bing. 682.

GENERALLY.

natural causes, such as the recess of the sea, or an accumulation of mud, &c. And where a public road obstructing a channel, once navigable, has existed for so long a time, that the state of the channel at the time when the road was made cannot be proved, it is to be presumed, that the right of navigation was legally extinguished. (1)

Every proprietor who claims a right, either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted possession of twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right. (2)

By stat. 2 & 3 Will. 4. c. 71. s. 2. (3) an uninterrupted enjoyment of a watercourse for the period of twenty years will give a valid title, unless it be answered by such evidence as before that statute would have rebutted the presumption of a grant; but it may be here observed, that water flowing over a close *prima facie* passes with it by a conveyance of the land. (4)

In case for the diversion of water from the plaintiff's mills, it appeared, that certain mining adventurers had obtained a lease from the proprietors of a mine, lying near and benefited by a drain or sough constructed by them (under what right did not appear, but presumed to be either under the custom of mining, or by license from the owner of the soil), and that afterwards the father of the plaintiff had obtained a lease from the lord of the manor, also owner of the soil through which the sough flowed, on which he erected cotton mills; subsequently, another company of adventurers began to construct on a lower level another sough, which, under an agreement with the proprietors of the first sough, and of other mines drained by it, they proceeded to extend, thereby reducing the quantity of water which would have passed along the first sough to the plaintiff's mills:—It was held, that as the origin of the watercourse, as well as its continuance, were referable to the convenience of the mine owners, and that from the nature of the case it was of a temporary character, no inference could be made of any intention to grant the use of the water in perpetuity, and that no such right was therefore acquired by the user, either by the presumption of a grant, or by force of stat. 2 & 3 Will. 4. c. 71. (5)

If after a right has been acquired to use water for one purpose, the owner has a right to use the same extent of water to a different purpose, provided he does no prejudice to any other owner in the use of the water: thus, in *Saunders v. Newman* (6) the plaintiff had forty years ago built a mill on the site of an ancient mill, and had within twenty years built a new mill with a wheel of the same dimensions; and afterwards substituted a wheel of different dimensions, but requiring less water; the alteration was held to be no defence to an action for forcing the water back and injuring the mill; Mr. Justice Abbott observing, "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that

An actual grant or license must exist to support an absolute right to water.

Stat. 2 & 3 Will. 4. c. 71. s. 2.

After a right has been acquired to use water for one purpose, the owner has a right to use the same extent of water to another purpose.

(1) *Rex v. Montague*, 4 B. & C. 598.

(2) *Wright v. Howard*, 1 S. & S. 190.
Mason v. Hill, 3 B. & Ad. 304. 2 N. & M. 747.

(3) *Vide post*, APPENDIX, 2914.

(4) *Canham v. Fish*, 2 C. & J. 126. 2 Tyrw. 155. 1 Price's P. C. 148.

(5) *Arkwright v. Gell*, 5 M. & W. 203.

(6) 1 B. & A. 258.

GENERALLY.

would stop all improvements in machinery. If indeed the alterations made from time to time prejudice the right of the lower mill, the case would be different." (1)

In the absence of a special custom, artificial water-courses are not distinguished in law from natural ones.

In the absence of a special custom, artificial watercourses are not distinguished in law from natural ones; and a title may be gained by twenty years' user, as well to the former as the latter. Therefore, where miners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery through whose premises the water flowed for twenty years after the working had ceased had, during that time, used it for brewing:—It was holden, that he thereby gained a right to the undisturbed enjoyment of the water, and that mines could not afterwards be so worked as to pollute it. (2)

Water diminished by drains.

After twenty years' uninterrupted enjoyment of a spring of water by the occupier of the close in which it issues above ground, the owner of an adjoining close cannot lawfully cut a drain, whereby the supply of water to the spring is diminished. (3)

Omission of tenant to appropriate the water during his tenancy.

The negligence or omission of a tenant to appropriate the water during his tenancy, will not destroy the right of his lessor to resume his original appropriation of the water. Thus, B., having diverted water from the mill of A., for which A. recovered damages, took a lease of the water from A. for ninety-nine years, and A. suffered his mill to fall into decay:—It was adjudged, that the owner of the land had a right to the water, as it formerly flowed, at the end of the term. (4)

Diversion of water without a waste.

Where the defendant erected a dam above the mill of the plaintiff, by which the water was diverted from its accustomed channel, but to which it returned long before it reached the plaintiff's mill, which diversion affected the regularity of the supply, though it produced no waste of water:—It was held, that the plaintiff was entitled to recover (5); and if one have ancient pits which are replenished by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the watercourse. (6)

When and by whom a stream can be restored to its ancient course.

In *Smyth v. Wilson* (7) it appeared, that A., the lessee of a water-mill, with the use of the water of a stream flowing through the land of the lessor, and falling into the mill-river above the lessee's premises, granted permission by deed to B., the lessee of a mill higher up, to place a weir across the stream, and divert its course so as to supply his mill. A. subsequently assigned his interest to C., who also became proprietor of the land through which the stream flowed. C., within twenty years after the erection of the weir, removed it, and restored the stream to its old course. In an action against him by B. it was held, that though, as assignee of A., C. might be estopped by A's grant, yet, as proprietor of the land through which the stream ran, he had a right to the use of the water

(1) Et vide etiam *Greenslade v. Halliday*, 6 Bing. 379. *Palmer v. Keblethwayte*, 2 Show. 250.

(2) *Magor v. Chadwick*, 11 A. & E. 571. *Quare*, Whether an universal practice in the neighbourhood to resume the use of such adit waters for mining purposes, after a long interval, might not have been set up in answer to the claim of easement, thereby raising the inference, that the party claiming

used the water, not of right, but only during the accidental disuse of the adit, and with knowledge, that the mine owners reserved to themselves a power to recommence working, and thereby disturbing the waters.

(3) *Balston v. Benstead*, 1 Camp. 463.

(4) *Davis v. Morpyn*, 4 B. & C. 8.

(5) *Shears v. Wood*, 7 Moore, 345.

(6) *Brown v. Best*, 1 Wils. 174.

(7) 2 Jebb & Symes (Irish), 660.

(even though not included in his lease), and might restore the stream to its old course. (1)

Where a plaintiff, who had merely a right to irrigate his meadow by placing a dam of loose stones and a board or fender across a small stream, fastened by means of two stakes a board or fender across the stream, an act that had never been done by his predecessors, and the defendant, who had rights on the same stream, having removed the stakes and the board also, for which a verdict was given against him for such removal; the court refused to set it aside, holding, that the defendant had no right to remove the board as well as the stakes, because the stakes gave the board a character of permanency, incompatible with the defendant's rights. (2)

If after the erection of works, and the appropriation by the owner of the land of a certain quantity of water flowing over it, the proprietor of other lands take what remains of the water before unappropriated, the first mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards. (3)

It seems, that if a mill-head pen back the water upon the adjoining lands, and injure them, but in consequence of defective construction and want of repair in the wheels and waste-gates, the mill-pond is, by the working of the mill at seasons wholly selected by the miller without the control of the land-owner, so soon and so frequently exhausted, that the adjoining lands are frequently relieved from the stagnating water, and suffer but small damage, the miller is justified in repairing and improving the construction of his mill, and thereby penning back the water upon his neighbour's land on the same level, for longer periods, although he thereby occasions him a greater damage. (4)

Where the defendants had erected on their own premises a permanent obstruction to a navigable drain, leading from a river through the defendants' premises to the plaintiff's close:—It was held, that an action lay for the plaintiff, notwithstanding the portion of the drain which passed through the plaintiff's close had for sixteen years been completely choked up with mud. (5)

A license to take a quantity of water at a particular place will not authorise the taking away the same quantity of water at another place. (6)

A general license to take water at any place is revocable, except as to such places where it has been acted upon, and expenses have been incurred. (7)

The plaintiff's father by oral license permitted the defendants to lower the bank of a river, and make a weir above the plaintiff's mill, whereby less water than before flowed to the plaintiff's mill:—It was held, that the plaintiff could not sue the defendants for continuing the weir. (8)

It is no defence to an action by a reversioner, for an injury to the reversion in not repairing a gutter for the conveyance of water through the plaintiff's land to the defendant's mill, whereby the water oozed through the

GENERALLY.

An erection of a permanent character cannot be made which is incompatible with the rights of another.

Right to pen back water for the purpose of repairing a mill.

Permanent obstruction of a navigable drain, but which had been choked up with mud for sixteen years.

License to take water at a particular place.

Oral license.

Where defect occasioned by the plaintiff's tenant.

(1) *Quare*, Whether the deed authorising the diversion of the stream should be registered?

(2) *Greenslade v. Halliday*, 6 Bing. 379.

(3) *Bealey v. Shaw*, 6 East, 214.

(4) *Alder v. Savill*, 5 Taunt. 454.

(5) *Bower v. Hill*, 1 Scott, 526. 1 Bing. N. C. 549.

(6) *Mason v. Hill*, 2 N. & M. 747. 5 B. & Ad. 1., *et vide* S. C. 3 *ibid*. 304.

(7) *Ibid*.

(8) *Liggins v. Inge*, 5 M. & P. 712. 7 Bing. 682.

GENERALLY.

Where a channel cannot be filled, if it damage the house of another.

gutter, and carried away the soil of the close, that the defect in the gutter was occasioned by the plaintiff's tenant. (1)

Where A. had immemorially, for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolated, and thence passed through the contiguous soil of B., below the surface, without producing visible injury, and B. built a new house in his land, below the level of his soil, in the current of the percolating water:—It was held, that A. could not justify filling his channel, if the percolating water thereby injured the house of B. (2)

ABATEMENT OF OBSTRUCTIONS.

If a man, in his own soil, erect any thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement, is not confined merely to nuisances to a house, to a mill, or to land. (3)

WHO CAN OR CANNOT MAINTAIN THE ACTION.

Effect of twenty years' exclusive enjoyment.

2. WHO CAN OR CANNOT MAINTAIN THE ACTION.

Twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it; but less than twenty years may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right. (4)

Where a way had been used adversely, and, under a claim of right, for more than twenty years, over land in possession of a lessee, who held under a lease for lives granted by the bishop of Worcester, it was holden, that under stat. 2 & 3 Will. 4. c. 71. this user gave no right as against the bishop, and did not affect the see; and that as the user could not give a title as against all persons having estates in the *locus in quo*, it gave no title as against the lessee and the persons claiming under him, and that no title was gained by an user which did not give a valid title as against the bishop, and permanently affect the see. (5)

An action can be maintained for absolute, although the plaintiff has not twenty years' possession.

If water have been accustomed to flow along a channel from time immemorial, and it have been unappropriated, the first owner of the adjoining lands on both sides who appropriates it, without doing an injury to any one, either above or below him, will acquire such a right by his appropriation, that though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. (6)

In *Gillon v. Boddington* (7), the plaintiff in 1822 had a remainder in fee in a wharf expectant on a tenancy for life of his father; the defendants in that year, dug soil out of their dock, which was contiguous, and the water thereby undermined the wall of the wharf; in 1823 the plaintiff's father died; and, in 1824, the action of the water on the wall had undermined it so far, that it fell:—It was held, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the

(1) *Egremont (Lord) v. Fulman*, M. & M. 404. 3 Stark. Ev. 3d ed. 1255.

(2) *Cooper v. Barber*, 3 Taunt. 99.

(3) *Raikes v. Townshend*, 2 Smith, 9.

(4) *Bailey v. Shaw*, 6 East, 219. Bull. N. P. 75. (b.)

(5) *Bright v. Walker*, 1 C. M. & R. 211. post, 2761.

(6) *Frankum v. Farnouth (Earl)*, 6 C. & P. 529.

(7) 1 C. & P. 541. R. & M. 161.

plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf.

A right of watercourse does not seem to be extinguished by unity of possession in any case, because it is a thing of necessity. (1)

WHO CAN OR
CANNOT MAIN-
TAIN THE AC-
TION.

Unity of pos-
session.

3. DECLARATION AND PLEADINGS.

An action for obstructing a watercourse is local in its nature (2), but a local description is unnecessary. (3)

DECLARATION
AND PLEAD-
INGS.
Venue.

If a trench cut in the county of N. cause the plaintiff's lands to be overflowed in the county of W., although a statute requires all actions to be brought and tried in the county where the cause of action arises, the action may be brought and tried in W. (4)

Trespass is the proper form of remedy where the action lies for an injury to the plaintiff's land covered with water; but an ejectment for a watercourse or stream of water is ill, for it is fluctuating, and of which no possession can be given — it should be of so much land covered with water. (5)

Trespass.
Ejectment.

Where the damage or injury ensues not directly from the act complained of, it is consequential or mediate, and does not amount to trespass: thus, if a person pour water on my land, the injury is immediate; but if he stop up a watercourse on his own land, whereby it is prevented from flowing to mine as usual, or if he place a spout on his own building, in consequence of which the water is sent therefrom into my land, the injury is consequential, because the flowing of the water, which was the immediate injury, was not the wrong-doer's immediate act, but only the consequence thereof, which will not render the act itself a trespass or immediate wrong. (6) In fact, it may be laid down, that case is the remedy for injury to watercourses where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water. (7)

Case.

Assumpsit lies for the use and occupation of a watercourse. (8)

Assumpsit.

A variance in a statement of the local situation (9) from that proved would be fatal: thus, if a weir be described as having been erected by the defendant at H., when it was erected at a lower part of the same water at T., the variance will be fatal. (10)

Variance.

The statement of the injury itself may be described generally, without setting out the particulars of the defendant's misconduct: thus, in actions for diverting water from a stream, it is sufficient to allege a diversion generally, without shewing the particular means adopted. (11)

Statement of
the injury.

It seems, that a declaration for obstructing a watercourse, without shew-

The mode in

(1) *Surrey v. Piggot*, Latch, 153. Poph. 166. 3 Bulst. 339. Noy, 84. Sir W. Jones, 145. Bull. N. P. 74. (a.)

(2) *Mersey and Irwell Navigation v. Douglas*, 2 East, 497. *Williams v. Land*, 4 Taunt. 729.

(3) *Ibid*.

(4) *Sutton v. Clarke*, 6 Taunt. 29. 1 Marsh. 429.

(5) *Challenor v. Thomas*, Yelv. 143.

(6) 1 Chitt. Pl. 139. *Reynolds v. Clarke*, Str. 634. 2 Ld. Raym. 1399. *Haward v. Banks*, 2 Burr. 1114.

(7) 1 Chitt. Pl. 140. *Williams v. Morland*, 2 B. & C. 910. *Griffiths v. Marson*, 6 Price, 1. *Challenor v. Thomas*, Yelv. 143.

(8) *Davis v. Morgan*, 4 B. & C. 8.

(9) *Vide post*, 2858. Reg. Gen. H. T. 4 Will. 4. as to omission of the venue in the body of the declaration.

(10) 2 Chitt. Pl. 557.

(11) 1 Saund. 346. (a.) *Anon.* 1 Ld. Raym. 452. Com. Dig. Actions upon the Case for a Disturbance (B.).

DECLARATION
AND PLEAD-
INGS.

which the ob-
struction has
been caused
should be
shewn.

No variance.

Where the
word "other"
is not matter
of description.

ing how, is bad on demurrer, but not after verdict. (1) The injurious act should be described according to the fact; and a count for diverting and turning, &c. is not supported by proof of penning back and checking a stream. (2)

Where the wrongful act complained of, was the digging and continuing a sewer, and thereby diverting the water from a pond; and the evidence was, that the water was not diverted by digging the sewer, but previously for the purpose of making the sewer, and it appeared, that, since the sewer had been made, the water in the pond could not rise to its former height:—It was held, that there was no variance between the declaration and the proof, so far as it related to the continuing of the sewer. (3)

Where the declaration stated, that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down a ditch at the back thereof; and the evidence was, that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden and fell into the ditch and obstructed it:—It was held, that this was a fatal variance. (4)

If, in an action on the case, a plaintiff in the first count claim the right to the use of a well as appurtenant to "a certain dwelling-house;" and in a second count, complain, that the defendant obstructed a watercourse, which the plaintiff claims as appurtenant to "a certain other dwelling-house;" the word "other" is here not matter of description, and therefore is no ground of nonsuit, that both the rights claimed were appurtenant to the same house. (5)

If the declaration be for diverting a watercourse from the plaintiff's mill, his possession of the mill should be concisely stated, and that by reason thereof he ought to have had the use and benefit of the watercourse, without stating, that it was an ancient mill, or disclosing the particular grounds upon which the right to the water is claimed. (6)

It is not necessary to shew any other title in a declaration for the diversion of a watercourse than "*quæ ad terram*," &c. of plaintiff "*curren-
consuevit* (7);" neither is it necessary to shew the *termini* of a water-
course. (8)

Where the plaintiff brought an action on the case for diverting a water-
course, stating, that the *locus in quo* was in the possession of one J. S. as
his tenant:—It was held, that the averment was satisfied by proof of a
mortgage from J. S., the tenant for life, to the plaintiff, who was entitled to
the reversion. (9)

(1) *Anon.* 1 Ld. Raym. 452. *sed quare*.

(2) *Griffiths v. Marson*, 6 Price, 1. *Fitzsimons v. Inglis*, 5 Taunt. 534. As to the offence of not repairing watercourses, &c., *vide* Chitt. C. L. 565—576. 602. (a) If a watercourse be stopped, to the nuisance of the country, and none appear by prescription to clear it, those who have the right of fishing, and those of the neighbouring towns who have a common passage and an easement therein, may be compelled to remove the obstruction. Hawk. P. C. b. i. c. 75. s. 13.

(3) *Dukes v. Gostling*, 1 Scott, 570. 1 Bing. N. C. 589.

(4) *Fitzsimons v. Inglis*, 5 Taunt. 534.

(5) *Taylor v. Bennett*, 7 C. & P. 329.

(6) 1 Chitt. Pl. 381. *Le Comte de Rutland v. Bowler*, Palm. 290. *Nelson v. Hobblethwaite*, 3 Lev. 133. *Fentiman v. Smith*, 4 East, 107. *Williams v. Morland*, 2 B. & C. 910.

(7) 2 Saund. 114. *Anon.* Cro. Car. 300. *Sands v. Trefuses*, *ibid.* 575. *Hobblethwaite v. Palmes*, 3 Mod. 49. 1 Show. 64. 2 *ibid.* 243. Carth. 85. 3 Lev. 133. 2 Chitt. Pl. 558.

(8) *Prickman v. Tripp*, Skin. 389. *Prickman v. Trip*, Comb. 231.

(9) *Partridge v. Bere*, 1 D. & R. 272. 5 B. & A. 604.

In a plea under stat. 2 & 3 Will. 4. c. 71. it is sufficient to allege, that the user had existed for forty years before the commencement of the suit, and it need not be alleged to have existed for forty years before the act complained of in the declaration. (1)

DECLARATION
AND PLEAD-
INGS.

PLEADINGS.

The plea of not guilty to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere fact of the diversion, and not its wrongful character. (2) And where the fact of the diversion was proved, but the plaintiff failed to shew his right to the water, the court ordered the verdict, which had been entered for the defendant on the issue of not guilty, to be set aside, and a verdict to be entered for the plaintiff, but without damages. (3)

Wrongful di-
version of
water.

Although in case by the tenant in possession against a wrong-doer, it is sufficient to declare generally, without disclosing any title (4), yet if a defendant justify under a right, it must be formally set out in the plea. (5)

Tenant in pos-
session against
a wrong-doer.

4. EVIDENCE—DAMAGES—COSTS—JUDGMENT.

The right to have a drain or passage for water through the lands of another, may either be direct or presumptive. Direct evidence of such a right must be by means of a grant under seal, in the case of a freehold (6); but a local description is unnecessary.

EVIDENCE —
DAMAGES —
COSTS — JUDG-
MENT.

EVIDENCE.

Direct evidence
to prove a right
to water.

Where in an action for diverting water from the mill of A., A. obtained a verdict; and A. and B. became subsequently possessed of the mill, and brought an action for a similar injury against the same defendants:—It was held, that as A. and B. were in possession of the mill, formerly in the possession of A., it must be presumed, that they were privy in estate with him, and that consequently the record was admissible in evidence in the second action. (7)

When record
of former ac-
tion admissible.

Where in an action for breaking the plaintiff's close and destroying a hatch, the defendant pleaded, that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing, he pulled it down; evidence may be given of what a former tenant said as to asking permission to have the water, because this is an act done, and may be proof of an exercise of a right by one side, and an acquiescence in it by the other; in fact, many things which pass for words are really acts. (8)

Declarations of
a former tenant.

In an action for the disturbance of a ferry, it is sufficient to prove possession and enjoyment, without producing documentary evidence, such as court rolls, where the ferry is within a manor, and has passed by surrender and admission. (9) And it is unnecessary either to allege or prove the payment of any specific sum for passage money (10), or to shew, that the

When mere
possession suf-
ficient.

(1) *Wright v. Williams*, 1 M. & W. 77.

(2) *Frankam v. Fulmouth (Earl of)*, 4 N. & M. 330. 2 A. & E. 452. 1 H. & W. 1. 6 C. & P. 529. Tidd's N. P. 366.

(3) *Ibid.*

(4) *Grimstead v. Marlowe*, 4 T. R. 717.

(5) *Ibid.*, et vide *Rider v. Smith*, 3 *ibid.* 766.

(6) *Hewlins v. Shippam*, 5 B. & C. 221. 2 Rol. Abr. Graunts (G.), 62. *Bolton v. Carlisle*

(*Bishop of*), 2 Hen. Black. 259. Touchst. by Atherley, 231. *Fentiman v. Smith*, 4 East, 107. 3 Stark. Ev. 3d ed. 1252.

(7) *Blakemore v. Glamorgan Canal Comp.* 1 Gale, 78.

(8) *Wakeman (Bart.) v. West*, 8 C. & P. 105.

(9) *Peter v. Kendal*, 6 B. & C. 703.

Blissett v. Hart, Willes, 508.

(10) *Peter v. Kendal*, 6 B. & C. 703.

EVIDENCE —
DAMAGES —
COSTS — JUDGE-
MENT.

Whether a river be navigable or not, is a question for the jury.

Insufficient evidence of diversion or obstruction.

Incompetency of witness.

DAMAGES.

plaintiff is owner of the soil on either side (1), if he have the right of embarking and disembarking his passengers; and although the crown may for neglect of duty repeal the grant by *scire facias* or *quo warranto*, such neglect is no answer to an action for disturbance of the ferry. (2)

Whether a river be navigable or not, is a question of fact for the jury (3): the flux or reflux of the tide is evidence of a navigable river (4), but not conclusive. (5) The cutting of rushes in a creek by strangers, and without interruption, is a strong circumstance to shew, that the river was public; and pleasure boats being accustomed to sail up a creek, is also cogent evidence of such public right. (6)

An allegation, that the defendant diverted and turned a stream of water, is not proved by evidence, that by interrupting its course and penning it back, he caused it to overflow the plaintiff's premises. (7)

In case for obstructing the plaintiff's right of way to his close by a navigable watercourse, it appeared, that the plaintiff's close, which abutted on the watercourse, had been detached, about five years before the action, from certain premises called the King's Head Inn. The only evidence of user was by persons frequenting the King's Head Inn in boats before the plaintiff's close was detached:—which was held, not to be evidence to go to a jury to support the right claimed by the plaintiff. (8)

An allegation that the plaintiff, by reason of his possession of a mill with the appurtenances, was entitled to the use of water running in a certain tunnel to the mill, is not supported by proof, that the tunnel was made on the defendant's land on an agreement by the latter to convey the right, and no conveyance having in fact been made, and the defendant's assent having been refused; for the plaintiff had not the right by reason of possession, but under a parol license, revocable in its nature, and in fact revoked. (9)

Where issue is joined on a traverse, that a stream of water has from time immemorial been accustomed to flow in a specified course, one who claims a right of water which depends upon the prescription alleged is, it seems, incompetent as a witness, upon the same principle, that a commoner cannot by his evidence support a custom beneficial to himself; but it is otherwise, where a right of water is claimed by prescription as appurtenant to a particular messuage. (10)

In an action on the case for diverting plaintiff's watercourse, where the jury, under circumstances of aggravation, gave 3000*l.* damages, the court granted a new trial, on the ground, that the damages given, greatly exceeded the amount of the injury proved. (11)

In an action on the case for disturbing the plaintiff in the use of a well, by putting rubbish into it, the plaintiff will be entitled to recover, if, by means of the rubbish, the water has been shallowed, and the well rendered

(1) 3 Stark. Ev. 3d ed. 1252. cit. in *Peter v. Kendal*, 6 B. & C. 703. Savile (Sir John), 11. pl. 29. *contrà*.

(2) *Peter v. Kendal*, 6 B. & C. 703. *Att. Gen. v. Richards*, 3 Anst. 753. *Painter v. Att. Gen.* 1 Dow, 316. *Vinkensterne v. Edden*, 1 Ld. Raym. 385.

(3) *Vooght v. Winch*, 2 B. & A. 662. *Weid v. Hornby (Clerk)*, 7 East, 195.

(4) *Miles v. Rose*, 5 Taunt. 706.

(5) *Ibid*.

(6) *Ibid*.

(7) *Griffiths v. Marson*, 6 Price, 1., et vide *Williams v. Morland*, 2 B. & C. 910.

(8) *Bower v. Hill*, 1 Scott, 526. 2 Bing. N. C. 339.

(9) *Fentiman v. Smith*, 4 East, 107., et vide *Hewlins v. Shippam*, 5 B. & C. 221.

(10) *Jebb v. Povey*, 2 Esp. N. P. C. 679.

(11) *Plydell v. Dorchester (Earl of)*, 7 T. R. 529. 1 Chitt. 729. (a.) n. 2 Tidd, 885.

less convenient for use; but if the effect only was to make the water temporarily muddy, that is too minute a damage to support the action. (1)

EVIDENCE —
DAMAGES —
COSTS — JUDG-
MENT.

Where the plaintiff alleged, that the defendant had erected one dam above the plaintiff's premises, and widened another, and thereby prevented the water from running in its usual course, and in its usual calm and smooth manner to the plaintiff's premises; and thereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the plaintiff, but did not allege any injury from the want of a sufficient quantity of water; and the jury found, that the plaintiff's premises were not injured; but were of opinion, that the defendant had no right to stop the water, or keep it pent up in the summer time:—It was held, that the plaintiff could not recover damages for the erection of the dam, but was bound to allege and prove, that he had sustained an injury from the want of a sufficient quantity of water. (2)

By stat. 3 & 4 Vict. c. 24. (3) if, in any action of trespass on the case, Costs. the plaintiff recover less damages than 40s., he will not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever.

Where a party who had a right to the use of running water, as an owner of adjoining lands, had appropriated it, and by his declaration claimed the right to it as the owner of a mill not twenty years old, the judge refused to amend the record at the trial; and the jury having found the plaintiff's right specially, which was indorsed on the *postea* under stat. 3 & 4 Will. 4. c. 42. s. 24., the court above, refused to allow judgment to be entered for the plaintiff on that finding, because, if the plaintiff had stated his right properly, the defendant might have pleaded differently. (4)

- (1) *Taylor v. Bennett*, 7 C. & P. 329. (4) *Franklin v. Falmouth (Earl of)*, 6 C. & P. 529. 2 A. & E. 452. 4 N. & M. 330.
(2) *Williams v. Morland*, 2 B. & C. 910. 4 D. & R. 583.
(3) *Ante*, 228.

WAY. (1)

1. DEFINED, pp. 2758, 2759.

2. RIGHT OF WAY BY GRANT, EXPRESS RESERVATION, OR CUSTOM, pp. 2759, 2760.

Words which will and will not confer a right of way — No way or other easement can subsist in land of which there is an unity of possession.

3. RIGHT OF WAY BY PRESCRIPTION, pp. 2760—2766.

Construction of stat. 2 & 3 Will. 4. c. 71. s. 2. by Mr. Baron Parke in Bright v. Walker — Twenty years' adverse enjoyment against tenant for lives, confers no title to an easement, it must be an enjoyment as of right — No title is gained by an user which does not give a valid title against all, and permanently affect the soil — Where a qualified right is not given by an enjoyment of twenty years — When the jury cannot be directed to presume a grant by one of the terms to the other, by proof of possession only — Enjoyment of twenty years must be "as of right" and without interruption — Judgment of Mr. Baron Parke in Monmouth Canal Comp. v. Harford — Construction of stat. 2 & 3 Will. 4. c. 71. with reference both to the law and form of pleading — Judgment of Lord Denman in Tickle v. Brown — "Enjoyment as of right" must be an enjoyment openly, notoriously, without particular leave at the time by a person claiming to use it, and without danger of being treated as a trespasser — Judgment of Mr. Justice Patteson in Payne v. Shadden.

4. WAY OF NECESSITY, pp. 2766, 2767.

Way of necessity nothing but a way by grant — Where origin of a way of necessity cannot be traced — Unity of seisin — Judgment of Chief Justice Tindal in Jame v. Plant — "Under an intended way," lessor only entitled to a way of necessity and convenience.

5. USER OF WAY, pp. 2768, 2769.

Grantee of a private way cannot go extra viam if it be impassable, as in the case of a public way — Judgment of Lord Ellenborough in Bullard v. Harrison — Where right is not confined to such ways, as were in use at the time of the grant — "For carrying away tithes" — "For all manner of carriages" — Foot passengers have a right to cross the carriage road.

6. PLEADINGS — EVIDENCE — COSTS, pp. 2769—2773.

Reg. Gen. H. T. 4 Will. 4. — Statement of termini — Judgment of Mr. Justice Tenterden in Simpson v. Lewthwaite — Pleading a right of way, either public or private, the defendant ought to shew the nature of the way — When defendant's title to the right of way not specially shewn — EVIDENCE — Evidence to support a plea under stat. 2 & 3 Will. 4. c. 71. s. 2. — Presumption where a strip of land lies between a highway and an adjoining inclosure — Property in trees, hedges, ditches, and party walls — Restriction of evidence under new assignment — Competency of witness — When verdict cannot be entered distributively — COSTS.

1. DEFINED.

DEFINED.

A right of way is a privilege which an individual or a particular description of persons may have of going over another person's grounds: such a

(1) *Vide antè*, 1003—1026. tit. CASE; 1027—1052. tit. COMMON; 1053—1172. tit. COVENANT; 1551—1561. tit. EVIDENCE; 2628—2657. tit. TRESPASS; 2748—2757. tit. WATER AND WATERCOURSES.

right is an incorporeal hereditament; it may arise by prescription, or grant, or private agreement, or license, or from necessity.

There are four kinds of ways, which are either public or highways for all persons, or private ways:—a foot-way; a horse-way, which includes a foot-way; a carriage-way, which includes both horse-way and foot-way; and a draft-way.

There may be both an occupation way and a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way. (1)

It is incumbent on the plaintiff, in order to maintain an action for the disturbance of his right, to prove, 1. the right of way claimed, and 2. the obstruction.

2. RIGHT OF WAY BY GRANT, EXPRESS RESERVATION, OR CUSTOM.

RIGHT OF WAY BY GRANT, EXPRESS RESERVATION, OR CUSTOM.

“The right of way may be granted on a special permission, as when the owner of the land grants to another the liberty of passing over his grounds, to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company.” (2)

Right of way may be granted on a special permission.

In an action on the case for the disturbance of a right of way, leading from a public street through the defendant's premises to a yard at the back of the plaintiff's house, originally forming part of the premises demised by lease to the defendant:—It was held, that a grant of “all ways, used or enjoyed before with” the plaintiff's premises, was good, though there was no express grant of the way in question. (3)

Words which will and will not confer a right of way.

Where A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using such piece of land as a foot or carriage-way; and gave him “all other liberties, powers, and authorities, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage:”—It was holden, that under these words B. had a right to put down a flagstone upon this piece of land in front of a door opened by him out of his house into this piece of land. (4)

Where A. granted to B. land of unequal width, described as abutting on a road on his own soil; and it abutted on the broadest part of the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road and the premises granted:—It was adjudged, that the grantor and those claiming under him were concluded from preventing the grantee from coming out into the road over this slip of land. (5)

Where one, seised in fee of premises, and of the soil over which a way, not of necessity, has been used by the occupier of them, grants those pre-

“With all ways, roads, &c. or in any-

(1) *Per Lord Denman in Brownlow v. Tomlinson*, 1 M. & G. 484.

(2) 2 Black. Com. by Chitt. 36.

(3) *Kooystra v. Lucas*, 1 D. & R. 506. 5 B. & A. 830.

(4) *Gerrard v. Cooke*, 2 N. R. 109.

(5) *Roberts v. Karr*, 1 Taunt. 495.

**RIGHT OF WAY
BY GRANT,
EXPRESS RE-
SERVATION, OR
CUSTOM.**

wise apper-
taining."

No way or
other easement
can subsist in
land of which
there is an
unity of posses-
sion.

"Appurte-
nances."

"All ways
used, occupied,
or enjoyed
therewith."

**RIGHT OF WAY
BY EXPRESS
RESERVATION
OR BY CUSTOM.**

**RIGHT OF WAY
BY PRESCRIPTION.**

mises "with all ways, roads, &c. to the same belonging, or in anywise appertaining," no way will pass, unless legally appurtenant; or unless it appears from the grant itself, that the parties meant to use the word in a sense more extended than the legal one. (1)

Where an under-lease described the road demised and the ways granted by the words, "all ways thereunto appertaining," it seems, that a right of way over the original lessor's soil would not pass by these words. (2)

No way or other easement can subsist in land of which there is an unity of possession. (3) But if a lessor having used convenient ways over his own adjoining land during his own occupation, demise premises with all ways appurtenant, unless it be shewn in evidence, that there was some way appurtenant in *alieno solo*, to satisfy the words of the grant, it will be intended, that he meant the ways used, and they will pass, though he miscall them appurtenant. (4)

One being seised in fee of the adjoining closes, A. and B., over the former of which, a way had immemorially been used to the latter, devised it to B. with the "appurtenances:"—It was held, that the devisee could not, under the word "appurtenances," claim a right of way over A. to B., as no new right of way was thereby created, and the old one was extinguished by the unity of seisin in the devisor. (5)

Where A. and B., co-partners, conveyed to C. two estates, W. and S., together with all ways therewith usually held, used, occupied, or enjoyed; as to W. and the appurtenances to the use of A. and his heirs, and as to S. and the appurtenances to the use of B. and his heirs:—It was held, that a way used before the partition from W. over S. does not vest in A. under this deed. (6)

A grant of W. and S., "with all ways used, occupied, or enjoyed therewith," extends to ways used, &c. over other lands of the grantor, but does not convey to the grantee a right to ways used to and from one of those parcels over the other of them. (7)

One who has a grant of an occupation way, may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved, that the public in general had used the way without denial for the last twelve years. (8)

A right of way may be claimed by express reservation, as where A. grants land to another, reserving to himself a way over such land.

A right of way may also be claimed by a custom, if it be an easement, and not a profit.

3. RIGHT OF WAY BY PRESCRIPTION.

"A way may be also by prescription, as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this imme-

(1) *Barlow v. Rhodes*, 3 Tyrw. 280. 1 C. & M. 439. It seems, that such intention cannot be collected from parol matter dehors the deed. Ibid.

(2) *Harding v. Wilson*, 2 B. & C. 100. 3 D. & R. 287.

(3) *Morris v. Edgington*, 3 Taunt. 24.

(4) Ibid.

(5) *Whalley v. Thompson*, 1 B. & P. 371.

(6) *Plant v. James*, 2 N. & M. 517.

(7) Ibid.

(8) *Allen v. Ormond*, 8 East, 4.

morial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created." (1)

RIGHT OF WAY
BY PRESCRIPTION.

The law respecting a prescriptive right of way was materially altered by stat. 2 & 3 Will. 4. c. 71. (2)

An illustration of the effect of the foregoing statute is presented by the case of *Bright v. Walker* (3), in which Mr. Baron Parke observed, "The way claimed was from a wharf in a close called Cliff meadow, through Eacham meadow, over the *locus in quo* called the Acre, where the obstruction took place, into a public highway. Cliff and Eacham meadows were held under the Bishop of Worcester, by a lease for three lives, granted in 1805 to Alderman Davis. In 1809, Roberts purchased the leasehold interest from Davis, and began to make bricks in Cliff meadow, and carried them through Eacham meadow and the Acre into the highway. In 1811 Dallow, the then occupier of the Acre, and the assignee of a lease for four lives under the bishop of the close called the Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down, and he and the plaintiff who claimed under him continued to carry bricks over the Acre without interruption for more than twenty years, when the defendant claiming as assignee of the bishop's lease under Dallow obstructed the way, and for that obstruction the action was brought. No proof was given on either side, that either of the original leases had been surrendered, and therefore the case must be considered, as if both had continued to the time of the obstruction. The jury found first, that they would not presume any grant of right of way by the bishop; and secondly, that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years; and the only question is, whether such an enjoyment gives to the plaintiff a right of way over the defendant's close, so as to enable him to maintain this action. And this depends upon the construction of the act of the 2 & 3 Will. 4. c. 71., and particularly sect. 2." "In order to establish a right of way, and to bring the case within this section, it must be proved, that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by sect. 5. such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription, or non existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done — if he shall have occasionally asked the permission of the occupier of the land — no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a license, written or parol, for a limited period, comprising the

Construction of
stat. 2 & 3
Will. 4. c. 71.
s. 2. by Mr.
Baron Parke
in *Bright v.
Walker*.

Twenty years'
adverse enjoy-
ment against
tenant for lives,
confers no title
to an easement;
it must be an
enjoyment as
of right.

(1) 2 Black. Com. by Chitt. 36.

vide ante, 1048. tit. COMMON; *et post*, 2913,
2914. tit. STATUTES OF LIMITATION.

(2) Stat. 2 & 3 Will. 4. c. 71. ss. 1 & 2.,

(3) 1 C. M. & R. 217.

RIGHT OF WAY
BY PRESCRIPTION.Judgment of
Mr. Baron
Parke in *Bright
v. Walker*.

whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear; and this enjoyment of twenty years, having been uninterrupted, and not defeated on any ground above mentioned, would give a good title. But if the enjoyment take place with the acquiescence or by the *laches* of one who is tenant for life only, the question is, What is its effect according to the true meaning of the statute? Will it be good to give a right against the see, and those claiming under it by a new lease, or only as against the termor and his assigns during the continuance of the term, or will it be altogether invalid?

"In the first place, it is quite clear, that no right is gained against the bishop: whatever construction is put on the seventh section, it admits of no doubt under the eighth. This section provides, 'that when any land or water, upon, over, or from which any such way or other convenient water-course or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of enjoyment of any such way, or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end, or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof.' It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that this possession of twenty years gives no title as against the bishop, and cannot affect the right of the see.

No title is gained by an user, which does not give a valid title against all, and permanently affect the see.

Where a qualified right is not given by an enjoyment of twenty years.

"The important question is, Whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the see.

"Before the statute, this possession would indeed have been evidence to support a plea or claim by a non existing grant from the termor, in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was, to state a grant by an owner in fee to an owner in fee. But since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years; for in the first place, the statute is, 'for the shortening the time of prescription;' and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended, that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all—they are such, as absolutely bind the fee in the land. And, in the next place, the statute no where contains any intimation, that there may be different classes or

rights, qualified and absolute, valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear, that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant. This view of the case derives confirmation from the 7th section, which provides as follows:—‘that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.’ This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is tenant for life; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the see: in order to do that, there must be that period of enjoyment against an owner of the fee. The conclusion, therefore, to which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as section 6. forbids a prescription in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other, by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking the possession into consideration, with other circumstances, as evidence of a grant which they may still find to have been made, if they are satisfied, that it was made in point of fact. We are therefore of opinion, that, in the present case, the plaintiff is not entitled to recover, but that a nonsuit must be entered.”

In order to confer a title upon an enjoyment of twenty years, it must be “as of right,” and without interruption: thus, in *Monmouth Canal Comp. v. Harford* (1) Mr. Baron Parke observed, “The issue is, whether the occupiers of the closes, of right and without interruption, have had the use and enjoyment for twenty years, as they insist, under this issue; therefore, they must shew an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright v. Walker* (2) lately decided in this court, it was held, that the claimant must shew, that he

RIGHT OF WAY
BY PRESCRIPTION.

Judgment of
Mr. Baron
Parke in *Bright
v. Walker*.

When the jury cannot be directed to presume a grant by one of the termors to the other by the proof of possession only.

The enjoyment of twenty years must be “as of right” and without interruption.

Judgment of
Mr. Baron
Parke in *Monmouth Canal
Comp. v. Harford*.

(1) 1 C. M. & R. 631.

(2) Ibid. 211. *antè*, 2761.

**RIGHT OF WAY
BY PRESCRIPTION.**

has enjoyed the way for the full period of twenty years, and that he has done so as of right, and without interruption, and that such claim might be answered by proof of a license, written or parol, for a limited period, comprising the whole or part of the twenty years. In the present case, the permission asked for and given shews, that the occupiers of the closes did not enjoy the way 'as of right,' and also, that they did not enjoy it uninterruptedly." Lord Lyndhurst also stated, "The simple issue is, whether there has been a continued enjoyment of the way for twenty years; and any evidence negating the continuance is inadmissible. Every time that the occupiers asked for leave, they admitted that the former license had expired, and that the continuance of the enjoyment was broken."

Construction of
stat. 2 & 3
Will. 4. c. 71.
with reference
both to the law
and form of
pleading.

Judgment of
Lord Denman
in *Tickle v.*
Brown.

In *Tickle v. Brown* (1) Lord Denman observed, "At the trial it was proposed, on the part of the defendant, to shew that a parol agreement had been made, and consideration paid for passing, in the year 1798. This evidence was offered on the first issue to negative the enjoyment for forty years as of right. And it was also offered on the second issue, as of itself shewing an interruption acquiesced in, or at all events as explanatory of the character of a cessation to use the way for four years, commencing in 1800, which cessation was proved, and ascribed by the defendant to interruption, but by the plaintiff to a voluntary abstinence from user, on account of the close being in tillage. The evidence was rejected, and the plaintiff had a verdict. A rule *nisi* for a new trial on the ground of that rejection having been granted, the case was argued in last Michaelmas Term. The question turns upon the second and fifth sections of stat. 2 & 3 Will. 4. c. 71., which the court is called upon to construe, with reference both to the law and the form of pleading; and, in so doing, we have the assistance of the cases of *Bright v. Walker* (2) and *The Monmouthshire Canal Comp. v. Harford* (3), in which this act of parliament came under the consideration of the court of Exchequer. The second section of the act is in the following words (his lordship here read the second section of the act), and the fifth section in the following (his lordship here read the fifth section). The greatest difficulty arises from the language of the concluding paragraph of this section, and more particularly from the words, 'or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment.' As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain, that they are treated by the legislature as consistent with such an enjoyment; and as, by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude, that the legislature used the words 'as of right' in such a sense, as that a party confessing the enjoyment 'as of right' for forty years or twenty, as the case may be, may account for and avoid the effect of it by alleging in the one case a consent or agreement, provided it be by deed or writing (4), and in the other any contract, &c. written or parol. (5) It follows, that the words 'as of right' cannot be confined to an adverse right from all time as far as evidence shews; for, if they were so confined, such enjoyment, once

(1) 4 A. & E. 380—384., vide etiam
Beasley v. Clarke, 2 Bing. N. C. 705.

(2) 1 C. M. & R. 211. *antè*, 2761.

(3) *Ibid* 614. *antè*, 2763.

(4) *Vide* s. 2.

(5) *Vide* s. 5.

confessed, could not be avoided by replying, that it was held by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words 'enjoyment as of right' cannot be confined to enjoyment under a strict legal right; for then a 'consent or agreement' in 'writing' not under seal, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense, and yet they must have the same sense as the words 'claiming right thereto' in the second section, otherwise there will be incongruities in the construction of the act. It seems, therefore, that the 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user, or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract, or license, in case of a plea for twenty years. According to this view of the act, a license in writing must be replied to a plea of forty years' enjoyment, if it cover the whole time, and the same of a parol license in case of a plea for twenty years. But it was argued by the attorney general, that each leave given, in case of permission repeatedly asked, is as much a consent or agreement *pro hac vice* as a consent or agreement for twenty years, and therefore, according to this view of the act, ought to be replied, which is contrary to the decision of the *Monmouthshire Canal Comp. v. Harford*. (1) On looking at the report of that case we find, that the decision rests on this ground, viz. that the asking leave from time to time *within* the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time the asker had no right; and, therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow that, not only an asking leave, but an agreement commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the fifth section; for the party cannot and does not rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as shewing, that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. The evidence proposed ought therefore to have been received on the first issue; and, on the second, it it may also have been admissible to shew, that the cessation to use was by reason of want of right, and not from voluntary abstinence."

RIGHT OF WAY
BY PRESCRIPTION.

"Enjoyment as of right" must be an enjoyment openly, notoriously, without particular leave at the time by a person claiming to use it, without danger of being treated as a trespasser.

The case of *Payne v. Shedden* (2) does not seem precisely to accord with some of the foregoing principles. It was an action of trespass *quare clausum fregit*; to which there was a plea of justification under a

(1) 1 C. M. & R. 614.

(2) 1 M. & Rob. 382.

**RIGHT OF WAY
BY PRESCRIPTION.**

Judgment of
Mr. Justice
Patteson in
Payne v. Shed-
den.

right of way, that the defendant, and other the occupiers of a certain messuage, had for twenty years enjoyed, without interruption, an occupation way, as of right, over the *locus in quo*; that is to say, from A. to B. (1): replication, denying enjoyment, as of right, for twenty years, &c. It appeared, that although the occupiers of the messuage had enjoyed a way over the *locus in quo* during the last twenty years, yet that the line and direction of the way had been a good deal varied, and at certain periods wholly suspended, by agreement between the parties. It was objected, that evidence of the user of the way, with such variations and suspensions of the enjoyment of it, did not support the plea; upon which Mr. Justice Patteson observed, "If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under the statute; for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with, the right. So, if, instead of the direct path from A. to B. another track over the plaintiff's land from A. to C., and thence to B., had been substituted by a parol agreement of the parties for an indefinite time, yet the user of this substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it."

4. WAY OF NECESSITY.

WAY OF NECESSITY.

"When the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same" (2); "for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass." (3) So where one, having three closes, sells the two extremes, a road to the middle one is reserved by operation of law. (4) So likewise where one as a trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity as incidental to the grant. (5)

Way of necessity nothing but a way by grant.

A way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant; for there seems to be no difference where a thing is granted by express words, and where, by operation of law, it passes as incident to the grant; and of course, it is as necessary to set forth the title to a way of necessity, as it is to a way by express grant (6); and a way of necessity cannot be pleaded generally, without shewing the manner in which the land, over which the way is claimed, is charged with it. (7)

Where origin of a way of necessity cannot be traced.

If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way, either by grant or prescription. (8)

(1) *Vide post*, 2914, 2915. Stat. 2 & 3 Will. 4. c. 71. ss. 2. & 5.

(2) 2 Black. Com. by Chitt. 36.

(3) *Ibid.*

(4) *Clark v. Cogge*, Cro. Jac. 170.

(5) *Hovton v. Frearson*, 8 T. R. 50.

(6) 2 Black. Com. by Chitt. 35. n. 1 Saund. 323. (a.)

(7) *Bullard v. Harrison*, 4 M. & S. 387.

(8) 1 Saund. 323. (a.)

It has been considered, that a way of necessity is not extinguished by unity of seisin (1); but it has since been held, that such a way is limited by the necessity which created it, and ceases, if at any subsequent period the party entitled to it, can approach the place to which it led by passing over his own land (2): but the estate which the party has in both lands must be equal in duration, quality, and all other circumstances of right. (3)

WAY OF NE-
CESSITY.

Unity of seisin.

In *Thomas v. Thomas* (4) it was holden, that a unity of possession of the land *a quod* and of the land *in quod* an easement exists, does not extinguish, but only suspends, the easement, where the party is seised in fee of the one parcel, and possessed for the residue of a term of the other; Lord Abinger stating, "The union of possession in the trustee did not extinguish the easement, but only suspended it during that unity of possession; and upon his parting with the premises to different tenants, the right revived:" and Mr. Baron Alderson observed, "If I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands, the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin; and if I part with the premises, the right, not being extinguished, will revive. That was the case here."

Judgments of
Lord Abinger
and Mr. Baron
Alderson in
Thomas v.
Thomas.

In *James v. Plant* (5) Chief Justice Tindal said, "Where a way has been extinguished by the unity of seisin of two estates, by the partition of the two, the way is revived. Thus, it is laid down as law (6), that 'a way is extinguished by unity of possession, and is revivable afterwards upon a descent to two daughters, where the land through which &c. is allotted to one; and the other land to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used, is sufficient to revive it;' and to the same point is the authority of Bro. Abtit. Extinguishment, 15., with this difference only, that he adds '*tamen videtur que est novel chimin.*'"

Judgment of
Chief Justice
Tindal in
James v. Plant.

Where a lease of a parcel of building ground described certain premises as abutting on "an intended way of thirty feet wide," which was not then set out, the soil being the property of the lessor, and the lessee underlet the premises, and described them as abutting on "an intended way," without mentioning the width; and the soil of the intended way, together with the adjacent land on the other side, was afterwards sold by the lessor to another person, who narrowed the intended way to twenty-seven feet, by building a wall thereon:—It was held, that the tenant of a house built by the underlessee was entitled only to a way of necessity and convenience, which having been left him, he could not maintain an action on the case for the alleged encroachment, he having sustained no actual injury thereby. (7)

Under "an intended way"
lessor only entitled to a way of necessity and convenience.

(1) *Buckby v. Coles*, 5 Taunt. 311. 1 Saund. 323. (a.)

(2) *Holmes v. Goring*, 2 Bing. 76.

(3) *Co. Litt.* 313. (b.) *Rez v. Hermitage (Inhabitants of)*, Carth. 241.

(4) 2 C. M. & R. 34.

(5) 4 A. & E. 763.

(6) 1 Jenk. Cent. Cas. 37.

(7) *Harding v. Wilson*, 3 D. & R. 287.

2 B. & C. 96. *Semble*, if the owner of two closes having no way to one of them but over the other, part with the latter without reserving the right of way, it will be reserved for him by operation of law.

Quere, Whether a way of necessity shall be the way most convenient to the lessee? *Morris v. Edgington*, 3 Taunt. 24.

USER OF WAY.

Grantee of a private way cannot go *extra viam* if it be impassable, as in the case of a public way.

Judgment of Lord Ellenborough in *Bullard v. Harrison*

Where a right is not confined to such ways as were in use at the time of the grant.

5. USER OF WAY.

In *Bullard v. Harrison* (1) Lord Ellenborough observed, "The question intended to be agitated upon this record is, whether in the case of a private way the grantee may break out, and go *extra viam*, if it be impassable, as in the case of a public way. As to that, I consider *Taylor v. Whitehead* (2) has settled the distinction, that the right of going on the adjoining land extends not to private as well as public ways. And there may be many reasons in the case of highways, why the public should have an outlet; because it is for the public good, that a passage should be afforded to the subjects at all times. But the same necessity does not exist in the case of a private right. Whoever will look to Serjeant Williams's note to the case of *Pomfre v. Rycroft* (3), will find both the law upon the subject, and the manner of pleading a way of necessity, very accurately detailed. It is a thing founded in grant; and the grantor of a private way does not grant a liberty to break out of it at random over the whole surface of his close. It is established law, that the grantee of a private way cannot break out of it."

Under the grant of a free and convenient way for the purpose of carrying coals (among other articles), the grantee has a right to lay a framed waggon-way (4); but under a grant of a way from A. to B., in, through, and along a particular way, the grantee is not justified in making a transverse road across the same. (5)

Where by a deed dated in 1630 the grantor conveyed in fee farm, land in the manor of A. in the county of Northumberland, "excepting and reserved out of the grant all mines of coals, within the fields and territories of A. aforesaid, together with sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits;" with a covenant by the grantees, that they, their heirs and assigns, "should give such accustomed recompense for digging and breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases." And by another deed of the same date, the same parties conveyed in fee farm to other persons, lands in the manor of H. (adjoining A.), with a like exception, reservation, and covenant:—It was held, that the right was not confined to such ways as were in use at the time of the grant, and that under the reservation of liberty of sinking pits, the right of erecting a steam engine and other machinery necessary for draining them, with all proper accessaries, passed as incident thereto, and that under the reservation in the former deed, the coal owner could not carry over A. coals got in H., although from part of the same mineral field." (6)

(1) 4 M. & S. 392., vide etiam *Taylor v. Whitehead*, Doug. 745.

(2) Doug. 745.

(3) 1 Saund. 393. n. 6.

(4) *Senhouse v. Christian*, 1 T. R. 560.

(5) Ibid.

(6) *Dand v. Kingsnote*, 6 M. & W. 174. To an action of trespass for breaking the plaintiff's close, and laying a railroad thereon, the defendant justified under the reservation

in the above deeds. The plaintiff, new assigned to the plea, that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default:—It was held, that on these pleadings, the plaintiff could not dispute that some species of railroad was within the reservation, but that the question

A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such way for general and universal purposes. (1)

A rector cannot claim a permanent right of way for the purpose of carrying away his tithe, unless by prescription or grant. (2)

The owner or occupier of the soil, provided he does it *bond fide* for the convenient management of the farm, has a right to vary and stop up a way by which the tithes have been carried, although the alteration puts the tithe-owner to great inconvenience, by compelling him to use a more circuitous route for the purpose of carrying them away. (3)

If a man, having a right of way over close A. for the occupation of close B., purchase an adjoining close C., he cannot use the way for the occupation of the latter close. (4)

Evidence of a prescriptive right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle (5):—but it is evidence for the jury to consider, together with the other facts in the case, whether it be not a drift way. (6)

The extent of the usage is evidence of a right only commensurate with the user. (7)

A foot passenger has a right to cross the carriage road, and a person driving a carriage along the road is liable to an action, if he do not take care, so as to avoid driving against a foot passenger who is crossing the road; and if a person thus driving, cannot pull up in time, because his reins break, that is no defence, as he is bound to have proper tackle. The rule as to a carriage being on its proper side of the road, does not apply with respect to a carriage and a foot passenger; for, as regards foot passengers, a carriage may go on either side of the road. (8)

USER OF WAY.

Way for agricultural purposes.

"For carrying away tithes."

"For all manner of carriages."

Foot passengers have a right to cross the carriage road.

6. PLEADINGS—EVIDENCE—COSTS.

By Reg. Gen. H. T. 4 Will. 4. (9) it is provided, that "where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken therefrom, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified."

And in all cases in which such right of way, or other similar right, is so pleaded, that the allegations as to the extent of the right, are capable of being construed distributively, they shall be taken distributively.

In *Simpson v. Lewthwaite* (10) Mr. Justice Taunton stated, "There is one

PLEADINGS—EVIDENCE—COSTS.

Reg. Gen. H. T. 4 Will. 4.

Statement of termini.

was, whether the railroad was constructed in a direction or in a manner unauthorised by the reservation.

(1) *Jackson v. Stacey*, Holt's N. P. C. 455.

(2) *James (Clerk) v. Dods*, 2 C. & M. 266.

4 Tyrw. 101.

(3) *Ibid.*

(4) *Laughton v. Wards*, 1 Lutw. 111.

(5) *Ballard v. Dyson*, 1 Taunt. 279.

(6) *Ibid.*

(7) *Ibid.*

(8) *Cotterill v. Starkey*, 8 C. & P. 691.

In an action of trespass for driving a carriage against the plaintiff, the defence of inevitable accident must be specially pleaded.

(9) *Post*, 2862.

(10) 3 B. & Ad. 232.

**PLEADINGS —
EVIDENCE —
Costs.**

Judgment of
Mr. Justice
Taunton in
*Simpson v.
Lewthwaite*.

difference between pleading a public and a private way; in the former case, it is not necessary to set out the *termini*; in the latter, both must be set out with certainty. It is not necessary, however, to set forth with precision all the closes over which the private way extends. There may be a convenience in requiring all the intervening closes to be set out; because the plaintiff thus knows the right claimed, and the record may be more certain evidence of the right established; but on the other hand, there may be great practical inconvenience, for at the trial the defendant will be encumbered with the difficulty of proving a way over all those closes. There is no case, however, which decides, that the intervening closes need be set forth. Then, was the way here proved, as claimed? It is claimed from the defendant's land, over the place trespassed upon, unto and into the king's highway. It was proved to be from the defendant's land over the plaintiff's close, and into the highway. The circumstance of there being some land intervening between the defendant's and the plaintiff's close, does not disprove the allegation in the plea. And I think the mere accidental fact of the plaintiff possessing land adjoining to part of the defendant's, from which part the defendant sometimes passed across the plaintiff's close, cannot make any difference; for if the rule of pleading be satisfied as to the right of way relied upon, it cannot signify, that there may be another road, which would better satisfy the description. This view of the case is supported by *Jackson v. Shillito* (1), and the opinions of two of the judges in *Rouse v. Bardin* (2) and *Wright v. Rattray* (3) is distinguishable from the present case, because there the party had not a right of way 'unto' the place named; he had lost a part of the way by unity of possession, and a subsequent conveyance, without reserving the right. Here the evidence satisfies the description of the way in the plea."

Pleading a right of way either public or private, the defendant ought to shew the nature of the way.

In pleading a right of way, be it either public or private, the defendant ought to shew the nature of the way, i. e. whether it be a foot-way, horse-way, or carriage-way; otherwise the plea will be bad for uncertainty.

In pleading a private way, the *terminus a quo* and *terminus ad quem* ought to be stated.

But in pleading a public way, it is not requisite to state either the places from which and to which it leads (4), or that it has immemorially existed (5); and if the precise locality be material to the defence, the defendant is bound to fix it by his pleadings. (6)

When defendant's title to the right of way not specially shewn.

Where in trespass *de bonis asportatis*, the defendant pleaded that, being in possession of a certain messuage, he removed the goods in question, which obstructed a right of way leading over a certain close in the said messuage:—It was holden on general demurrer, that the plea was bad, because the defendant's title to the right of way over the said close was not specially shewn. (7)

EVIDENCE.
Evidence to support a plea under stat. 2 & 3 Will. 4. c. 71. s. 2.

To support a plea, framed on stat. 2 & 3 Will. 4. c. 71. s. 2., of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. (8)

Under a plea denying that the way used for forty years by the occupiers

(1) Ckt. 1 East, 381.

(2) 1 Hen. Black. 351.

(3) 1 East, 377.

(4) *Rouse v. Bardin*, 1 Hen. Black. 351.

(5) *Aspindall v. Brown*, 3 T. R. 265.

(6) *Elison v. Inles*, 11 A. & E. 665. 3 P. & D. 391.

(7) *Hoyts v. Hogan*, 2 Jebb & Syme (Irish), 326.

(8) *Lawson v. Langley*, 4 A. & E. 890. vide etiam *Kinloch v. Nevils*, 6 M. & W. 784. post, 2914.

of the defendant's farm was of right and without interruption, to which there was a replication traversing the user as of right: — It was held, that under this issue the plaintiff might give in evidence, that the way had been used by leave and license only (1), and shew by evidence, that the way had been used by stealth, or in the absence of, or without the knowledge of, the occupier, or that it was only a precarious enjoyment.

PLEADINGS —
EVIDENCE —
Costs.

A plea of forty or twenty years' user, under stat. 2 & 3 Will. 4. c. 71. ss. 2. & 4., is not supported by proof of user from a period of fifty years before the commencement of the action down to within four years of it; and if the evidence go no farther, there is no case for the jury. (2)

By act. 41 Geo. 3. c. xxxi. s. 66. the incorporated company of the proprietors of the Grand Surrey Canal were required to make and maintain bridges over the canal for the use of the owners and occupiers of adjoining lands, and also where the canal was carried across any common highway, public bridle-way, or foot-path. In 1804, the company erected a swivel bridge at a spot, where there was a public bridle-way and foot-path, which bridge, as a carriage-way, was intended to be for the exclusive accommodation of the tenants of an adjoining estate, called the Rolls estate. From 1810 to 1822 the public occasionally used the bridge with carriages. In 1822, a church was built near to the canal, streets were formed, and the neighbourhood became very populous. From 1822 to 1832 the bridge was used by the public as a carriage way without interruption. In 1832, the company began to exact a toll from persons, not tenants of the Rolls estate, crossing the bridge with carriages, and in 1834, they removed the swivel bridge, and built a stone bridge in its stead. In trespass by the company against the defendant for passing along the bridge with a horse and chaise, without the leave of the company, the judge, after reading the evidence of the jury, told them that, supposing the bridge in question to have been originally built as a carriage way, for the exclusive accommodation of the tenants of the Rolls estate, still, if in consequence of the acts of the company, an idea grew up in the minds of the public, that they intended to dedicate the bridge to the public use, such acts would amount to a dedication: — It was holden, that, taking all the summing up together, that there was no misdirection, and that the evidence warranted the jury in finding, that there had been a dedication; and that there was nothing in the constitution of the company, or in the nature of their property, to prevent them from dedicating the bridge in question to the public. (3)

Evidence of
dedication.

Where a strip of waste land lies between a highway and an adjoining inclosure, the presumption is, that both the strip of land and the highway *ad medium filum viae*, are the property of the owner of the adjoining inclosure (4), whether he be a freeholder, a leaseholder, or a copyholder (5);

Presumption
where a strip
of land lies be-
tween a high-
way and an
adjoining in-
closure.

(1) *Beasley v. Clarke*, 2 Bing. N. C. 705.

(2) *Parker v. Mitchell*, 11 A. & E. 788.
post, 2914.

(3) *The Grand Surrey Canal Comp. v. Hall*, 1 M. & G. 392. A corporation aggregate, or a railway company, are liable to be indicted for breaches of duty, such as the non repair of bridges, which it is their duty to repair. If they are indicted in the Queen's Bench, they can appear by attorney; but if they are indicted at the assizes, it seems, that

they cannot appear there by attorney, but should apply for a writ of *certiorari*, and appear by attorney in the Queen's Bench; and if they do not, there may be a distress *ad infinitum* against them. *Regina v. The Birmingham and Gloucester Railway Comp.* 9 C. & P. 469.

(4) *Steel v. Prickett*, 2 Stark. 463. *Stevens v. Whistler*, 11 East, 51.

(5) *Doe d. Pring v. Pearsey*, 7 B. & C. 304.

PLEADINGS —
EVIDENCE —
COSTS.

Property in
trees,

Hedges and
ditches.

Rule respect-
ing ditching.

Property in
party walls.

Restriction of
evidence under
new assign-
ment.

but where strips of land so situated are connected with open commons, the presumption is liable to be much weakened by evidence of ownership applicable to such commons.

Cutting down trees by the side of a highway, and the cleaning and repairing the way, are evidence of the ownership of the soil.

If two adjacent fields be separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field in which the ditch is not; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. (1) "The rule about ditching is this:—no man, making a ditch, can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land."

"Therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet, and eight feet, has any thing to do with it." (2) Where lands abutting on a ditch and a lane on each side belong to different owners, the presumption is, that a hedge and ditch on one side both belong to the occupier of the land on that side. (3)

The common user of a wall separating adjoining lands belonging to different owners, is *prima facie* evidence, that the wall, and the land upon which it stands, belongs to the owners of those adjoining lands, in equal moieties, as tenants in common. (4)

To a declaration in trespass *quare clausum fregit*, the defendant pleaded a right of way over the close in which &c.; the plaintiff new assigned extra the way in the plea mentioned; to which the defendant pleaded, that the plaintiff obstructed the way in the plea mentioned; wherefore the defendant deviated; the plaintiff replied *de injuriâ*:—It was held, that on this record the plaintiff was entitled to apply the evidence to a way across the close which he admitted, and which had not been obstructed, and that the defendant could not prove his case by shewing, that another way which he claimed across the close, which was disputed by the plaintiff, had been obstructed. (5)

In *Brownlow v. Tomlinson* (6) it appeared, that in 1838 the occupier of a field, called the "Hall Close," took down the old fence, and added to the field a strip of land adjoining a public road. In an action for a trespass committed upon the strip of land about a year after it had been so taken in, the declaration described the *locus in quo* as the Hall Close: which description was held to be proper.

An indictment for the non repair of a highway, describing the way as immemorial, is not supported by proof of a highway, extinguished as such, sixty years before, by an inclosure act, but since used by the public, and repaired by the district charged. The 23d sect. of stat. 5 & 6 Will. 4. c. 50. is not retrospective in respect of roads completely public by dedication at the

(1) *Per* Bayley J. in *Guy v. West*, cit. Selw. N. P. 1314.

(2) *Per* Lawrence J. in *Fowles v. Miller*, 3 Taunt. 138.

(3) *Noye v. Reed*, 1 M. & R. 65.

(4) *Cubitt v. Porter*, 8 B. & C. 257. *Willshire v. Sidford*, ibid. 259. n.

(5) *Ellison v. Isles*, 11 A. & E. 665. A

judge should not, even by consent of parties, allow an issue to be tried, which the record does not properly raise, unless the parties will amend the pleadings. *Per* Patteson J. at Nisi Prius. Ibid. Respecting facts which will support a new assignment, vide *Allen v. Gomme*, 11 A. & E. 759.

(6) 1 M. & G. 484.

time of the act; it applies to roads then made, and in progress of dedication. (1)

On an issue upon a claim of way in right of occupation of the messuage and land of G., the occupier of a part of the house occupied by G. is not a competent witness to support the affirmative, though his part of the house may have no communication with the part which G. occupies. (2)

But if a right of way be pleaded for the inhabitant householders of M. to fetch water, an inhabitant householder of M. may be examined as a witness in support of this plea under stat. 3 & 4 Will. 4. c. 42. s. 26. (3)

To an action of trespass, the defendant pleaded a right of way on foot and with horses, cattle, carts, waggons, and other carriages, for the convenient occupation of his close K. The jury having found, that he had a right of carting timber and wood only from K., it was held, that the plaintiff was entitled to the entire verdict, and that the defendant could not enter it distributively for such right as the jury found. (4)

Where a defendant pleaded a right of way for the inhabitant householders of M. to carry goods and fetch water; and the jury found, that they had a right of way to fetch water and to water horses, but negatived the right of way to carry goods:—It was held, that as to the right of way for fetching water, a verdict should, under Reg. Gen. 4 Will. 4. V. (5), be entered for the defendant; and as to the carrying of goods, it should be entered for the plaintiff; but that, respecting the watering of horses, the verdict was inoperative. (6)

The judge, on the trial of an indictment for the non repair of a highway, found at sessions under stat. 5 & 6 Will. 4. c. 50. s. 95., has no power to award costs for a frivolous defence under the ninety-eighth section. The power is limited to the court at which the indictment was preferred. (7)

On an indictment for the non repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way used to pass; and where a parish are acquitted on such an indictment, on the ground of there being no highway, the court is not bound to award costs under stat. 5 & 6 Will. 4. c. 50. s. 95. (8)

A judge who tries at *Nisi Prius* an indictment for non repair removed by *certiorari*, has no power under stat. 5 & 6 Will. 4. c. 50. s. 95. to award costs. (9)

PLEADINGS —
EVIDENCE —
Costs.

Competency of witness.

When verdict cannot be entered distributively.

Costs.

(1) *Regina v. Westmark* (Tithing of), 2 M. & Rob. 305.

(2) *Parker v. Mitchell*, 11 A. & E. 788.

(3) *Knight v. Woore*, 7 C. & P. 258.

(4) *Higham v. Rabett*, 5 Bing. N.C. 622.

(5) *Post*, 2862.

(6) *Knight v. Woore*, 7 C. & P. 258.

(7) *Regina v. Preston* (*Inhab. of*), 2 M. & Rob. 137.

(8) *Regina v. Paul* (*Inhab. of*), *ibid.* 307.

(9) *Ibid.*

WHARFS AND WHARFINGERS. (1)

1. GENERALLY, pp. 2774, 2775.

Wharf defined — When wharfage dues can or cannot be recovered.

2. RESPONSIBILITIES AND DUTIES OF WHARFINGERS, pp. 2775—2777.

Answerable for ordinary neglect — Delivery of goods must be made on board the ship — Neglecting to take out a sufferance for goods — To charge a wharfinger, the goods must have been delivered to him — What is evidence of a delivery to and an acceptance by a wharfinger — What is insufficient evidence — Judgment of Lord Ellenborough in Buckman v. Levi.

3. REMEDIES FOR OR AGAINST WHARFINGERS, pp. 2777—2779.

When trover lies against wharfingers — Attornment by wharfingers — When title of plaintiff cannot be disputed — When assumpsit or case lies against wharfingers — When wharfingers can maintain assumpsit — Sale by wharfinger not a sale in market overt — LIEN BY WHARFINGERS — Wharfingers have a general lien for the balance of their account — Wharfinger's lien has a priority of an extent — Wharfinger has not a general lien for labourage or warehouse room — Wharfage and other charges which ought to be paid by the importer — EVIDENCE — Where receipt of goods by wharfinger does not require a stamp.

GENERALLY.

1. GENERALLY.

Wharf defined.

A wharf is a convenient place for the landing, warehousing, and shipping of goods. Natural ground on the banks of a canal, though used for the purpose of a wharf, is not a wharf; neither is the sea beach. The term in its ordinary and legal import means a place built or constructed for the purpose of loading and unloading goods, and for the use of which, wharfage or compensation is paid to the owner. Sufferance wharfs are certain privileged places upon which goods are permitted to be landed in the custody of the custom-house, till such time as the duties are paid, or the goods are bonded. (2)

When wharfage dues can or cannot be recovered.

Wharfage seems only to be due when the goods are laid upon the wharf for the purpose of being loaded or unloaded. It differs specifically from anchorage or mooring: these are charges rather incidental to the ship than the goods (3); and if wharfage be due, from the goods having been unloaded against the express directions of the consignee, he does not become liable for the charge; and if the goods be detained, trover will lie for them; because, whatever act of another brings a charge upon the owner, contrary to his orders, is a tortious conversion. (4)

(1) *Vide ante*, 961—1001. tit. CARRIERS.

(2) In justifying, in a plea to an action of trespass, the use of a crane in a public wharf, it is sufficient to say, that "it is a public, open, and lawful wharf," without claiming the right by immemorial usage; for the public have a right to use the cranes

erected on public quays. *Bolt v. Stennett*, 8 T. R. 606.

(3) *Stephen v. Costor*, 3 Burr. 1409. 1 W. Black. 423., *vide stat.* 22 Car. 2. c. 11.

(4) *Syeds v. Hay*, 4 T. R. 260. *Jeremy on Carriers*, 94.

GENERALY.

By an act of parliament, certain persons were incorporated as the Hull Dock Company, and premises (before the property of the crown) were given to them for the purposes of the act, and they were authorised to make a dock, quays, wharfs, &c., which it was enacted should be vested in them for the purposes of the act. Amongst other things it was provided, that all goods, &c. which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that act should be liable to pay; and should be charged and chargeable with the like rates of wharfage and payments as were usually taken or received for any goods, &c. loaded or discharged upon any quays or wharfs in the port of London:—It was held, that as the premises were only vested in the company for the purposes of the act, they had no common law right to a compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays. (1)

Where a statute does not give any right to claim wharfage for goods shipped off from their quays.

Wharfingers in London are not entitled to wharfage for goods unladen into lighters out of barges fastened to their wharfs. (2)

2. RESPONSIBILITIES AND DUTIES OF WHARFINGERS.

The responsibility of a wharfinger commences from the moment the warehouseman's tackle is applied to the goods, and ceases upon his delivery of them, according to the owner's express or implied directions (3); and where goods are to be forwarded coastwise, and it is the custom of wharfingers to deliver them to the mates of the coasters, the wharfinger's responsibility ceases upon such delivery, and the obligation of the shipowner *eo instanti* arises, though the goods be lost before they are carried off the wharf (4); because, where the responsibility of the ship begins, that of the wharfinger ends; the mate is such a recognised officer on board the ship, that delivery to him is a good delivery; if the jury believe, that the mate received the goods, they are therefore in his care; and if they were once well delivered to the mate, their being lost on the wharf cannot affect the wharfinger.

RESPONSIBILITIES AND DUTIES OF WHARFINGERS.

Wharfingers stand generally in the situation of ordinary bailees for hire, and are therefore answerable only for ordinary neglect (5); they are not insurers like carriers, and they are not answerable for thefts by their servants, if they can prove, that they have exercised the same care of their bailments as of their own property (6); they are not answerable for destruction by rats, reasonable care having been taken to prevent such mischief; and if a wharfinger have insured the property from fire, and it be burnt, and the warehouseman receive the amount of the insurance, the owner may recover from him. It is however a question, whether a warehouseman, by removing goods from the warehouse (for the use of which the owner pays warehouse room) to another, is not liable for loss by fire (7); and

Answerable for ordinary neglect.

(1) *Hull Dock Comp. v. La Marche*, 8 B. & C. 42. 2 M. & R. 107.

(2) *Stephen v. Castor*, 3 Burr. 1408. 1 W. Black. 413. 423.

(3) *Thomas v. Day*, 4 Esp. N. P. C. 262. *Cobban v. Downe*, 5 ibid. 43. *Coggs v. Bernard*, 2 Ld. Raym. 909.

(4) *Cobban v. Downe*, 5 Esp. N. P. C. 41.

(5) *Jones (Sir W.) on Bailments*, 96.

(6) *Vide White v. Boulton*, Peake's N. P. C.

113. *Garside v. Trent and Mersey Navigation (Proprietors of)*, 4 T. R. 581.

(7) *Sideways v. Todd*, 2 Stark. 400.

RESPONSIBILITIES AND DUTIES OF WHARFINGERS.

DUTIES OF WHARFINGER.

Delivery of goods must be made on board the ship.

Neglecting to take out a sufferance for goods.

To charge a wharfinger, the goods must have been delivered to him.

What is evidence of a delivery to and an acceptance by a wharfinger.

What is insufficient evidence of a delivery. Judgment of Lord Ellenborough in *Buckman v. Levi*.

as a general principle it may be laid down, that wherever an action on the case lies against a common land carrier, it lies also against a wharfinger; it is impossible to make a distinction between them. (1)

The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters is similar to that of a carrier. (2)

If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board:—and it likewise seems to be his duty, either by himself or his servants, to see the goods put on board, and then to make an entry of the shipment. (3)

In an action against a wharfinger, to whom goods were sent to be shipped, for neglecting to take out a sufferance, for want of which the goods were seized, it is not necessary to aver or prove, that the goods were condemned by a sentence *in rem*. (4)

But to charge a wharfinger, the goods must be proved to have been booked, or to have been delivered to the wharfinger himself, or to some person who can be proved to have been his agent for the purpose of receiving them. (5)

In *Quiggin v. Duff* (6) it appeared, that goods were forwarded by K., a carrier, from London to Liverpool, addressed to the plaintiff (at the Isle of Man), "care of D. (the defendant), Brunswick Street, Liverpool." The goods were landed by K. on a public wharf at Liverpool, and, on the same day, notice was sent to the defendant of their arrival, and he signed the carrier's book, containing an acknowledgment, that the goods in question had arrived for him (the defendant). He caused them also to be entered in the clearance and manifest of a steam vessel about to sail for the Isle of Man. It was proved also, that, on former occasions, when goods had been brought by K. for the defendant, he had desired that they might remain at the wharf till he sent for them. The defendant never sent to the wharf for the boxes until six days after their arrival, when they were not to be found:—It was held, in an action on the case against the defendant for negligence in not taking proper care of the goods, that there was evidence for the jury of a delivery to and an acceptance by him.

But leaving goods at a wharf piled amongst other goods, without communication with any one there, is not a delivery to the wharfinger: thus, in *Buckman v. Levi* (7) Lord Ellenborough said, "A delivery of goods to a carrier or wharfinger with due care and diligence, is sufficient to charge the purchaser; but he has a right to require, that in making this delivery due care and diligence shall be exercised by the seller. Before

(1) *Ross v. Johnson*, 5 Burr. 2827.

(2) *Maving v. Todd*, 1 Stark. 72. 4 Camp. 225., *vide ante*, 961—1001. tit. CARRIERS. *Quare*, how far the liability of hoymen extends after they have delivered the goods at the wharf to which they ply. *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693.

A wharfinger is not an agent within the meaning of stat. 6 Geo. 4. c. 94. s. 4. *Monk v. Whittenbury*, 2 B. & Ad. 484. 1 M. & Rob. 81.

(3) *Leigh v. Smith*, 1 C. & P. 638. E. & M. 224.

(4) *Baker v. Liscoe*, 7 T. R. 171. But it is sufficient to aver, "that for want of such sufferance, the said goods were seized as forfeited, whereby the same became wholly lost to the plaintiff;" and proof of a seizure in fact by the officer, for a just cause of forfeiture, is sufficient to sustain the declaration.

(5) *Buckman v. Levi*, 3 Camp. 414.

(6) 1 M. & W. 174.

(7) 3 Camp. 414.

the defendant can be charged in the present instance, he must be put into a situation to resort to the wharfinger for his indemnity. But no receipt was taken for the chairs; they were not booked; and no person belonging to the wharf is fixed with a privity of their being left there. The plaintiff was bound to procure them to be booked, or to deliver them to the wharfinger himself, or some person who can be proved to be his agent for the purpose of receiving them. The person upon the wharf, when the chairs were left, might be a thief, watching for an opportunity to purloin them; the defendant therefore is not furnished with a remedy over against the wharfinger, and is not himself liable as purchaser of the goods."

RESPONSIBILITIES AND DUTIES OF WHARFINGERS.

3. REMEDIES FOR OR AGAINST WHARFINGERS.

REMEDIES FOR OR AGAINST WHARFINGERS. WHEN TROVER LIES AGAINST WHARFINGER.

Where a person, entrusted with the goods of another, puts them into the hands of a third person without orders, it is a conversion (1); therefore, trover can be supported against a wharfinger (2), who by mistake (3) or under a forged order (4) delivers goods to a wrong person, or who improperly breaks open a box containing goods, or sells them. (5)

If A. sell corn to B., who buys on speculation, and the corn is landed at the warehouse of C. (the granary-keeper of B.), who is told, that he is to hold it on the account of A., A. has a sufficient property in it to maintain trover against C. (6) And a return made by A. in such case, under stat. 1 & 2 Geo. 4. c. 87. s. 12., that such corn was sold and delivered to B., is not conclusive evidence against A. of an absolute unconditional sale and delivery, so as to bar him of his right to recover it out of the hands of C. (7)

Where A. shipped goods at Dundee, by the order of, and for B. in London, and shortly after the shipment A. ascertained, that B. had stopped payment, and he then indorsed and forwarded the bill of lading to the plaintiff in London, directing him to take possession of the goods, and he demanded them from the defendants, who were wharfingers, and in whose custody they were:—It was held, on their refusal to deliver over the goods to the plaintiff, that he had a sufficient title to sue for them in trover. (8)

In *Gillet v. Hill* (9) it appeared, that an order signed by O. for the delivery by the defendants, wharfingers, of twenty sacks of flour to the plaintiff (the party named in the order), was lodged with and accepted by them in the usual course of business, they at the same time declaring, that they had but five sacks to spare, which the party might have, and which he received accordingly; and on application for the rest, they declined to deliver it. An action of trover was brought against them by the party named in the order, but it did not appear, that he knew that O. had any other flour in the defendant's possession, and the defendants did not produce any delivery orders by which any such flour had been previously appropriated by O. The jury found that the defendants had accepted the

(1) *Byeds v. Hay*, 4 T. R. 260. 264.

(2) *Deereux v. Barclay*, 2 B. & A. 702.

(3) *Ibid.*

(4) *Lubbock v. Inglis*, 1 Stark. 104. *Stephenson v. Hart*, 4 Bing. 476.

(5) *Anon.* 2 Salk. 655. *Barton v. Williams*, 5 B. & A. 401. 1 Chitt. Pl. 155.

(6) *Woodley v. Brown*, 1 C. & P. 593. 10 Moore, 201. 2 Bing. 527.

(7) *Ibid.*

(8) *Morison v. Gray*, 9 Moore, 484. 2 Bing. 260.

(9) 2 C. & M. 531. 4 Tyrw. 290.

REMEDIES FOR
OR AGAINST
WHARFINGERS.

Attornment by
wharfingers.

Where title of
plaintiff cannot
be disputed.

When *assumpsit*
or case lies
against wharf-
ingers.

When wharf-
inger can
maintain *assumpsit*.

order generally, and gave a verdict for the plaintiff for the value of the fifteen sacks; and the court refused to disturb the verdict, because trover was maintainable, as the defendants had not limited their acceptance of the order to any minor quantity of O.'s flour then in their hands, or alleged, that they must select the sacks to be delivered to the plaintiff.

Where wharfingers acknowledge the title of a person for whom they hold property, it is considered as an attornment, and they are conclusively estopped from disputing such title, whatever may be the claim of a third person, at least if they were fully acquainted with the nature of such claim, when they made the admissions. (1)

A manufacturer deposited goods with a wharfinger at S. for the purpose of being shipped for the defendant's wharf in L., receiving from them receipts describing them. The manufacturer indorsed upon these receipts, orders upon the defendants to deliver the goods on their arrival to the plaintiffs, the latter having advanced money upon them. The plaintiffs sent the receipts and delivery orders to the defendants, and demanded the goods. The defendants stated, that the goods had not arrived, but promised that when they did arrive, they should be forwarded to the plaintiffs:—It was holden, that the defendants, having thus assented to the plaintiffs' title to the goods, could not afterwards dispute it; and that the plaintiffs might maintain trover upon their refusal to deliver them. (2)

If a warehouseman, on receiving an order from the seller of malt to hold it on account of the purchaser, give a written acknowledgment, that he so holds it, he cannot set up as a defence for not delivering it to the purchaser, that, by the usage of trade, the property of malt sold is not transferred till it is remeasured, and that, before the malt in question was remeasured, the seller became bankrupt. (3)

Trover cannot in general be sustained for a mere omission or non-feasance against a party who was lawfully possessed of the goods (4); and therefore, if a wharfinger by negligence lose goods entrusted to his care, the remedy in general must be case or *assumpsit*. (5) A bare non delivery of goods by a wharfinger is not a conversion (6), unless the goods be in his possession, and he refuse to deliver them on demand (7); and his false assertion, that he had delivered the goods to the consignee, is not a conversion (8); neither is it a conversion to retain property under the decree of a court of competent jurisdiction. (9)

When an agent has any beneficial interest in the performance of a contract, or a special property or interest in the subject-matter of the agreement, he can support an action in his own name upon the contract, under which principles a warehouseman or carrier can maintain *assumpsit* for their services. (10)

(1) *Goelling v. Birnie*, 7 Bing. 345., see vide *Stonard v. Dunkin*, 2 Camp. 344. *Haives v. Watson*, 2 B. & C. 541. *Ogle v. Atkinson*, 5 Taunt. 750. *Barton v. Bodington*, 1 C. & P. 307., where the above rule is laid down in more unqualified language.

(2) *Holl v. Griffin*, 3 M. & Sc. 732. 10 Bing. 246.

(3) *Stonard v. Dunkin*, 2 Camp. 344.

(4) *McCombie v. Davies*, 6 East, 540. *Devereux v. Barclay*, 2 B. & A. 704.

(5) *Ross v. Johnson*, 5 Burr. 2825. 3 Saund. 47. (f.)

(6) *Severin v. Keppell*, 4 Esp. N. P. C. 157.

(7) *Dewell v. Maxon*, 1 Taunt. 391.

(8) *Attersoll v. Brient*, 1 Camp. 409. 1 Chitt. Pl. 155.

(9) *Ante*, 2701—2713. tit. TROVER.

(10) *Martini v. Coles*, 1 M. & S. 147.

But where goods came to a wharfinger consigned to A.; and B., believing them to be meant for himself, carried them from the wharf, and used them before he discovered the mistake:—It was held, that the wharfinger, after paying A. the value of the goods, could not maintain an action against B. for money paid to recover the amount. (1)

REMEDIES FOR
OR AGAINST
WHARFINGERS.

It may be here observed, that a sale by a wharfinger is not a sale in market overt, so as to change the property: thus, if the owner of goods send them to a wharf in the borough of Southwark, where goods of the same sort are usually sold; and the wharfinger without any authority sells them to a *bond fide* purchaser, who duly pays for them: this is not a sale in market overt to change the property, and trover lies for the goods at the suit of the owner against the purchaser. (2)

Sale by wharf-
inger not a
sale in market
overt.

Wharfingers have a general lien for the balance of their accounts. (3)

LIEN BY
WHARFINGERS.

A wharfinger's general lien on the goods of his customer in his possession for his balance, in respect of freight and wharfage, due before the teste of an immediate extent, issued against such customer, will prevail against the extent. (4)

Wharfingers
have a general
lien for the
balance of their
account.

A wharfinger has not a general lien in respect of labourage and warehouse room, except by agreement express or implied: general continued and undisputed usage may be evidence of such agreement; but where the right is disputed in the place where the wharfinger lives, he cannot set it up against a customer unless he has previously given him notice that he will deal only upon those terms. (5)

Wharfinger's
lien has a
priority of an
extent.

Where wharfage and other charges due on goods imported were, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the meantime removed or not; and goods were sold to J. S., and after Christmas the importer became bankrupt:—It was held, that there was no lien on the goods for the wharfage as against J. S. (6)

Wharfinger has
not a general
lien for labour-
age or ware-
house room.

Where goods deposited at a wharf are sold by the owner, and he gives notice thereof to the wharfinger, paying all charges up to that time, the wharfinger cannot claim a lien against him for subsequent charges in respect of such goods, on the ground, that no delivery order was lodged, and the notice was merely oral. (7)

Wharfage and
other charges,
which ought to
be paid by the
importer.

If the value of the goods be above 20*l.*, but the wharfage be under 20*l.*, an unstamped memorandum by a wharfinger of the receipt of goods, to be shipped in a particular manner, may be given in evidence to shew the terms upon which they were received. (8)

EVIDENCE.

Where receipt
of goods by a
wharfinger does
not require a
stamp.

(1) *Sills v. Laing*, 4 Camp. 81.

(2) *Wilkinson v. King*, 2 *ibid.* 335.

(3) *Vide antè*, 986, 987. LIEN OF CAR-
RIERS. *Naylor v. Mangles*, 1 Esp. N. P. C.
109. *Spears v. Hartly*, 3 *ibid.* 81., et vide
Rushforth v. Hadfield, 6 East, 519. 7 *ibid.*
224.

(4) *Rex v. Humphery*, M'Clel. & Y. 173.

(5) *Holderness v. Collinson*, 1 M. & R. 55.
7 B. & C. 212.

(6) *Crawshay v. Homfray*, 4 B. & A. 50.,
et vide *Richardson v. Goss*, 3 B. & P. 119.

(7) *Barry v. Longmore*, 12 A. & E. 639.

(8) *Chadwick v. Sills*, R. & M. 15.

APPENDIX.

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5. QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER, pp. 2801—2872.
 - I. TRINITY TERM, 1 WILL. 4. 1831, pp. 2801—2813.

Bail may be justified, at the same time at which they are put in,— Notice of bail to state bail's residence within the last six months, &c.—Names of bail — Liability of plaintiff and defendant for the costs of justifying or opposing bail— Plaintiff must give one day's notice of exception to bail— Bail not to be changed without leave of the court — PARTICULARS OF DEMAND— When particulars of demand are to be delivered with the declaration— Copy of particulars and set-off, if any, to be annexed to the record — Rule not imperative on the plaintiff to deliver particulars — Summons and order for particulars — Where an entry of a stet processum will not be compelled— Form of particulars — Fresh particulars — Amendment of particulars — When particulars sufficient to enable the plaintiff to recover under the account stated — Plaintiff

only required to state the credit which he gave generally — When plaintiff will have his costs, although he may not have given credit — Where statement of money received by the plaintiff from the defendant will not be ordered — Particulars between vendor and vendee — Objections to title — Actions for torts — Suing for breach of an agreement, and assigning special damage — Evidence cannot be adduced inconsistent with the bill of particulars — Particulars annexed to the record differ from those delivered to the defendant — Effect of a mistake in the particulars at the trial — Where delivery of particulars need not be proved — When defendant will have to pay the costs of the particulars — Imparance — Non pros. not to be signed until four days after demand in writing — Not necessary to issue more than two summonses for attendance before a judge — No declaration de bene esse — Declaration in ejectment may be served before the first day of any term — Notice for taxation of costs — Rules to plead several matters to be obtained on summons, &c. — Where no summons or order are requisite — Period at which the rules are to commence — Form of affidavit of bail — PLEADING — Declarations to be in accordance with prescribed forms — SCHEDULES OF FORMS AND DIRECTIONS.

II. HILARY TERM, 2 WILL. 4. 1832, pp. 2813—2841.

AUTHORITY TO PROSECUTE OR DEFEND — AFFIDAVIT of service of process — Affidavit not entitled when received — Addition of deponent in affidavit — Affidavits not to be sworn before attorney, or agent, or clerk, except affidavits to hold to bail — ARREST — No second arrest without leave — PROCEEDINGS UNDER STAT. 1 & 2 VICT. c. 110. — Affidavits for work or money paid must state, that it was done at the request of the defendant — Supplemental affidavits not allowed — Variance between actum and declaration, or want of *ac etiam*, not to discharge bail or defendant — *Writ WHEN AND HOW TO BE FILED* — Sheriff ruled to return writ and omitting so to do — Officer to endorse the day and hour of filing the writ — BAIL — Neither attorney nor his clerk to be bail except to render — When country bail-pièce is to be transmitted and filed — Plaintiff may except to sheriff's bail, though after assignment of the bail bond — Two days' notice of justification sufficient in all cases — When bail, excepted to in vacation, can justify — When notices of more bail than two shall be deemed irregular — When affidavits of justification will be deemed insufficient — Rejected bail may render — Amount for which bail will be liable — Bail may render before prison doors close — Proceedings on bail bond cannot be had pending body rule — Commencement of proceedings on bail bond — Twenty days to except to bail on habeas corpus — Bail in error, amount of recognisance — Bail in ejectment, amount of recognisance — BAIL BOND AND ACTION THEREON — APPEARANCE — IRREGULARITY IN PROCESS AND PROCEEDINGS — When initials or misnomers not to affect arrest — Irregularity when to be complained of — Judgment may be signed for double pleading without a rule — DECLARATION, AND TIME FOR — When plaintiff will be deemed out of court — Declaring against prisoners — Rule to declare on removal of causes — Not requisite in general to have a rule to declare — Peremptory rule to declare — Variance in venue, no discharge of bail — Damages need not be expressed in notice of declaration — After amendment of declaration, no new rule to plead requisite — PLEA, AND TIME FOR — Demand of plea may be made, when the declaration is delivered — Plaintiff may insertoyer — Pleading without imparance — Without leave no plea to be wated — PARTICULARS — NOTICES AND RULES AND SERVICE THEREOF — When notice of declaration may be stuck up in the office — Service of rules and orders to be made before nine o'clock at night — Original rule need not be shown unless demanded — Delivery of notices where a term's notice of trial is required — Rule to reply — Demand of replication — PAYMENT OF MONEY INTO COURT — Side-bar rule to pay money into court — Undertaking of the defendant on payment of money into court — Stats. 11 Geo. 4. & 1 Will. 4. c. 68. s. 10. and 3 & 4 Will. 4. c. 42. s. 21. — Where the claim is for a given sum, and the amount ascertainable by mere calculation — Time at which money should be paid into court — Plea of payment, is a bar to the further maintenance of the action — Where plea held good, although it did not state to which cause of action the payment applied — WHAT IS ADMITTED BY A PAYMENT INTO COURT — Where defendants have paid money into court, it is incompetent for them to set up, that one of them is not a party to the contract — Judgment of Mr. Baron Alderson in *Ravenscroft v. Wise* — Authority of agent — Special contract — Covenant — Debt — Professional character — WHAT IS NOT ADMITTED BY A PAYMENT INTO COURT — Where plea of payment only admits that something is due on a contract — Judgment of Mr. Baron Maule in *Kingham v. Robins* — Payment of money into court under an *indebitatus* count by two or more defendants, is no admission of a joint liability — Judgment of Mr. Baron Alderson in *Stapleton v. Noel* — WORK AND LABOUR — Goods sold and delivered — When plaintiff alleges multifarious and inconsistent facts — When payment of money by a justice does not admit the right of action — When right of property not admitted — Policies of insurance — Bills of exchange — Statute of Limitations — Infancy — PLEA OF PAYMENT — Payment must be pleaded specially — Plea of payment must follow the form given by the new rules — Where there are several counts — Payment cannot be given in

evidence under the general issue—Statute of Limitations not affected by Reg. Gen. H. T. 4 Will. 4.—Defendant will be compelled to give particulars of a plea of payment—Plea of payment divisible—Plaintiff when entitled to judgment non obstante veredicto—STAY OF PROCEEDINGS—COSTS—Where replication of damages ultra the money paid into court—When judgment will not be arrested on a verdict for the defendant upon a demurrable plea—TRIAL AND NOTICE THEREOF—Short notice of trial at bar—Notice of countermand—Rule for a view may be had without affidavit or motum—NEW TRIAL, MOTION IN ARREST OF JUDGMENT, &c.—JUDGMENT AND TIME FOR SIGNING—JUDGMENT AS IN CASE OF NONSUIT—TRIAL BY PROVISIO—WARRANT OF ATTORNEY AND COGNOVIT—COSTS—EXECUTION—SCIRE FACIAS—ERROR—SUPERSEDEAS—ATTORNEY AND HIS BILL—MISCELLANEOUS—Pluries capias need not be stamped for exigent—To charge defendant in execution not necessary to enter proceedings—Side-bar rules on last day of term—Rules enlarged without notice—Security for costs to be moved for before issue joined—Leave to compound penal actions—A defendant may withdraw his plea in person—No rule for jury without a judge's order—An order to inspect court rolls absolute in first instance on affidavit, &c.—Rule to change venue absolute in first instance—Paying money into court, where actions are consolidated—After judgment by default, continuances not necessary—Plaintiff discontinuing after plea to undertake, &c.—Pleadings to the country not to be signed—Where no new matter can be pleaded, no rule to rejoin—No distinct roll for imparance—Pauper when to pay costs—Debt and costs to be indorsed on process—Form of indorsement—Four days after Hilary and Trinity Terms, plaintiff may declare de bene esse—Original writs not to be recited in declarations—When bail bond to stand as a security—No costs of a witness called only to prove a copy of a public document allowed, unless admission previously required—No costs of proving handwriting to any document stated on pleadings, without summons to admit—Computation of time—Commencement of rules.

III. EASTER TERM, 2 WILL. 4. 1832, p. 2841.

The days between Thursday before and Wednesday after Easter Day not reckoned except in notices of trial or inquiry—Reg. Gen. H. T. 2 Will. 4. s. 10. not to apply to writs of quo minus.

IV. MICHAELMAS TERM, 3 WILL. 4. 1832, pp. 2842—2845.

Writ to contain the names of all the defendants in the action—Fees to be taken—When day of service to be indorsed on the writ—Amendment of writ of summons—Alias and pluries writs may be issued into other counties—Forms of writs—No fee to be paid for a non omittas clause in a distringas—Attorney's as well as agent's name to be indorsed on the writ—Writ will be irregular for want of indorsement—Where the time to plead, &c. expires after August 10., the party to have the same time after October 24. as if the pleading had been filed, &c. on that day—If an order to return writ in vacation be made a rule of court, an attachment may issue without service of that rule—Proceedings stayed, if issued without attorney's consent—Declarations to be entitled of the day, &c. on which filed—Forms of declarations and writs.

V. HILARY TERM, 3 WILL. 4. 1833, p. 2846.

Rule or order to return capias expiring in vacation, with cepi corpus returned—Judge's order to issue to bring in the body by putting in and perfecting bail.

VI. TRINITY TERM, 3 WILL. 4. 1833, p. 2846.

Prisoners to be declared against before the end of next term after arrest, detainer, or render on entering an appearance, unless time given—Prisoners to plead in like manner as other defendants—In actions of debt on recognisance of bail, they may stay proceedings on payment of costs of writ, if they render the principal within fourteen days after service of process.

VII. MICHAELMAS TERM, 4 WILL. 4. 1833, p. 2847.

Defendant must put in bail in the county where arrested.

VIII. HILARY TERM, 4 WILL. 4. 1834, pp. 2847—2852.

Where demurrers must be delivered—Before signed, points to be stated—Where points not stated may be argued—No rule to join in demurrer—Joinder need not be signed—Issue and demurrer how made up—Special case and demurrer set down without concilium—Paper books how delivered—The number of the roll must be stated in the margin of a plea of judgment recovered—No writ of error to be a supersedeas of execution—Execution to issue if points be frivolous—No rule to certify and tran-

scribe—Where no rule to allege diminution, nor rule to assign errors, scire facias quare executionem non is requisite—PROCEEDINGS IN ERROR—When notice of taxing not necessary—Repassing Nisi Prius record abolished—Writs of trial to be sealed only—Proof of documents—Costs—Form of notice to produce documents.

IX. HILARY TERM, 4 WILL. 4. 1834 [PLEADING RULES], pp. 2852—2864.

Recital of Stat. 3 & 4 Will. 4. c. 42. s. 1.—FIRST GENERAL RULES AND REGULATIONS—Pleadings to be entitled of the day and year when pleaded—No entry of continuances—Not to affect the times of proceedings—Plea puis dater continuance—Affidavit to verify—Judgment to be entered of the day when signed—Warrants of attorney not to be entered—Several counts and pleas where allowed—EXAMPLES OF DECLARATIONS—PLEADINGS IN PARTICULAR ACTIONS: 1. ASSUMPSIT—2. COVENANT AND DEBT—3. DETINUE—4. CASE—5. IN TRESPASS—FORMS OF ISSUES, JUDGMENTS, AND OTHER PROCEEDINGS IN ACTIONS COMMENCED BY PROCESS UNDER STAT. 2 WILL. 4. c. 39.

X. HILARY VACATION, 4 WILL. 4. 1834, p. 2864.

XI. HILARY TERM, 6 WILL. 4. 1836, pp. 2864—2866.

Holidays—Examination, &c. of attorneys—Examiners appointed—Regulations to be made—Petition of appeal—Where examination to be had—Term's notice—Notices of application—Re-admission of attorneys.

XII. EASTER TERM, 6 WILL. 4. 1836, pp. 2866—2868.

Appointment of examiners—Regulations for the examination of articulated clerks—Articles, &c. to be left with the secretary of the Incorporated Law Society—Attendances for examination—Certificate of examiners—Questions as to due service, to be answered by the clerk—Questions as to due service, to be answered by the attorney.

XIII. MICHAELMAS TERM, 7 WILL. 4. 1836, p. 2868.

Rules to return writs, or to bring in the body, except in London and Middlesex, to be eight instead of six day rules.

XIV. EASTER TERM, 7 WILL. 4. 1837, p. 2868.

Appointment of examiners.

XV. HILARY TERM, 1 VICT. 1838, p. 2869.

Affidavits, if sworn before a country commissioner or judge of assize, may be read in court without taking copies—Filing affidavits—Justification of bail—Special jury in replevin—Rules of court how dated—Rules to return writs, how obtained—SHERIFF'S FEE.

XVI. TRINITY TERM, 1 VICT. 1838, pp. 2869—2871.

Staying actions on bills, &c.—Reg. Gen. H. T. 4 Will. 4. ss. 17. & 19. repealed—Payment of money into court—Form of plea—Proceedings by plaintiff after payment of money into court—General issue by statute—Payments credited in particulars of demand need not be pleaded—Rule not to apply to claim of balances—Payment in reduction of damages or debt not to be allowed.

XVII. MICHAELMAS TERM, 2 VICT. 1838, p. 2871.

Admission of attorneys.

XVIII. HILARY VACATION, 2 VICT. 1839, p. 2871.

Forms of writs as framed by the judges, pursuant to stat. 1 & 2 Vict. c. 110.

XIX. HILARY TERM, 3 VICT. 1840, p. 2872.

Regulations respecting writs under stat. 1 & 2 Vict. c. 110. s. 20.

XX. TRINITY TERM, 3 VICT. 1840, p. 2872.

Payment of costs for a judge's order, when made a rule of court.

XXI. HILARY TERM, 4 VICT. 1841, p. 2872.

Proceedings in ejectment.

XXII. TRINITY TERM, 4 VICT. 1841, p. 2872.

When judgment under stat. 1 Will. 4. c. 7. s. 2. may be signed without any rule for judgment.

1. EXCHEQUER OF PLEAS, pp. 2785—2792.

I. MICHAELMAS TERM, 1 WILL. 4. 1830.

M. T. 1 WILL. 4.
1830.OFFICERS OF
THE COURT
AND THEIR
FEES.Fees which
sworn and side
clerks are to
receive.

IN pursuance of an act passed in the first year of his present majesty's reign, intituled "An act for the more effectual administration of justice in England and Wales," it is ordered by the court, that the several fees hereunder mentioned shall and may continue to be taken by the sworn and side clerks of this court, the same being for duties to be performed by them as officers of the court, similar to the duties of the other superior courts. And it is further ordered, that, in the taxation and allowance of costs, such fees shall be distinguished from, and form no part of, the fees and charges which shall be allowed to the attorneys who have been, or shall be, admitted to practise under and by virtue of the said act, but the same shall be allowed as disbursements.

	£	s.	d.
On process of <i>subpœna ad respondendum</i> - - -	0	1	6
Filing affidavit of service of <i>subpœna</i> - - -	0	1	0
Attachment for not appearing to <i>subpœna</i> - - -	0	1	6
<i>Alias</i> and <i>pluries</i> attachment, each - - -	0	1	6
One appearance in the paper book for one defendant - - -	0	1	0
For every additional defendant - - -	0	0	4
On special bail and filing - - -	0	4	4
For taking bail off the file to produce in court - - -	0	1	0
Filing all affidavits (not excepted by act of parliament), <i>postea</i> s, and inquisitions - - -	0	1	0
Searching for all writs, affidavits, and processes, each time, per term - - -	0	0	4
Searching for judgment and all matters of record, per term - - -	0	0	4
Office copies of all affidavits, and other matters of record, per folio - - -	0	0	8
Office copies of all rules, per folio - - -	0	0	4
On taking all pleadings out of the office, 4d. per folio, according to the number of folios marked on the pleading by the party filing the same, per folio - - -	0	0	4
On filing declarations - - -	0	0	4
Enrolling deeds and other matters requiring to be enrolled, per folio - - -	0	0	4
For every warrant of attorney - - -	0	0	4
For entering every rule - - -	0	0	4
For drawing, and copy of every order of court, per folio - - -	0	0	8
For exemplifying a record, per folio - - -	0	0	4
For entering a <i>certiorari</i> out of Chancery - - -	0	3	4
For acknowledging satisfaction on record - - -	0	4	8
For every release - - -	0	2	0
For entering an <i>audita querela</i> - - -	0	3	4
For attending every trial at bar - - -	1	0	0
For every exhibit read at a trial at bar - - -	0	1	0
For entering all proceedings on writs of error, per folio - - -	0	0	4
For enrolling writ of error - - -	0	6	8
For office copies of all pleadings, when required, per folio - - -	0	0	4
For each writ of <i>supersedeas</i> on an attachment - - -	0	1	0

[These fees are exclusive of the master's fees.]

Vide stat. 7 Will. 4. & 1 Vict. c. 30. s. 6. and 11 Geo. 4. & 1 Will. 4. c. 58.

2. That the several duties for which fees are appointed in the said schedule shall be performed by the sworn and side clerks of the said office, or their sufficient deputies or deputy, on the request of the persons now or hereafter admitted to practise as attorneys in this court, within the hours and times hereinafter appointed, whereupon such fees as aforesaid shall become payable.

Duties of the
sworn and side
clerks or the
deputies.

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1830.

Duties of the
master.

Office hours.

Appointment
of attorneys ad-
mitted to sue
and defend
in actions pre-
viously com-
menced.

PRACTICE.

The name and
address of
attorney, and
the day, month,
and year, to be
indorsed on all
writs.

Service of
subpœna.

Joinder of
several defend-
ants in one
writ.

Appearance by
the same
attorney.

3. That the several duties heretofore performed by the clerk of the pleas or his deputy, at the instance of the sworn or side clerks of the office of pleas, shall hereafter, at the instance of and for the attorneys admitted as aforesaid, be in like manner performed by the said clerk of the pleas, or his deputy, on payment of his lawful fees for the same.

4. That the said office of pleas shall be kept open for business every day, (Sundays, Christmas Day, Good Friday, Easter Monday, Ascension Day, and Midsummer Day, and days appointed for public feasts, thanksgivings, or fasts excepted), from the hour of eleven in the morning till three in the afternoon, and from five o'clock in the afternoon till nine o'clock at night during term, and for sixteen days after an issuable term, and for ten days after a non issuable term; and at other times till seven o'clock in the evening.

This rule has been altered by Reg. Gen. M. T. 2 Will. 4. and T. T. 7 Will. 4. *post*, 2791.; *vide stat.* 3 & 4 Will. 4. c. 42. s. 43. and Reg. Gen. H. T. 6 Will. 4., by which the holidays are settled.

5. That in all actions which, before the first day of this present term, were pending in this court, the parties, plaintiffs or defendants, shall and may be at liberty to apply to one of the barons of this court, for an order, appointing any person who shall then be an attorney of this court, to be his or her attorney, in further prosecuting or defending such action, upon undertaking to pay the sworn or side clerk previously employed by him his costs incurred in such action, to be taxed, if required, by the master; and that service of such order on the opposite party or parties, or his or her attorney, shall be sufficient notice to him or them of such appointment.

Vide stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 10., 7 Will. 4. & 1 Vict. c. 56. s. 4., and 1 & 2 Vict. c. 45. s. 3.

1. It is ordered, that henceforth the name and address of the attorney issuing any writ shall be indorsed or written thereon; and also, that the day, month, and year in which the same shall be issued, shall be indorsed or written on all writs hereafter to be issued in the office of pleas of this court; and if the same be mesne process, other than a writ of *subpœna ad respondendum*, a *præcipe* or particular of such writ, containing the county into which the same shall issue, the names of every party, plaintiff and defendant, therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be so issued, shall be delivered to the clerk or deputy clerk of the pleas, on his being required to sign such writ, which *præcipe* shall be duly filed on files, to be provided by the said clerk of the pleas, or his deputy, for each term and vacation, according to the county into which the same shall be issued; and if such process be *subpœna ad respondendum*, and process of contempt thereon, and writ of *supersedeas* thereon, a *præcipe* shall in like manner be left with the sworn or side clerks, or their deputies, in the office of pleas, containing the names of every party, plaintiff and defendant, therein, the time of the return thereof, the name and address of the attorney issuing the same, and the day of the date on which the same shall be issued, which shall be kept on a similar file by the sworn and side clerks; to which *præcipes* any attorney of this court, or his clerk, shall have access, on payment of the fee payable in respect thereof.

Vide stat. 1 & 2 Vict. c. 110. s. 2., by which all personal actions are to be commenced by writ of summons.

2. That a copy of all processes of *subpœna ad respondendum* hereafter to be issued out of this court, and of any indorsement thereon, shall be served; and no service thereof shall be effected, as heretofore, by service of any label or other minute thereof.

3. That where there are more than four defendants in a joint action, to be commenced in this court, residing in the same county, the whole number of such defendants shall be named in one writ; and if the whole number of defendants shall appear by the same attorney, and at the same time, the names of all the defendants shall be inserted in one appearance.

Vide post, 2842. Reg. Gen. M. T. 3 Will. 4. s. 1. Respecting the mode of entering an appearance, *vide stat.* 2 Will. 4. c. 39. Sch. No. 2.

4. That all recognisances of bail in actions in the said office of pleas, when taken or allowed by a baron, shall be left by the attorney for the defendant or defendants with the sworn or side clerks, or their deputy, in the office of pleas, until duly allowed, who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference, which book shall be open to the inspection of the attorneys so admitted as aforesaid, or their clerks; and notice of such bail being allowed, and left and filed in the said office of pleas, with the names, descriptions, and addresses of the bail, shall be given by the attorney for the defendant or defendants to the attorney for the plaintiff or plaintiffs within the times prescribed for giving notice of bail by the former rules of this court; and proceedings may be thereupon had for excepting to and perfecting such bail within the times and in like manner as is and are prescribed by the existing rules and practice of the court, except so far as the same may be altered by the present or any subsequent rule of this court.

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1830.

Recognisances of bail, when allowed, to be left at the office of pleas, and entered in a book, to be open for inspection.

Notice to be given.

Vide antè, 1276—1278. stat. 1 & 2 Vict. c. 110. Reg. Gen. H. T. 1 Will. 4. s. 1. *post*, 2801. Reg. Gen. H. T. 2 Will. 4. s. 17. *post*, 2816. Reg. Gen. H. T. 1 Vict. *post*, 2869.

5. That on every appearance to be entered by the sworn or side clerks, as officers of the said office of pleas, they shall cause to be put the name and address of the attorney at whose instance, and the day on which the same shall be entered; and such appearance shall be entered by the defendant's name, by the said sworn clerks, in proper books, having an alphabetical index-book of reference, entered by the plaintiff's name, to be provided by the clerk of the pleas for each term, which books shall be open to the inspection of the said attorneys, so admitted as aforesaid, and their clerks, without fee or reward.

Appearances to be entered.

See vide stat. 2 Will. 4. c. 39. Reg. Gen. H. T. 2 Will. 4. ss. 3. & 31. *post*, 2813. 2818. Reg. Gen. M. T. 3 Will. 4. s. 3. *post*, 2842.

6. That all declarations *de bene esse* shall be filed with the sworn and side clerks, or their deputy, and shall be entered in alphabetical order in proper books for each term, to be kept by them for that purpose, which books shall, at all times within office hours be open to the inspection of the persons admitted to practise as attorneys of this court, and their clerks, without fee or reward; and the declaration so filed shall and may be taken out of the office by the defendant or his attorney, upon payment of the fees payable in respect thereof.

Filing and entry of declarations *de bene esse*.

There can now be no declaration *de bene esse*. The Uniformity of Process Act (2 Will. 4. c. 39.), by appointing eight days from the execution of the *capias*, or service of the summons, as the time for putting in bail, or appearing to these writs respectively, and prohibiting proceedings in the mean time, had the effect of preventing the plaintiff from declaring between the return day of the writ and the time for putting in bail, or entering an appearance. The Reg. Gen. M. T. 3 Will. 4. s. 11. (*post*, 2844.) revived this practice in bailable actions; but the *capias* not now being the commencement of the action, that rule is inoperative. *Jervis's New Rules*, 9.

7. That service of all pleadings, summonses, orders, rules, notices, and other proceedings, heretofore served on the sworn or side clerks, at their seats in the said office of pleas, shall hereafter be served upon the attorney or attorneys of the adverse party or parties, by delivering the same to, or leaving the same for him, in the manner hereinafter mentioned; and that henceforth no entry of any notice shall be required to be made in any book to be kept in the said office of pleas as heretofore.

Pleadings, summonses, orders, &c. to be served on attorneys of adverse parties.

8. That the clerk of the pleas, or his deputy, shall forthwith cause to be prepared a proper alphabetical book for the purposes after-mentioned, and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any such attorney as aforesaid, or his clerk, without fee or reward; and that every attorney admitted in this court and residing in London, or within ten miles of the same, shall forthwith enter in such book, in alphabetical order, his name and place of abode, or some other proper place, in London, Westminster, or the borough of Southwark, or within one mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall, upon his admission, make the like entry; and as often as any

Books to be provided, and kept at the office of the clerk of the pleas, in which attorney to enter his name and place where he may be served with notice, &c.;

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1830.

and notices, &c. which do not require personal service to be there served.

Service where no entry of place where attorney may be served.

Where the defendant has appeared, or an appearance has been entered, and an attorney has given notice of acting for defendant, all proceedings, &c. are to be served upon such attorney, before nine o'clock.

Notice, &c. to tax costs.

Declaring on writs returnable on any day of the term.

Pleading thereto.

Render, where the defendant is at large.

such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book; and that all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order, or rule for such attorney, in the said office of pleas shall be deemed as effectual and sufficient, as if the same had been served at such place of residence as aforesaid.

9. That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered appearance therein according to the statute, and the defendant shall by an attorney of this court have given notice in writing to the attorney for the plaintiff or his agent of his being authorised to act as attorney for such defendant, all proceedings, notices, and summonses, rules, and orders, which, according to the practice of this court, were heretofore delivered by the sworn or side clerks of the other party, plaintiff or defendant, shall be delivered to, or served upon, the attorney or attorneys of the other party, plaintiff or defendant; and that all notices, &c. shall be so served or delivered before nine o'clock in the evening.

Vide Reg. Gen. H. T. 2 Will. 4. s. 50. *post*, 2822.

10. That one day's previous notice of the time of taxing costs, upon rules, orders, town *postees*, and inquisitions, and a copy of the bill of costs and affidavit to increase (if any), shall be given and delivered by the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice; and that, in the cases of *postees* and inquisitions in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation.

The non compliance with this rule is only a ground for reviewing the taxation (*Taylor v. Murray*, 3 M. & W. 141. *Wilkins v. Perkins*, 2 *ibid.* 315. 5 Dowl. P. C. 461.), and does not apply to a judgment on demurrer (*Taylor v. Murray*, 3 M. & W. 141.); and if the defendant do not appear, but an appearance be entered for him, this rule is inapplicable. *Burch v. Pointer*, *ibid.* 310., *vide* Reg. Gen. T. T. 1 Will. 4 s. 12. *post*, 2808. and Reg. Gen. H. T. 4 Will. 4. I. s. 17. *post*, 2850.

11. That upon process of *quo minus* and *venire facias* personally served on a defendant, and upon all writs of *distringas*, whereupon notice, pursuant to the stat. 7 & 8 Geo. 4. c. 71. shall be given returnable on any day of the term, the plaintiff shall be at liberty to declare *de bene esse* within eight days after the return thereof, or on appearance in chief; and if plaintiff declare, either conditionally or in chief, in London or Middlesex, and the defendant live within twenty miles of London, the defendant shall plead within four days after such declaration shall be filed or delivered, with notice to plead accordingly, without any imparlance; and in case the plaintiff declare in any other county, or the defendant live above twenty miles from London, the defendant shall plead within eight days after such declaration shall be filed or delivered, with notice to plead accordingly, without any imparlance, provided such declaration be filed or delivered on or before the last day of the term in which such process shall be returnable, and a rule to plead be duly entered.

Vide stat. 2 Will. 4. c. 39. s. 11. Reg. Gen. M. T. 3 Will. 4. s. 12. *post*, 2844.

12. That, on application by a defendant or his bail, or either of them, for an order of one of the barons of this court to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render a notice thereof and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and there-

upon the bail for the said defendant shall be wholly exonerated, without entering any *caoneretur*.

M. T. 1 WILL. 4.
1890.

The Palace Court is not a superior court within the meaning of the statute on which these rules are founded. *Scailh v. Brown*, 5 Dowl. P. C. 412.

13. And that if a defendant shall be in custody of the gaoler of the county gaol of any county in England or Wales, by virtue of any process issued out of any of his majesty's superior courts of record, he may be rendered in discharge of his bail in any action depending in this court, in like manner as is hereinbefore provided for a render in discharge of bail, and thereupon the bail shall be wholly exonerated from liability as such bail.

Render, where the defendant is in custody.

14. That, hereafter, there shall be two days appointed for the trials of causes at Nisi Prius in term in London, and the like in Middlesex, to be named by the lord chief baron of this court, previous to the commencement of each term; and that, on such nomination, the said lord chief baron shall also appoint the hour at which the court will sit on each of those days.

Sittings in term.

Vide stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 7.

15. That whenever a plaintiff shall rule the sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and that a plaintiff, having so ruled the sheriff shall not proceed on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid.

Justification of bail after a body rule.

Vide post, 2817. Reg. Gen. H. T. 3 Will. 4. s. 23.

16. That hereafter all special bail shall be justified within four days after execution before a baron at chambers, as well in term as in vacation.

Bail, when and where justified.

Whereas, by stat. 11 Geo. 4 & 1 Will. 4. c. 70., intituled "An act for the more effectual administration of justice in England and Wales," it is amongst other things enacted, that all the power, authority, and jurisdiction of his majesty's court of session of the said county palatine of Chester, and of the judges thereof, and of his court of Exchequer of the said county palatine, and of the chamberlain and vice-chamberlain thereof, and also of his judges and courts of great sessions in the principality of Wales, shall cease and determine at the commencement of the said act; and that all suits at law then depending in any of the said courts, shall be transferred to the court of Exchequer, there to be dealt with and decided according to the practice of the said court of Exchequer, or of the court from whence the same shall be transferred, according to the discretion of the court to which the same shall be transferred; which court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction to all intents and purposes possessed before the passing of this act by the court from whence such suit shall be removed.

Removal of causes from Wales.
Preamble.

Respecting criminal proceedings, writs of right, and *quo warranto*, vide stat. 1 Will. 4. c. 3.

1. This court doth therefore order, that, as to all suits at law depending in any of the said courts on the 12th day of October last past, the same shall be dealt with and decided according to the practice of this court, unless this court, or a baron thereof at chambers, shall, upon special application upon notice to an adverse party, otherwise direct.

Practice to be pursued in Welsh suits.

2. And it is further ordered, that where process shall have been served, and the plaintiff shall not have declared, that the plaintiff shall be at liberty to declare on all process returnable before or in the present term, or before or in next Hilary Term, or the vacation following the same, as if the same, as to all process returnable before the end of this present term, had been made returnable as in the present term; and as to all process returnable between the end of the present term and the vacation next following next Hilary Term, as if the same had been returnable of next Hilary Term; and the defendant shall appear to such process, or put in bail thereto, within eight days after notice of this rule, as to writs the return days whereof shall then be passed, and as to writs returnable after the end of the present term, within six days

Writs where returnable.

M. T. 1 WILL. 4.
1830.

Proceedings
where declara-
tion filed in
Wales.

Where interloc-
utory judg-
ment signed.

Proceedings
continued by
way of sug-
gestion.

Rules upon
sheriffs in re-
spect of process
issued out of
courts
abolished.

Returns by
sheriffs.

H. T. 1 WILL. 4.
1831.

Bail to justify
in court, except
in vacation.

Adjourned
sittings in
London.

after the same shall be returnable ; and the defendant shall be at liberty to give a rule to declare and, in default of declaration, to sign *non pros.* accordingly.

3. And it is further ordered, that in all cases in which a declaration hath been delivered or filed in the court of sessions, a certificate thereof shall be obtained under the hand of the late prothonotary or late deputy prothonotary of the court in which the same shall be filed, and be verified by affidavit, to be intitled in this court, and such certificate and affidavit shall be filed with the deputy clerk of the pleas without fee or reward ; and the plaintiff shall thereupon be at liberty to give a rule to plead, and in default of plea, to sign judgment in like manner as if the declaration had been filed in this court, an appearance having been first duly entered in this court, if the same shall not have been entered in the said court in which such suit was commenced ; and each party shall be at liberty to plead, reply, or take any subsequent proceeding, and to rule an adverse party to proceed in such action as if the same action had been originally commenced in this court ; but that no judgment shall be signed for want of declaration, plea, replication, or other proceeding, until a rule to declare, plead, reply, rejoin, &c., shall have been first given in the office of pleas of this court, and demand of declaration, plea, replication, or other proceeding in writing, served on the adverse party or his attorney, according to the practice of this court, so many days before such judgment shall be signed, as the practice of this court requires upon rules to declare, plead, reply, rejoin, &c.

4. And it is further ordered that, in case any interlocutory or final judgment shall have been signed in any of the said courts abolished by the said act, the plaintiff, on filing a certificate thereof as aforesaid, shall be at liberty to proceed thereon in like manner as if such judgment had been signed in this court ; but, that in case process of execution shall issue on any final judgment signed in any court abolished by the said act, it shall be stated in such process, in what court final judgment was so signed as aforesaid.

5. And it is further ordered, that any proceeding taken in any court abolished by the said act may be continued by way of suggestion in this court ; such suggestion being subject to correction, upon a summons for the purpose by any of the barons of this court.

6. That in case any process shall have issued out of any of the courts abolished by the said act, the sheriff to whom the same may have been issued may be ruled to return such process into this court, in like manner as if the said process had been returnable in this court ; and if such sheriff shall have made a return to the said court so abolished as aforesaid, or shall make a return to this court of *cepi corpus*, he may be ruled in like manner to bring in the body ; and process so issued as last aforesaid may be returned to this court by the sheriffs of the county of Chester, county of the city of Chester and principality of Wales, in like manner as if the same had been returnable in this court.

II. HILARY TERM, 1 WILL. 4. 1831.

Whereas by a rule of this honourable court, made in Michaelmas term last past, it was ordered that, hereafter, all special bail should be justified before a baron at chambers, as well in term as in vacation : And whereas it is expedient to repeal so much of the said rule as relates to the justification of bail in term time, it is therefore ordered, that, from and after the present term, the justification of bail in term time shall (unless by consent) take place, as heretofore, in open court ; and that the justification of bail before a baron at chambers shall be confined to cases of consent, and to justification in vacation.

2. It is ordered, that, from and after this present term, the sitting day at Nisi Prius, at the Guildhall, in and for the city of London, shall be the second day after every term, and that such sitting shall be adjourned until such day as the court shall then direct : And it is further ordered, that, in every notice of trial hereafter to be given for the sittings after any term to be holden at the Guildhall aforesaid, it shall be specified whether the cause is intended to be tried on the first day of such sittings or at the adjournment day ; and that, in every

case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant or defendants reside above forty miles from the said city of London, and four days before the said first day, if the defendant or defendants reside within that distance.

By stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 7. there are to be only twenty-four days' sittings for London and Middlesex after Hilary, Trinity, and Michaelmas Terms, and six days after Easter Term, except for trials at bar or by consent. *Vide post*, 2828. Reg. Gen. H. T. 2 Will. 4. s. 57, *et seq.*

III. TRINITY TERM, 1 WILL. 4. 1831.

Whereas, since the statute 7 & 8 Geo. 4. c. 71. instances have occurred in which, upon proceedings in the court of Exchequer, by way of *subpoena* and attachment, defendants have been arrested upon writs of attachment, notwithstanding the same have not issued for a bailable cause of action, and it is desirable that such practice should be discontinued, it is therefore ordered, that, from henceforth, no arrest shall be made upon any such writ of attachment, unless the same shall be for a bailable cause of action, and shall be duly marked and indorsed for bail.

Stat. 2 Will. 4. c. 39. abolished the writ of attachment.

IV. MICHAELMAS TERM, 2 WILL. 4. 1831.

It is ordered, that, from and after the last day of this present term, the Exchequer Office of Pleas be kept open as follows: that is to say, during term, and one week after every term, from eleven o'clock in the morning until three o'clock in the afternoon, and from six to nine o'clock in the evening; and at other times, from eleven o'clock in the morning until four o'clock in the afternoon, the usual holidays excepted, when the said office is to be closed.

V. HILARY TERM, 7 WILL. 4. 1837.

It is ordered, that from and after the last day of the present term, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced in the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be granted on an affidavit of merits, or if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded on an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

VI. TRINITY TERM, 7 WILL. 4. 1837.

It is ordered, that from and after the last day of this term, all the offices (the rule office excepted) be open in term time, from eleven o'clock in the forenoon till five in the afternoon, and not in the evening; and that the rule office be kept open in term from eleven in the forenoon till three o'clock in the afternoon, and from six till eight o'clock in the evening; and that in vacation all the offices be open from eleven in the forenoon till three in the afternoon, except between the 10th August and the 24th October, when they are to be open from eleven in the forenoon till two o'clock in the afternoon only.

VII. MICHAELMAS TERM, 2 VICT. 1838.

The court ordered, that, for the future, the peremptory paper should be called on before motions on the second day of each term; and intimated, that they would strike out all cases in which counsel did not appear to support or oppose the rule.

VIII. HILARY TERM, 3 VICT. 1840.

It is ordered, that every person who shall intend to apply for admission as an attorney of this court, and who shall not have been admitted an attorney or

H. T. 1 WILL. 4.
1831.

T. T. 1 WILL. 4.
1831.

When no arrest
to be made upon
attachment.

M. T. 2 WILL. 4.
1831.

Office hours.

H. T. 7 WILL. 4.
1837.

Rules for ap-
plication for
setting aside an
attachment or
staying pro-
ceedings on the
assignment of a
bail bond.

T. T. 7 WILL. 4.
1837.

Office hours.

M. T. 2 VICT.
1838.

Peremptory
paper.

H. T. 3 VICT.
1840.

Admission of

H. T. 3 VICT.
1840.

attorneys in the
Exchequer.

solicitor of any other court, shall (in addition to the notices to be given to the examiners, masters, &c., as required by a rule of Hilary Term, 6 Will. 4. 1836, read in all the courts), for the space of one full term, previous to the term in which he shall apply to be admitted, cause his name and place or places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attorneys to whom he shall have been articulated, written in legible characters, to be affixed in the Exchequer Office of Pleas, in such place as public notices are usually fixed; and also enter, or cause to be entered, in two books to be kept for the purpose, one at the chambers of the lord chief baron, and the other at the chambers of the other barons of this court, his name and place or places of abode for the last preceding twelve months, and also the name or names and place or places of abode of the attorney or attorneys to whom he shall have been articulated.

T. T. 3 VICT.
1840.

IX. TRINITY TERM, 3 VICT. 1840.

[Admission of Attorneys, *vide post*, 2800.]

M. T. 5 VICT.
1841.

Sittings at
Nisi Prius.

X. MICHAELMAS TERM, 5 VICT. 1841.

It is ordered, that from and after the present term there shall be three sittings at Nisi Prius in term in Middlesex for the trial of causes; the days for holding such sittings respectively to be appointed by the lord chief baron of this court previously to the commencement of each term.

2. COMMON PLEAS, pp. 2792—2799.

E. T. 1 WILL. 4.
1831.

Fee to prothonotaries for entering declaration, when to be paid.

I. EASTER TERM, 1 WILL. 4. 1831.

Whereas, by the ancient course of this court, the fee paid to the prothonotaries for the entry of every declaration in a cause has hitherto been of right payable at the time of filing thereof: And whereas it is expedient that, for the future, the practice of this court should be made conformable to that of the respective court of King's Bench and Exchequer, so far as regards the time of such payment, it is therefore ordered, that, from and after the essoign day of next Trinity Term, the fee due to the said prothonotaries for such entry as aforesaid may be paid at any time previously to entering the issue or passing the record in such cause; or in case there shall be no record, at any time previously to signing interlocutory or final judgment; and further, that in all cases where there shall be no judgment, the said fee shall be payable at the time of taxing costs, where the proceedings in any cause are stayed, or such cause terminated by any rule of this court, or order of a judge.

Pleading after an amendment of the declaration.

2. It is ordered, that, in future, where any amendment in the declaration shall be made after a rule to plead shall have been entered, no new rule to plead shall be necessary, provided such amendment be made in the term or the vacation succeeding the term in or of which the rule to plead shall have been entered; and the defendant shall have two days, exclusive of the day on which the amendment shall be actually made, to alter his plea, or plead *de novo*, unless otherwise ordered by the court, or the judge granting leave for the amendment.

Vide post, 2820. Reg. Gen. H. T. 2 Will. 4. s. 42.

E. T. 2 WILL. 4.
1832.

Posteas and
inquisitions.

II. EASTER TERM, 2 WILL. 4. 1832.

It is ordered by the court, that, after the *posteas* and inquisitions have been left with the clerk of the judgments, conformably with the rule made in Trinity Term, 13 Geo. 2., it shall be lawful for the clerk of the judgments to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution: And it is hereby further ordered, that the attorney or agent who procures such *posteas* or inquisitions from the office of the clerk of the judgments, shall cause the same to be returned again to the same office, during the office hours of that day.

M. T. 4 WILL. 4.
1833.

Fines and recoveries.

III. MICHAELMAS TERM, 4 WILL. 4. 1833.

These rules were repealed by Reg. Gen. H. T. 4. *post*, 2794.

Whereas by stat. 3 & 4 Will. 4. c. 74. s. 89. it is enacted, "that the lord chief justice of the court of Common Pleas at Westminster shall, from time to time, appoint the person who shall be the officer with whom such certificates as in the said act are mentioned shall for the time being be lodged, and may remove him at pleasure, and that the court of Common Pleas at Westminster shall also, from time to time, make such orders and regulations as the said court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the said act, and touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place:" Now it is ordered, that in addition to the form of the certificate mentioned in the 84th section of the said act, after stating the names of the parties and the words "and acknowledge the same to be her act and deed," the following words should be inserted, "And I [or, we] do further certify, that the several premises comprised in the said indenture are situate in the parish or several parishes, and place or places following; that is to say, in the parishes of — [as the case may be], in the county of —."

M. T. 4 WILL. 4.
1833.

Certificate.

And it is further ordered, that, where the acknowledgments shall be made before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any of the parties in the transaction giving occasion to the taking such acknowledgment; and that, in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof, that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any of the said parties, and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be mentioned in such affidavit: *And it is further ordered*, that the commissioners do inquire of married women, whether they intend to give up their interest in the estate to be passed by such deed, without having any provision made for them in return for, or in consequence of, their so giving up such interest; and if it appears that any provision is to be made for any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been actually made, and one of the said commissioners shall state in the affidavit, so to be made as aforesaid, that such inquiry was made, and also the answer given thereto; and where any such provision has been agreed to be made, that he, the said commissioner, is satisfied that the same has been made; and where such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, that he, the said commissioner, has no reason to doubt the truth of such declaration, and verily believes the same to be true: *And it is hereby further ordered*, that the affidavits verifying such certificate, where the acknowledgment is taken by a judge or master in Chancery, be in the form hereunto annexed, marked A.; and where before any of the commissioners appointed in pursuance of the said act, in the form hereunto annexed, marked B.; with such variations only as the circumstances of the case shall render necessary: *And it is hereby further ordered*, that the certificates and the affidavits verifying the same shall be delivered to the officer to be so appointed within one month from the making the acknowledgment, and that the officer shall not receive the same after that time, without the direction of the court or a judge.

One of the ' commissioners at the least not to be professionally concerned for the parties.

Form of affidavit.

Examination of married women.

Certificates to be verified by affidavits.

Certificates and affidavits to be delivered within one month from the making of the acknowledgment.

A.

Form of Affidavit verifying the Certificate, where the Acknowledgment is taken before a Judge or Master in Chancery.

FORMS OF
AFFIDAVITS.

A. B. of — maketh oath and saith, that he knows —, the wife of —, in the certificate hereunto annexed mentioned; and that the acknowledgment

M. T. 4 WILL. 4. 1833. therein mentioned was made by the said —, and the certificate signed by the said — (judge or master) therein mentioned, in the presence of this deponent. And this deponent further saith, that the said — was, at the time of making such acknowledgment, of full age and competent understanding.

B.

Form of Affidavit verifying the Certificate, where the Acknowledgment is taken by any of the Commissioners appointed in pursuance of the Act of Parliament.

A. B. of —, in the county of —, gentleman, one of the attorneys of his majesty's court of — at Westminster, and one of the commissioners named in the certificate hereunto annexed, maketh oath and saith, that he knows —, the wife of —, in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the commissioners in the said certificate mentioned, on the day and year therein mentioned, at —, in the county of —, in the presence of this deponent; and that, at the time of making such acknowledgment, the said — was of full age and competent understanding: and that the said — knew the said acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made. And this deponent further saith, that he, this deponent [or, the said I. K., *as the case may be, adding, if not the commissioner making the affidavit, whose place of residence is at —*], is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any or either of the parties to the transaction giving occasion to the taking such acknowledgment. And this deponent further saith, that in pursuance of the order made by the court of Common Pleas in Michaelmas Term, 1833, the said commissioners did inquire of the said — [or, *if more than one, of each of them, the said —*], whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken, without having any provision made for her in return for or in consequence of her so giving up her interest in such estates, and that, in answer to such inquiry, the said — declared, that she did intend to give up her interest in the said estates, without having any provision made for her in return for, or in consequence of, her so giving up her interest, which declaration of the said — this deponent has no reason to doubt the truth of, and verily believes the same to be true [or, *declared that a provision was to be made for her in consequence of her giving up her interest in the said estates*]: And this deponent, before her acknowledgment was so taken, was satisfied, and does now verily believe, that such provision has been made.

N. B. — *When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.*

H. T. 4 WILL. 4. 1834.

IV. HILARY TERM, 4 WILL. 4. 1834.

Whereas it has been found expedient to make alterations in the general rules made in Michaelmas Term last by this court, for the purpose of carrying into effect the statute passed in the 3d and 4th years of the reign of his present majesty, cap. 74., intituled, "An act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance:"

And whereas it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution; and it will be convenient, that all the orders and regulations made by the court under the said act should be contained in the same rule:

Rule M. T. 4 Will. 4. repealed.

Now it is hereby further ordered, that the said general rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which, before the first day of March next ensuing, shall have been taken, pursuant to the direction of the said rules of Michaelmas Term last.

Acknowledgment by mar-

And it is hereby further ordered, that, where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act,

before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein, as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

H. T. 4 WILL. 4.
1834.

ried woman
before whom
taken.

Examination
of married
women.

And it is further ordered, that, before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of, her so giving up such interest; and where such married woman, in answer to such inquiry, shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear to them, or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made, by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.

Vide post, 2798. Reg. Gen. T. T. 4 Will. 4.

And it is hereby further ordered, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall [*except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed*] be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the counties palatine of Lancaster or Durham, and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent [*or, if more than one person join in the affidavit*, that one or more of the deponents] knew the person or persons making such acknowledgment; and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his, deponent's, knowledge or belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein, as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit; and that, previously to such acknowledgment being taken, the deponent had inquired of such married woman [*or, if more than one, of each of such married women*], whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall declare that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true: and where any provision has been agreed to be made, the deponent shall state, that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said judge [master, or commissioners].

Verification of
certificate

And it is hereby further ordered, that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein such married woman shall appear to be interested, shall by deed be described to be situate.

Form of
affidavit.

H. T. 4 Will. 4.
1834.

And it is hereby further ordered, that the affidavit shall be in the form herewith annexed, subject to such variations as the circumstances of the case shall render necessary, or such affidavit may be made, where it is found convenient, by one of the said commissioners, with such variation in the form thereof, as shall be necessary in that behalf.

In *re Schofield* (3 Bing. N. C. 293.) Chief Justice Tindal observed, "There can be little doubt the primary intention of the court was, that when a married woman acknowledged a deed, she should do it under the sanction of two commissioners and a practising attorney, and I remember that some professional men at first thought credence should be given to the commissioners without calling on them to make an affidavit; afterwards, upon some inconvenience occurring, it was thought, that one of the commissioners, if a practising attorney, might, where it was convenient, make the affidavit. I can put no other construction on the words 'such affidavit may be made, where it is found convenient, by one of the said commissioners;' and therefore this rule should be made absolute."

When and to
whom cer-
tificates to be
delivered.

And it is hereby further ordered, that the certificates and affidavits verifying the same shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or a judge.

Office fees.

And it is hereby further ordered, that the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—

£. s. d.

To a judge or master for taking the acknowledgment of every married woman, of which 7s. 6d. will be paid in the case of a judge to his clerk, and the residue thereof will be paid over to the treasury; and in the case of a master, the whole will be paid over to the treasury, or the fee fund account of the court of Chancery.	-	1	6	8
To the two perpetual commissioners for taking an acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13s. 4d. for each commissioner	-	1	6	8
To each commissioner, when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses.	-	1	1	0
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses	-	2	2	0
To the clerk of the peace, or his deputy, for every search	-	0	1	0
To the same for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names	-	0	5	0
To the same, for every further complete number of 50 names, an additional	-	0	2	6
To the officer of every search	-	0	1	0
To the same for every official copy of the certificate	-	0	2	6
To the same for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names	-	0	5	0
To the same for every further complete number of 50 names additional	-	0	2	6
To the same for preparing every special commission, including a fee of 5s. to the clerk of the chief justice or other judge for the fiat	-	0	15	0
To the same for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3d & 4th Will. 4. c. 74.	-	0	5	0

Vide post, 2798. Reg. Gen. T. T. 4 Will. 4.

Fees.

And it is hereby further ordered, that the fees and charges to be paid for the entries of deeds required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the pro-

tectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act, by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls, shall be as follows:—

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1834.

	£	s.	d.
For the indorsements on the deed of the memorandum of production, and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5s. together - - - - -	0	10	0
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of 72 words - - - - -	0	0	6
For taking the consent of each protector of settlement of lands - - - - -	0	13	4
For taking the surrender by each tenant in tail of lands - - - - -	0	13	4
For entries of such surrender, or the memorandums thereof, on the court rolls, at per folio of 72 words - - - - -	0	0	6

Form of Affidavit verifying the Certificate of Acknowledgment taken in pursuance of the Act of Parliament, to be made by some practising Attorney or Solicitor, and to be sworn before a Judge of the Court of Common Pleas, or a Commissioner appointed for taking Affidavits in the said Court.

Form of
affidavit verify-
ing the cer-
tificate of ac-
knowledgment.

IN THE COMMON PLEAS.

A. B. of —, in the — of —, gentleman, one of the attorneys [or, solicitors] of the court of —, maketh oath and saith, that he knows —, the wife of —, in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the judge [or, master, or, by A. B. of &c. and C. D. of &c., the commissioners in the said certificate mentioned] on the day and year therein mentioned, at —, in the — of —, in the presence of this deponent, and that at the time of making such acknowledgment the said — was of full age, and competent understanding, and that the said — knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made [And this deponent further saith, that to the best of this deponent's knowledge and belief, neither of the said commissioners is (or the said A. B., or the said C. D., one of the said commissioners, is not) in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned]: And this deponent further saith, that, previous to the said — (the married woman) making the said acknowledgment, he, this deponent, inquired of the said — (the married woman) [or, if more than one, of each of them the said — and — (the married women)], whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estates, and that, in answer to such inquiry, the said — (the married woman) declared, that she did intend to give up her interest in the said estates, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest; of which declaration of the said — (the married woman) this deponent has no reason to doubt the truth, and verily believes the same to be true, or declared that a provision was to be made for her in consequence of her giving up her interest in the said estates: And this deponent further saith, that, before her acknowledgment was so taken, he was satisfied, and does now verily believe, that such provision has been made by deed or writing, or that the terms thereof have been reduced into writing, and that such deed or writing has been produced to the said judge [master, or commissioners]: And, lastly, this deponent saith, that it appears by the deed, acknowledged by the said — (the married woman), that the premises wherein she is stated to be interested are described to be in the parish or place of — [or, pa-

H. T. 4 WILL. 4. 1834. rishes or places of — and —], in the county of — [or, counties of —, as the case may be]. Sworn, &c.

N. B. — When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

T. T. 4 WILL. 4. 1834.

Verification of certificate.

V. TRINITY TERM, 4 WILL. 4. 1834.

It is ordered, that from and after the last day of this term, where such part of the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament respecting fines and recoveries, as state "the deponent's knowledge of the party making the acknowledgment and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

Fees on acknowledgment.

And it is further ordered, that where more than one married woman shall, at the same time, acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only.

And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees; and so also, where the same married woman shall, at the same time, acknowledge more than one deed respecting the same property.

And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

In every case, the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

M. T. 5 WILL. 4. 1834.

Attorneys to enter their admissions yearly.

VI. MICHAELMAS TERM, 5 WILL. 4. 1834.

Whereas inconvenience hath arisen by reason of the attorneys practising in this court not having made any entry of their admission as attorneys, and of the taking out of their annual certificates in the book kept for that purpose by the clerk of the warrants:

And whereas, by the custom and rules of this court, every attorney ought to pay to the clerk of the warrants, or his deputy, his termage fees, being eightpence in every term, one moiety of which forms the fund for the support of the criers of this court:

And whereas complaint hath been made to us, that of late such payments have been much neglected:

It is ordered, that every person admitted an attorney of this court, not having already entered such his admission, and also every attorney hereafter to be admitted, shall henceforth enter his admission, and shall cause his annual certificate to be on or before the first day of Easter Term in every year, entered with the said clerk of the warrants, which entries shall, in all cases where the annual certificate has been already entered in one of the courts, be made without fee or reward, and shall at the same time pay and discharge all his arrears of termage fees.

Vide stat. 1 & 2 Vict. c. 45. s. 3.

T. T. 7 WILL. 4. 1837.

Office hours.

VII. TRINITY TERM, 7 WILL. 4. 1837.

It is ordered, that, from and after the last day of this present Trinity Term, all the offices (the secondaries' excepted) be open in term from eleven in the forenoon until five in the afternoon, and not in the evening; and that the secondaries' office be open in term from eleven in the forenoon until three in the afternoon, and from six o'clock until eight o'clock in the evening; and that in the vacation all the offices be open from eleven in the forenoon until three in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven in the forenoon until two in the afternoon only.

8. HILARY TERM, 1 VICT. 1838.

It is ordered, that, on and after the first day of next Easter Term, every rule for judgment, as in case of a nonsuit after peremptory undertaking and default, shall be absolute in the first instance.

It is also ordered, that, from and after the last day of this present Hilary Term, it shall not be necessary to file warrants of attorney to prosecute or defend previous to or at the time of signing interlocutory or final judgment, or at any stage of the cause.

It is also further ordered, that, from and after the last day of this term, all judgments may be signed on the morning after the day on which the time for pleading has expired.

It is also further ordered, that, on and after the first day of this next Easter Term, every motion for judgment against the casual ejector or ejectment in London and Middlesex, may be made on any day during the term.

It is ordered, that, from and after the first day of this present term, every rule or order of a judge directing the discharge of the defendant out of custody upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith.

In the Queen's Bench in town causes, no *supersedeas* is necessary, for the rule of allowance directs the marshal to discharge the prisoner. In the Common Pleas and Exchequer, whether the defendant be in custody of the warden of the Fleet or of the sheriff, and in the Queen's Bench, where the defendant is in custody of the sheriff, a *supersedeas* issues, the rule of allowance being, in the two latter courts, the authority for the officer to sign the writ. *Jervis's New Rules*, 33.

H. T. 1 VICT. 1838.

Judgment as in case of a nonsuit.

Warrants of attorney.

Judgments when signed.

Judgment against the casual ejector.

Supersedeas.

3. EXCHEQUER CHAMBER, p. 2799.

MICHAELMAS TERM, 2 WILL. 4. 1832.

It is ordered, that henceforth the costs of proceedings upon writs of error, from the court of Exchequer to this court be taxed and allowed by the master of the court of Exchequer.

M. T. 2 WILL. 4. 1832.

Taxation of costs in error.

4. QUEEN'S BENCH, pp. 2799—2800.

I. EASTER TERM, 1 WILL. 4. 1831.

It is ordered, that, instead of the words "the month of Easter, or morrow of All Souls," contained in the rule of this court of Easter Term, in the fifth year of King William and Queen Mary, for regulating the proceedings upon declarations delivered to prisoners in gaol, the words "thirteenth day of Easter Term, and thirteenth of Michaelmas Term," be respectively substituted, unless such thirteenth day should happen to be a Sunday, and then, that the fourteenth days of those terms respectively be substituted.

E. T. 1 WILL. 4. 1831.

Pleading by prisoners.

II. MICHAELMAS TERM, 3 WILL. 4. 1832.

It is ordered, that all writs of summons, *distringas*, *capias*, and detainer, issued in the county of Middlesex, shall be issued, signed, and sealed by the signer of the bills of Middlesex, and that all such writs, issued in any other county, shall be issued and signed by the signer of the writs in the King's Bench office, and sealed by the sealer of the writs until further orders.

M. T. 3 WILL. 4. 1832.

Signing and sealing writs.

III. TRINITY TERM, 7 WILL. 4. 1837.

It is ordered, that, from and after the last day of this term, all the offices (the rule office excepted) be open in term time from eleven in the forenoon till five in the afternoon, and not in the evening.

And that the rule office be open in term time from eleven in the forenoon till three in the afternoon, and from six till eight in the evening.

And that all the offices be open in vacation from eleven in the forenoon till three in the afternoon, except between the 10th day of August and the 24th day of October, when they shall be open from eleven in the forenoon till two in the afternoon only.

T. T. 7 WILL. 4. 1837.

Office hours.

T. T. 7 Will. 4.
1837.

Fees on filing
sheriff's return
in vacation.

Abolishing fees
for keys of
treasury during
office hours.

Whereas, by the practice of this court, sheriffs may now be required to file writs with their returns, as well in vacation as in term time; and upon all writs filed in vacation an extra charge of 5s. 10d. is paid for keys of the treasury: and whereas, the like charge of 5s. 10d. is also paid upon all searches made in vacation for writs so filed, and upon all copies of such writs or returns thereof: it is ordered, that, from and after the last day of this present term, such extra charge of 5s. 10d. be discontinued upon all writs filed by sheriffs in vacation, and all searches for such writs, and all copies thereof, or of returns thereto; and that, hereafter, in vacation, such writs may be filed by sheriffs, and searches made for the same, and copies of such writs and returns thereto made and obtained without payment of the said extra charge of 5s. 10d.

H. T. 1 Vict.
1838.

Practice in
ejectment.

IV. HILARY TERM, 1 VICT. 1838.

Whereas, by the practice of this court in all actions of ejectment, it is necessary that the plea and consent rule should be filed at the chambers of one of the judges of the same court.

It is hereby ordered, that, from and after the last day of this present term, the said practice be discontinued, and in all such actions, the plea, with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer, as heretofore.

M. T. 3 Vict.
1839.

Name of
relator in a *quo*
warranto in-
formation to be
mentioned.

V. MICHAELMAS TERM, 3 VICT. 1839.

It is ordered, that no rule be hereafter granted for filing any information in the nature of a *quo warranto*, unless, at the time of moving, an affidavit be produced by which some person or persons shall depose upon oath, that such motion is made at his or their instance as relator or relators; and that such person or persons shall be deemed to be the relator or relators in case such rule shall be made absolute, and shall be named as such relator or relators in such information in case the same shall be filed, unless this court shall otherwise order.

E. T. 3 Vict.
1840.

Applicants for
admission as
attorneys.

VI. EASTER TERM, 3 VICT. 1840.

It is ordered, that every person who shall intend to apply for admission as an attorney of this court, and who shall not have been admitted an attorney or solicitor of any other court, shall (instead of the notices required by the rule of *Trinity*, 31 Geo. 3., but in addition to the notices to be given to the examiners, masters, &c., as required by rule of Hilary, 6 Will. 4. 1836, read in all the courts), for the space of one full term previous to the term in which he shall apply to be admitted, enter, or cause to be entered, in two books to be kept for that purpose, one at the chambers of the lord chief justice of this court, and the other at the chambers of the other judges, his name and place or places of abode, and also the name or names and place or places of abode of the attorney or attorneys to whom he shall have been articulated: AND IT IS FURTHER ORDERED, that a printed copy of the list of admissions be stuck up in the *Queen's Bench* office, and at the judges' hall or chambers in *Rolls' Gardens*: AND IT IS FURTHER ORDERED, that any person applying to be re-admitted an attorney of this court shall (*instead of the notices now required*), three days at the least previous to the first day of the term on the last day of which he intends to apply to be re-admitted, leave at the office of the masters of this court a notice in writing, containing his name and place or places of abode for the last preceding twelve months; and that, before the said first day of term, he shall enter, or cause to be entered, in the two before-mentioned books, a like notice, and shall, at the same time, cause to be filed the affidavit upon which he seeks to be re-admitted, at the office of the masters aforesaid, and a copy thereof left at the chambers of the lord chief justice of the court of *Queen's Bench*: AND IT IS FURTHER ORDERED, that the masters reduce such notices of re-admission into alphabetical order, and add the same to the list of admissions.

[A similar order to the foregoing was made in the Exchequer, T. T. 3 Vict. 1840, excepting, that "*Hilary*, 3 Vict." was substituted for "*Trinity*, 31 Geo. 3.," "chief baron and barons" for "chief justice and justices," "*Exchequer Office of Pleas*" for "*Queen's Bench Office*," and the words "*instead of the notices now required*" omitted.

5. QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER, pp. 2801—2872.

I. TRINITY TERM, 1 WILL. 4. 1831.

It is ordered, that a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. That if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof, as aforesaid, to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

T. T. 1 WILL. 4. 1831.

Bail may be justified at the same time at which they are put in.

Vide ante, 1276—1278. tit. ARREST FOR DEBT. Stat. 1 & 2 Vict. c. 110.

Notice of bail may be given in three ways:—1. The old notice of bail having been put in. 2. The like notice with an affidavit of sufficiency with a view to the costs of justification. 3. The notice under this rule of putting in and perfecting bail at the same time, which is a four days' notice, exclusive of Sunday. It was intended by the latter notice, founded on this rule, to give further facility to the defendant, and not to deprive him of any advantage which he then had. The rule therefore does not apply to prisoners, who may still, as before the rule, put in and justify bail at the same time upon a two days' notice (*Jervis's New Rules*, 39. *Davies v. Grey*, 2 C. & J. 309. *King's bail*, 1 Dowl. P. C. 509.); nor to added bail. *Perry's bail*, 2 C. & J. 475. 1 Dowl. P. C. 564. *Key v. McIntyre*, 2 M. & W. 347. 5 Dowl. P. C. 453.

But the prisoner must, in his notice, describe himself as a prisoner (*Creighton's bail*, 1 Dowl. P. C. 609. *Pool's bail*, 2 M. & W. 312. *Bullen's bail*, 3 Dowl. P. C. 422.), or shew that he is in custody. *Frith's bail*, 2 *ibid.* 229.

2. And it is further ordered, that every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

Notice of bail to state bail's residence within the last six months, &c.

Country and town bail (*Anon.* 1 Dowl. P. C. 259.) are included in the foregoing rule.

The place of residence of the bail during the last six months must appear in the notice of justification, and the description of the bail must be given in the same manner as in the notice of bail. *Welsh v. Lywood*, 1 Bing. N. C. 258.

The names of the bail must be stated with accuracy: thus, where "Francis" was written "Frances" the notice was holden bad. *Anon.* 1 Moore, 126. And where the initial only of one of the two christian names of a bail was given, Mr. Justice Coleridge intimated, that the notice was bad, but allowed the bail to justify on payment of costs. *White's bail*, 2 H. & W. 134. *Jervis's New Rules*, 40.

Names of bail.

If the description be such as to mislead the plaintiff, or if fraud be apparently intended, the defendant will be held to a strict proof of his description; thus, if an attorney's clerk or a porter be described as gentlemen, the notice of bail may be treated as a nullity (*Fenton v. Ruggles*, 1 B. & P. 356.); but if a misdescription be the result of accident, or one not likely to mislead, and no prejudice result therefrom to the plaintiff, the defendant will be allowed to rectify his error.

Where the description is such as to mislead.

Where one of the bail, carrying on the business of a Scotch ale agent, was described in the notice of bail as a "gentleman," it was held to be a substantial misdescription. *Flemming's bail*, 1 C. & M. 111. And "manufacturer" has been likewise decided to be a bad description. *Fearnley's bail*, 1 Dowl. P. C. 40.

Trade or mystery.

But a clerk in the post-office (*Wood v. Ray*, 2 *ibid.* 692.), or a clerk in the custom-house (*Anon.* 1 Chitt. 492. n.), may be described as gentlemen. "Yeoman" is a good description of a bail. *Lanyon's bail*, 3 Dowl. P. C. 85. And "A. B. of No. 21. Tokenhouse Yard, in the city of London, clerk to C. D. of the same place," has been holden sufficiently descriptive of a deponent in an affidavit. *Cooper v. Folkes*, 1 M. & G. 942.

The objection to a notice of bail, that the number of the street is not stated, must be taken in the first instance; but it will be waved by obtaining time to inquire, unless it be sworn, that the bail's residence cannot be found. *Foster's bail*, 2 Dowl. P. C. 586.

Number of the house or street in which the bail resides.

In *Muir v. Smith* (2 Tyrw. 742.) Mr. Baron Bayley allowed the bail to justify upon payment of costs, where the number of the house of one of the bail had been omitted, but the bail had been found, and were not opposed on any other ground. Where a bail has two places of residence it is not necessary to mention both. *Anon.* 1 Dowl. P. C. 159. *Fortescue's bail*, 2 *ibid.* 541.

T. T. 1 WILL. 4.
1831.

Time of re-
sidence.

Housekeeper or
freeholder.

Liability of
plaintiff and
defendant for
the costs of
justifying or
opposing bail.

When the
plaintiff will
have to pay the
costs.

But the residence stated must be the actual and not the constructive residence of the bail for the last six months, because the object of the notice is to enable the plaintiff to find the bail; and therefore, where a bail had a cottage at Streatham, but for the then last three months had resided in the Strand, and the residence at Streatham was only mentioned in the notice, it was holden insufficient. *Thomson v. Smith*, 1 Dowl. P. C. 340.

A notice of bail describing them as of a parish merely, will answer. *Treasure's bail*, 2 *ibid.* 670.

The name of a township, without the name of a street, stated to be in a certain parish named in the notice of bail, is unobjectionable. *Ibid.*

It is requisite to state affirmatively, that the bail have resided during the last six months at the places mentioned in the notice. *Holling's bail*, 5 *ibid.* 290. But it is not necessary, that the bail should sleep in the house described in the notice of bail, if he can be found there. *Thomson's bail*, 1 *ibid.* 497.

In *Johnson's bail* (*ibid.* 438.), where the notice described the bail to have within the last six months resided, &c., it was held bad; but in *Ward's bail* (1 C. & M. 22, 1 Dowl. P. C. 596.) a similar defect was holden to be cured by the affidavit of justification, which stated, that the bail had resided at the place named for the last six months.

An affidavit in justification of bail omitting to disclose their residence, is insufficient, notwithstanding the plaintiff does not appear to oppose. *Welsh v. Lywood*, 1 Bing. N. C. 258.

The bail must be described in the notice as housekeepers or freeholders, notwithstanding the notice be accompanied by an affidavit, in which they are properly described. *Anon.* 1 Dowl. P. C. 161.

But a defect in the notice, as omitting to describe the bail as householders or freeholders, will not render the notice a nullity, and entitle the plaintiff to sign judgment, but the objection should be made when the bail appear. *Bell v. Foster*, 8 Bing. 334. 1 Dowl. P. C. 271. *Rex v. Middlesex (Sheriff of)*, 1 C. & M. 482.

Keeping a brothel is not of itself a ground for rejecting bail. *Gouge's bail*, 3 Dowl. P. C. 320.

"Householder" is not a sufficient description. *Anon.* 1 *ibid.* 127.

Where the bail, being a freeholder and not a housekeeper was described as a housekeeper, he was rejected by Mr. Justice Littledale. *Wilson's bail*, 2 *ibid.* 431.

A lodger in England, possessed of a house in Scotland (1 *ibid.* 61.), or the domestic servant of a foreign ambassador (*Lock's bail*, *ibid.* 124.), or a leaseholder, not a householder or a freeholder, cannot justify as bail. *Smith's bail*, *ibid.* 1.

3. And it is further ordered, that if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendants shall pay the costs of opposition, unless the court, or a judge thereof, shall otherwise order.

This rule has no effect upon the actual justification of the bail, but was merely intended, by giving the plaintiff full particulars of the bail, and ample opportunity of inquiring into their circumstances, to put a stop to the practice of frivolous exception to good bail by making the plaintiff pay the costs of justification if the bail justified, and by visiting the defendant with the like penalty, to deter him from attempting to impose upon the plaintiff by a false affidavit. *Jervis's New Rules*, 41. *Grant's bail*, 1 C. M. & R. 598.

It does not apply to any case in which the defendant must justify, though the bail are not excepted to. *Webb's bail*, 1 Dowl. P. C. 446.

But in other cases the affidavit of sufficiency may be used with a notice, in the old form, of bail having been put in; or, as it would seem, with a four day's notice of putting in and justifying bail; and in the former case, though the bail reside in the country, and justify by affidavit. *Jervis's New Rules*, 41.

In order to obtain the costs of justifying bail, an application should be made at the time of justification (*Fream v. Best*, 2 Dowl. P. C. 590.); and costs of opposition on technical grounds are not allowed. *Hanwell's bail*, 3 *ibid.* 425.

Where bail, having made the affidavit required by this rule, justify after exception, although the plaintiff does not appear to oppose, the defendant is still entitled to the costs of the justification. *Johnson's bail*, 1 *ibid.* 514.

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the court will compel him to pay the costs of putting them in. *Gwynne v. Fuller*, *ibid.* 444.

Keeping a gambling-house is not a ground for rejecting bail; and if allowed, it is not a ground for refusing to the defendant the costs of justification. *Anon.* *ibid.* 160.

Upon the justification of bail in a country cause, one of the bail was allowed time to explain respecting some property which it was alleged was mortgaged; this being afterwards done, it was held, that the defendant was entitled to costs of justification. *Grant's bail*, 3 Dowl. P. C. 165.

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If the bail cannot justify in respect of the property mentioned in the affidavit, but have other property sufficient for the purpose, this is no ground for rejecting the bail (*De Bode's bail*, *ibid.* 368. *Shave v. Spode*, 2 M. & W. 42. *Stevens v. Miller*, *ibid.* 368.); they may justify notwithstanding; and although at one time this was allowed only upon payment of costs (*Jackson's bail*, 1 Dowl. P. C. 172. *Hemming v. Blake*, *ibid.* 179.), it has been subsequently held, that, according to the language of the rule, the only effect, is to relieve the plaintiff from the costs of justification, which become costs in the cause. *Brown v. Ahrenfeldt*, 4 M. & W. 76.

Where there is a defect in the notice of bail, and further time is given to inquire as to them, and they ultimately justify, the defendant is not entitled to the costs of justification. *Anon.* 1 Dowl. P. C. 126.

When defendant will have to pay the costs.

If bail be opposed on the ground of the affidavit of justification being defective, in not swearing, that they are "worth" the requisite amount, but it appears, that the bail are in fact sufficient, and afterwards justify, the defendant will not receive the costs of justifying bail, but he will not pay the costs of opposing. *Pogoy's bail*, 3 *ibid.* 170. Bail coming up a second time to justify, must pay or deposit the costs of a former unsuccessful attempt; and where costs are payable, the defendant's being in prison will not excuse him from payment. *Pasmore's bail*, *ibid.* 214.

Where an affidavit of justification of bail stated, that the bail was a housekeeper at S. but did not state that he resided there, it was held, that this was a sufficient deviation from the form given by the rule of Trinity Term, 1 Will. 4., to deprive the defendant of the costs of justification. *Heald's bail*, 3 *ibid.* 423., *vide etiam Anon.* 1 *ibid.* 126. *Weller's bail*, 6 *ibid.* 312. *Evans's bail*, 1 *ibid.* 384.

4. And it is further ordered, that if the plaintiff shall not give one day's notice of exception to the bail, by whom such affidavit shall have been made, the recognisance of such bail may be taken out of court without other justification than such affidavit.

Plaintiff must give one day's notice of exception to bail.

This rule does not apply to cases where notice of exception is not necessary. It is not necessary in the case of a prisoner, as there bail must justify without exception. The defendant, a prisoner, is therefore not entitled to have the recognisance taken out of court without further justification. *Webb's bail*, 1 Dowl. P. C. 446. *Rex v. Wilson*, 3 *ibid.* 255.

5. And it is further ordered, that the bail, of whom notice shall be given, shall not be changed without leave of the court or a judge.

Bail not to be changed without leave of the court.

This rule does not apply to the case of a prisoner, and a prisoner's bail may be changed without leave. *Bird's bail*, 2 Dowl. P. C. 583. It applies to changing bail put in by the sheriff, as well as to that put in by a party. *Rex v. Essex (Sheriff of)* in *Levy v. Paine*, 2 *ibid.* 783.

The object of this rule was to compel the defendant to put in substantial bail in the first instance; and in *Whitehead v. Minn* (2 C. & J. 54.) bail was not allowed to be changed without sufficient reason, and then only on payment of costs and other conditions.

Where a defendant had leave to add another bail, on condition of making an affidavit of merits, which he did, but pleaded a plea by which the merits could not come in question; it was held, not to be a virtual breach of the condition. *Rix v. Kingston*, 3 Dowl. P. C. 158.

An expectation that a cause would be settled, is not sufficient to entitle a defendant to change his bail. *Orchard v. Glover*, 1 *ibid.* 707.

Where bail are added by a judge's order, four days' notice need not be given. *Perry's bail*, 2 C. & J. 475. 1 Dowl. P. C. 564. *Key v. McIntyre*, 2 M. & W. 348. 5 Dowl. P. C. 453. But where the order to change the bail was not obtained until the day on which the bail was to justify, the court gave the plaintiff time to inquire into the sufficiency of the bail. *Perry's bail*, 2 C. & J. 475. The order, when granted, should be annexed to the notice of justification, with a two days' notice, one day exclusive, and the other inclusive, and served upon the plaintiff's attorney. If it be granted upon payment of costs, the costs must be paid before the bail can justify. *Jourdain v. Gunn*, 2 Tyrw. 491.

6. And it is further ordered, that with every declaration, if delivered, or with the notice of declaration, if filed, containing accounts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand (*vide INDEX*, tit. *Particulars of Demand*), under those counts, where such particulars can be comprised within three folios; and where the same cannot

PARTICULARS OF DEMAND.

Particulars of plaintiff's demand are to be

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delivered with
the declaration.

Copy of partic-
ulars and set-
off, if any, to
be annexed to
the record.

Rule not im-
perative on the
plaintiff to de-
liver particulars.

Summons and
order for par-
ticulars.

Where an entry
of a *set pro-*
cessus will not
be compelled.
Form of parti-
culars.

Fresh parti-
culars.

Amendment of
particulars.

When partic-
ulars sufficient to
enable the plain-
tiff to recover
under the ac-
count stated.

be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the judge's marshal.

It seems not to be imperative on the plaintiff to deliver particulars or a statement of his demand with the declaration, or notice thereof, though, if he omit to deliver such particulars or statement, he will not be allowed for them in costs, if afterwards called for and delivered.

The foregoing rule is confined to declarations, containing counts of *indebitatus assumpsit*, or debt on simple contract; but the bill of particulars differs from the declaration, inasmuch, as the one discloses the nature and legal effect of the plaintiff's claim, the other its component ingredients.

The proper mode of applying for particulars, and for further and better particulars, is in the first instance by summons; and if either party be dissatisfied with the judge's decision, then an appeal lies as in other cases to the court. *Lush, Pr. 382.*

Where a judge's order has been made a rule of court, a motion to set aside the order is irregular; it should be directed against the rule. But it is questionable, whether a judge at chambers, in making an order upon the plaintiff to deliver particulars, which he had omitted to deliver with his notice of declaration, under Reg. Gen. T. T. 1 Will. 4 s. 6., can order him to pay the costs of the application? *Clement v. Weaver*, 1 Dowl. P. C. N. S. 193.

A defendant being served with a writ of summons, obtained an order for particulars before declaration; after waiting three months, the plaintiff refused to go on with the action, or to enter a *set processus*; and the court refused an application to compel him to do so. *Kirby v. Snowden*, 4 Dowl. P. C. 191.

The particulars must be explicit, and apply to those counts upon which the plaintiff seeks to recover, and should, generally speaking, specify items, dates, and amounts; but the particulars need only be certain to a common intent. *Lines v. Recs*, 1 Jur. 593.

It would be a contempt to deliver under an order a particular as general as the declaration. *Brown v. Watts*, 1 Taunt. 353., vide etiam *Mitchell v. Wright*, 1 Esp. N. P. C. 280.

But there is no objection, when an account has been already delivered, to refer to it generally in the particulars, without restating the items of it. *Hatchet v. Marshal*, Peake's N. P. C. 229.

Where the acceptor of two bills of exchange for 250*l.* each, was arrested upon a *caupon* indorsed thus, "bail for 240*l.* and upwards by affidavit:"—the plaintiff claims 250*l.* 6*s.* 4*d.* with interest thereon from the 30th of December to the day of payment, for debt, and 3*l.* 10*s.* for costs, &c.; and the declaration was upon two bills, and the particulars stated that the action was brought to recover 500*l.*:—It was held, that the defendant was entitled to other particulars. *Daves v. Anstruther*, 5 Dowl. P. C. 738. 2 M. & W. 817.

If upon an order, a party's attorney refer to another particular already delivered by his client, he is not obliged to deliver fresh particulars. *Hatchet v. Marshal*, Peake's N. P. C. 229.

The plaintiff can amend his particulars at any stage of the cause, and almost as a matter of course, provided the application be not made after a great lapse of time.

The order is usually granted on payment of costs, besides which, the judge annexes such other conditions as the practice of the case may require. Vide *Collins v. Aron*, 4 King. N. C. 233. *Staples v. Holdsworth*, *ibid.* 719.

In *assumpsit*, the first count of the declaration was on an undertaking by the defendant to pay such costs, charges, and expenses, as the plaintiff (an attorney) should incur in an action to be brought by him against G. on a bill of exchange, drawn by the defendant on G., which was lying due, and which the plaintiff had agreed to take up for the honour of the defendant. In the second count the plaintiff declared as indorsees of the bill; the third was for money paid; the fourth on an account stated. On the first count the defendant paid into court a sum covering the plaintiff's costs out of pocket. On the second count, the ultimate issue was, whether a bill subsequently given by the defendant to the plaintiff was given in satisfaction of the first, or as a collateral security. The plaintiff first gave a particular of demand applicable only to the count on the bill of exchange. The defendant obtained an order for par-

particulars "of the bill of costs, charges, and expenses mentioned in the first count of the declaration," and the plaintiff thereupon delivered a particular, containing a copy of his whole bill of costs in the action against G., and also the amount of the bill and interest. At the trial the judge ruled, that the costs out of pocket could only be recovered on the first count: and it was subsequently held, that the particulars were sufficient to enable the plaintiff to recover the rest of the bill of costs under the account stated. *Fisher v. Wainwright*, 1 M. & W. 480.

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The rule which requires the sum or balance claimed to be stated in a particular of demand does not require the plaintiff to state the items in reduction of his demand; it is sufficient, if he state the credit which he gives generally, so as to shew the balance he claims. *Smith v. Eldridge*, 5 N. & M. 408. 1 H. & W. 527.

Plaintiff only required to state the credit which he gave generally.

Where a plaintiff had not complied with the rule of court, in giving credit in his particulars of demand for sums admitted to have been paid on account: the court refused an application to deprive him of costs, after the case had been referred to arbitration, on the terms of the costs abiding the event, and an award had been made on the whole matter. *Ibid*.

When plaintiff will have his costs although he may not have given credit.

The court will not compel a plaintiff suing for the balance of an account, to furnish a statement of moneys received by him from the defendant, because it would be granting a bill of discovery, without the terms which a court of equity imposes. *Penprase v. Crease*, 1 M. & W. 36. 4 Dowl. P. C. 711. *Smith v. Eldridge*, 4 A. & E. 64. *Randall v. Ikey*, 4 Dowl. P. C. 682.

Where statement of moneys received by the plaintiff from the defendant will not be ordered.

In *Kenyon v. Wakes* (2 M. & W. 764., vide *Rooth v. Howard*, 5 Dowl. P. C. 438. *Nicholl v. Williams*, 2 M. & W. 758.), which was an action of *assumpsit* for wages, the general issue only was pleaded. The particulars stated a claim for wages at 15s. a week, amounting to 148l., and gave credit for payments on account to the amount of 70l. The defendant put the particulars in evidence at the trial, no objection being made on the part of the plaintiff, and contended, that the plaintiff was only entitled to wages at 7s. per week, which would reduce the demand below the balance claimed in the particulars. The jury found for the defendant, and the court refused to grant a new trial.

Particulars between vendor and vendee.

When the vendee objects to the abstract of title, as insufficient, defective, and objectionable, the court will, at the instance of the defendant, require the plaintiff to deliver a particular, specifying the matters of fact which he intends to rely upon at the trial, as being the cause of his not being able to complete the purchase (*Collett v. Thompson*, 3 B. & P. 246.); but he is not bound to state every objection in point of law arising from the abstract. *Ibid*. And where no such particulars have been obtained, the plaintiff is not confined at the trial to these objections which he has stated to the vendor, but may rely on any other. *Squire v. Tod*, 1 Camp. 293. *Collett v. Thompson*, 3 B. & P. 246. But where, in rescinding the contract, a particular objection to the abstract was inscribed on it, it was held, that the plaintiff could not at the trial insist on other objections which were not taken, and which, if taken, might have been removed. *Todd v. Hoggart*, M. & M. 128., vide *Squire v. Tod*, 1 Camp. 293.

Objections to title.

In an action for money had and received brought to recover back the deposit paid to the auctioneer on the sale of an estate, on the ground that the title deeds were defective, the defendant is not entitled to particulars of objections to the title in point of law, but only to objections arising upon matters of fact. *Roberts v. Rowlands*, 3 M. & W. 543.

Actions for torts,

In actions for wrongs, the injury complained of is generally stated in the declaration, and it is not usual to make an order for particulars, but circumstances may occur which make it necessary; and it seems to be necessary to produce an affidavit, denying the defendant's knowledge of what the plaintiff is proceeding for, in order to obtain particulars in an action of trespass, trover, or on the case. *Snelling v. Chenells*, 5 Dowl. P. C. 80. *Tidd's N. P.* 303.

In an action against the marshal for an escape, he is entitled to a particular of the cause of action for which the plaintiff sues. *Webster v. Jones*, 7 D. & R. 774. *Davies v. Chapman*, 6 A. & E. 767.

Suing for breach of an agreement and assigning special damage.

And the court will not compel a plaintiff suing for the breach of an agreement, and assigning by way of special damage that he has incurred certain expenses, to furnish particulars of such special damage. *Retallick v. Hawkes*, 1 M. & W. 573. So in an action on the case against an attorney for negligence, in assigning leasehold property belonging to the plaintiff, *per quod* the plaintiff had to pay damages to the assignee, the court refused to compel the delivery of particulars of the plaintiff's demand. *Stannard v. Ulithorne*, 3 Bing. N. C. 326. 5 Dowl. P. C. 370.

Evidence cannot be adduced inconsistent with the bill of particulars.

The plaintiff will not be permitted to adduce evidence inconsistent with his bill of particulars: thus, if a bill of particulars state the plaintiff's demand to be for goods sold and delivered to the defendant, no evidence can be received of goods sold by the defendant, as agent for the plaintiff. *Holland v. Hopkins*, 2 B. & P. 243. 3 Esp. N. P. C. 168.

Where the plaintiff declared on three bills of exchange as distinct causes of action in three several counts, but by his particular of demand confined his right to recover on the bill set forth in the first count only; and the defence was, that the defendants were not partners when that bill was drawn; and the plaintiff offered in evidence the two other bills of a subsequent date, but drawn at the same time as the

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Particulars annexed to the record different from those delivered to the defendant.

Effect of a mistake in the particulars at the trial.

former, for the purpose of shewing a continuing partnership, which were rejected on the ground, that they were not included in the particulars, the court of C. P. granted a new trial. *Duncan v. Hill*, 5 Moore, 567. 2 B. & B. 682.

If a plaintiff deliver one particular under an order, and afterwards a second without an order, he cannot give evidence of any demand in the second which was not included in the first. *Brown v. Watts*, 1 Taunt. 353.

Where a particular states a promissory note only, which cannot be received in evidence for want of a stamp, the party admits that his only claim is on the note, and he cannot give evidence of the consideration. *Wade v. Beasley*, 4 Esp. N. P. C. 7.

So also a reference to an account delivered before the commencement of the action is a virtual compliance with the order for the delivery of a bill of particulars, and the plaintiff is bound by the account. *Hatchet v. Marshal*, Peake's N. P. C. 172. *Etches v. Fellowes*, Wightw. 78.

But where the plaintiff's bill of particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands by the plaintiff and R., and won by the plaintiff of R., the court held, that he could not recover the amount of his own stake, on proof, that he had not demanded it from the defendant before it was paid over. *Davenport v. Davies*, 1 M. & W. 570.

But although a plaintiff cannot give evidence beyond his particular, he may take advantage of any evidence produced by the defendant to increase his demand. *Hurst v. Watkins*, 1 Camp. 68.

Where the plaintiff annexed to the record particulars varying from those delivered to the defendant, and, there being no evidence of the particulars delivered, got a verdict upon an item not included in the particulars delivered, the court granted a new trial, without costs; but refused to nonsuit the plaintiff, because the defendant was not in a condition to raise the question at the trial, and the point was not reserved. *Morgan v. Harris*, 2 C. & J. 461. 2 Tyrw. 385. 1 Dowl. P. C. 570.

If the particulars vary so materially from the evidence as to render it probable, that the defendant has not been apprised of the real claim intended to be made by the plaintiff, the latter will be precluded from going into evidence of that part of his demand; but a particular of demand is not to be construed so rigidly as to nonsuit a plaintiff for inaccuracies which could not mislead. *Harrison v. Wood*, 8 Bing. 371. 1 M. & Sc. 536.

If the plaintiff's particular convey the requisite information to the defendant, however inaccurately it may be drawn up, it is sufficient, unless the defendant can shew by affidavit, that he has been misled by the particular. *Day v. Bower*, 1 Camp. 69. n. *Spencer v. Bates*, 1 Gale, 108. *Green v. Clark*, 2 Dowl. P. C. 18.

If a bill of particulars specify the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right, which results to the plaintiff out of that transaction. *Brown v. Hodgson*, 4 Taunt. 189., sed vide *Wade v. Beasley*, 4 Esp. N. P. C. 7.

An erroneous date to a bill of particulars will not preclude the plaintiff's demand, where the date cannot mislead. *Millwood v. Walter*, 2 Taunt. 224.

A plaintiff may recover a demand in his particular, although he may have omitted to include such demand in a bill previously sent to the defendant. *Short v. Edwards*, 1 Esp. N. P. C. 374. *Blake v. Lawrence*, 4 ibid. 147.

If the declaration be on a bill of exchange, and for goods sold, and a particular of demand be obtained under a judge's order, the plaintiff may recover on the bill, though it be not mentioned in his particulars of demand. *Cooper v. Amos*, 2 C. & P. 267.

Under a particular, stating that the action was brought to recover the amount of a promissory note, interest on it is recoverable. *Blake v. Lawrence*, 4 Esp. N. P. C. 147.

In *Lambirth v. Roff* (8 Bing. 411. 1 M. & Sc. 597.) the plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to the defendant in their trade of brewers. A verdict having been given for the plaintiffs on proof of delivery of spirits, the defendant obtained a rule nisi for a nonsuit, on the ground, that he had been surprised by the variance between that particular and the proof: it appearing, however, that he had been neither surprised nor misled, the court discharged the rule.

A printer who had let out men, presses, and type, for the printing of a newspaper, was allowed to recover, in an action for work and labour, although his particulars described the demand to be "for composing and printing a certain newspaper," &c., the defendants not having, at the trial, availed themselves of the variance between the particulars and the evidence. *Bagster v. Robinson*, 9 Bing. 77.

In ejectment to recover premises for non-payment of rent, a variance between the amount of rent stated in the particulars of demand of the lessors of the plaintiff, and the amount proved at the trial to be due, was held to be immaterial. *Tenny d. Gibbs v. Moody*, 10 Moore, 252.

In an action of debt for rent it was held, that the plaintiff might recover, without shewing in what parish the lands were situate, notwithstanding that the particulars of his demand described them in a wrong parish, it not appearing, that any misrepresentation was intended, or that the defendant held more than one parcel of land of the plaintiff, so as to be misled by it. *Davies v. Edwards*, 3 M. & S. 380.

In an action by the assignees of a bankrupt, the declaration stated the cause of action to be money had and received to the use of the bankrupt; the particulars of demand described it as had and received to the use of the plaintiffs: — It was held, that it was not such a variance as would prevent the plaintiff's from recovering, it not appearing that the defendant could be misled by it. *Tucker v. Barrow*, M. & M. 137. 3 C. & P. 85. 7 B. & C. 623.

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In *assumpsit* for not accounting for goods, and also for goods sold and money had, a bill of particulars stating the demand to be for the goods (which it specifies) and for money had and received, &c., is sufficient. *Hunter v. Welsh*, 1 Stark, 224.

Where the bill of particulars is appended to the record, pursuant to the rule of court, it is not necessary to prove the delivery of it to the defendant. *Macarthy v. Smith*, 8 Bing. 145. 1 M. & Sc. 227. 1 Dowl. P. C. 253.

Where delivery of particulars need not be proved.

It will not prevent a plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. *Day v. Davies*, 5 C. & P. 340.

When in *assumpsit* the defendant pleaded non joinder in abatement, and the particular contained items as due from the defendant and his partner, who was not sued, it was held, that the particulars supported the plea, although part of the demand was due from the defendant solely. *Colson v. Selby*, 1 Esp. N. P. C. 452.

Effect of bill of particulars as an admission.

An item of plaintiff's demand appearing on the face of the particulars of defendant's set-off given under a judge's order, is not such an admission as to supersede the necessity of proving it. *Miller v. Johnson*, 2 *ibid.* 602.

Where the particulars of the plaintiff's demand exceed three folios, the court will order the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant may have had full particulars of the account before action brought. *James v. Child*, 2 C. & J. 252. 2 Tyrw. 102. 1 Dowl. P. C. 310.

When defendant will have to pay the costs of the particulars.

7. And it is further ordered, that, upon every declaration, delivered or filed, on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any impleance.

Impleance.

Since stat. 2 Will. 4. c. 39. s. 11., impleances have been abolished.

8. And it is further ordered, that no judgment of *non pros.* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney or agent, as the case may be.

Non pros. not be signed until four days after demand in writing.

If a demand of declaration have been served and time to declare be obtained, the defendant may sign judgment of *non pros.* without a fresh demand of declaration; and if there have been once a demand, that is sufficient. When time to declare is obtained, the party remains in the same situation when it has expired, as when it was obtained. *Wells v. Hare*, 1 Dowl. P. C. 366.

A judgment of *non pros.*, signed by the defendant for the non-delivery of particulars pursuant to a judge's order, is irregular. *Sutton v. Clarke*, *ibid.* 259. 1 M. & Sc. 271.

An order for particulars operates as a stay of proceedings, and where an order for particulars was obtained and served, and the defendant afterwards, and before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice that he had abandoned his order for particulars: — It was held to be improper. *Wickens v. Cox*, 4 M. & W. 67.

In an action against several defendants a judgment of *non pros.* cannot be signed until all have appeared. *Palmer v. Feistel*, 2 Dowl. P. C. 507.

By Reg. Gen. H. T. 2 Will. 4. a. 54. (*post*, 2822.), service of a rule to reply, &c. is a sufficient demand. If the plea or rejoinder conclude to the country, so that the plaintiff can only reply or surjoin the *similiter*, he must do so if it be demanded, or the defendant may sign judgment of *non pros.* *Wye v. Fisher*, 3 B. & P. 443. *Seaton v. Skeg*, 3 Dowl. P. C. 537.

9. And it is further ordered, That hereafter it shall not be necessary to issue more than two summonses for attendance before a judge, upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary.

Not necessary to issue more than two summonses for attendance before a judge.

A summons is in general a stay of proceedings from the time it is returnable until it is settled. *Morris v. Hunt*, 2 B. & A. 355. *Rex v. Middlesex (Sheriff of)*, 5 B. & C. 389. *Glover v. Watmore*, *ibid.* 769. *Redford v. Bdie*, 6 Taunt. 240. If

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the order be made, it must be drawn up and served forthwith, or the opposite party may treat it as a nullity and proceed. *Charge v. Farhall*, 4 B. & C. 865. *Edensor v. Hoffman*, 2 C. & J. 140. A judge at chambers can give costs. *Doe. d. Prescott v. Roe*, 1 Dowl. P. C. 274. *Hughes v. Brand*, 2 ibid. 132. In re *Bridge*, 4 N. & M. 5. *Collins v. Aron*, 4 Bing. N. C. 233.

No declaration
de bene esse.

10. And it is further ordered, that no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

A declaration *de bene esse* cannot now occur. *Vide antè*, 2787.; *vide stat.* 2 Will. 4. c. 39. Reg. Gen. M. T. 3 Will. 4. a. 11. *post*, 2844.

Declaration in
ejectment may
be served before
the first day of
any term.

11. And it is further ordered, that declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the essoign or first general return-day.

Notice for tax-
ation of costs.

12. And it is further ordered, that before taxation of costs, one day's notice shall be given to the opposite party.

Where by the practice of the courts, costs need not be taxed, it is unnecessary to give notice as required by this rule; for instance, the costs of judgment on *cognovits* and warrants of attorney, they are a fixed sum and cannot be reduced, therefore a taxation is unnecessary. *Griffiths v. Liversedge*, 2 Dowl. P. C. 143.

Rules to plead
several matters
to be obtained
on summons,
&c.

Where no sum-
mons or order
are requisite.

13. And it is further ordered, that no rule to show cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognisances; but that such rules shall be drawn up upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognisances. Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

To a declaration on a bill of exchange with the common counts, the defendant pleaded, that the bill of exchange in the first count mentioned was paid when due, and also, as to the first count, that he did not promise; and as to the other counts, that he put himself upon the country: — It was held, that the plaintiff could treat each as a separate plea, though the second was declared inadmissible by the new rules, and the last put nothing in issue, and he was therefore justified in signing judgment, there being no signature to the pleas or rule to plead double. *Hockley v. Sutton*, 2 Dowl. P. C. 700., *vide post*, 2819. Reg. Gen. H. T. 2 Will. 4. a. 34.

In future, when a motion is made for the purpose of setting aside pleas pleaded by a judge's order or rule of court, for pleading several matters, the motion must be made to rescind the order or rule, not to strike out the pleas. On motion to set aside pleas, it appeared by affidavit, that they were pleaded to the first and second counts of a declaration at the suit of a railway company, and were, to the first count, 1. that the call was not duly made upon all the subscribers and shareholders by competent persons, and for the sole purpose of the undertaking; 2. that due notice was not given of the call; and to the second count the like pleas; but nothing further appeared as to the declaration: — It was held, that the declaration ought to have been set out, and that the court could not, on this statement, entertain the motion. *South-eastern Railway Comp. v. Sprot*, 11 A. & E. 167.

Period at which
the rules are to
commence.

14. And it is further ordered, that these rules shall take effect on the first day of next Michaelmas Term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of October next.

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1831.*Form of Affidavit of Bail (vide ante, 2802.).*

IN THE

BETWEEN, &c.

A. B. (1), one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper (2) [or freeholder, as the case may be] residing at [describing particularly the street or place, and number, if any]; that he is worth (3) property to the amount of £—— [the amount required by the practice of the courts] over and above [what will pay (4)] all his just debts [if bail in any other action, add “and every other sum for which he is now bail”]; that he is not bail for any (5) defendant, except in this action [or if bail in any other action or actions, add, “except for C. D. at the suit of E. F. in the court of —— in the sum of £——; for G. H., at the suit of J. K., in the court of ——, in the sum of £——;” specifying the several actions, with the courts in which they are brought, and the sums in which the deponent is bail]; that the deponent’s property, to the amount of the said sum of £—— [and if bail in any other action or actions “of all other sums for which he is now bail as aforesaid”], consists of [here specify the nature and value of the property in respect of which the bail proposes to justify, as follows] stock in trade, in his business of ——, carried on by him at ——, of the value of £——, of good book debts (6) owing to him to the amount of £——, of furniture (7) in his house at ——, of the value of £——, of a freehold [or leasehold] farm of the value of £——, situate at ——, occupied by —— [or of a dwelling-house of the value of £——, situate at ——, occupied by ——; or of other property, particularising each description of property, with the value thereof]; and that the deponent hath for (8) the last six months resided at —— [describing the place or places of such residence]. Sworn, &c.

Form of
affidavit of bail.

Though the form of the affidavit to be made by bail, according to these rules, be several, it may be made jointly. An affidavit of sufficiency by country bail, purporting to be according to this form, and not containing all its requisites, is good, if it be sufficient according to the old rules. *Anon.* 1 Dowl. P. C. 115.

1. Though the affidavit be in form several (Reg. Gen. H. T. 2 Will. 4. s. 5. *post*, 2814.), the addition of every person should be inserted. *Treasure’s bail*, 2 *ibid.* 670. *Brown’s bail*, 5 *ibid.* 220. *Morgan v. Stone*, 1 Gale, 15.
2. Householder is not sufficient. *Anon.* 1 Dowl. P. C. 127. *Heald’s bail*, 3 *ibid.* 423. *Welsh v. Lynwood*, 1 Bing. N. C. 258.
3. The word “worth” is substituted instead of the original words “possessed of,” because, by Reg. Gen. H. T. 2 Will. 4. s. 19. (*post*, 2817.), affidavits of justification shall be deemed insufficient unless they state, that each person justifying is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail. In town cases, a non-compliance with this rule will merely have the effect of depriving the defendant of the costs of justification, should the bail justify. *Thompson’s bail*, 2 Dowl. P. C. 50. But with country bail, if the defendant profess to use this affidavit of sufficiency as an affidavit of justification, the bail will be rejected, if they do not comply with this form, and state that they are worth property to the amount required (*Hutchinson’s bail*, 1 Dowl. P. C. 571. *Simpson’s bail*, *ibid.* 605. *Rogers v. Jones*, *ibid.* 704. *Watson’s bail*, 2 *ibid.* 198. *Naylor’s bail*, 3 *ibid.* 452. *Edmunds v. Keats*, 6 *ibid.* 359. *Penson’s bail*, 4 *ibid.* 627. *Weller’s bail*, 6 *ibid.* 312.); and permission will not be granted to amend the affidavit.
4. The words “what will pay” are not in the original form, but are essentially requisite. *Miller’s bail*, 5 *ibid.* 602. *Hunt’s bail*, 4 *ibid.* 272., *sed vide* Reg. Gen. H. T. 2 Will. 4. s. 19. *post*, 2817.
5. In *Smith’s bail*, when the deponent stated, that he was not bail for any, omitting the word defendant, the affidavit was holden to be sufficient. 1 Dowl. P. C. 514.
6. Debts, without stating book debts, is sufficient. *Lanyon’s bail*, 3 *ibid.* 85. If funded property be stated, the description of fund must be mentioned. *Anon.* 1 *ibid.* 159.
7. The place where the furniture is deposited must be stated. *Cooper’s bail*, 3 *ibid.* 692.
8. “Within the last six months resided,” is insufficient. *Johnson’s bail*, 1 *ibid.* 438.

Whereas declarations in actions upon bills of exchange, promissory notes, and PLEADING. the counts usually called the common counts, occasion unnecessary expense to par-

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1831.

Declarations to
be in accord-
ance with pre-
scribed forms.

ties by reason of their length, and the same may be drawn in a more concise form: now for the prevention of such expense, it is ordered, that if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, that on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

In *Lane v. Thetwell* (1 M. & W. 140.) Lord Abinger said, "I do not think the forms given in the rule in question were intended to introduce any matter which was not necessary before, but rather to reject matter which was unnecessarily made part of the old form. They could not be intended to alter the law as to what were or were not necessary allegations in pleading, either as to form or substance: the judges had no authority whatever to impose these forms upon the parties to actions as the law of the land."

SCHEDULES OF FORMS AND DIRECTIONS.

SCHEDULES OF FORMS AND DIRECTIONS.

Count on a
promissory
note against the
maker, by
payee or in-
dorsee, as the
case may be.

1. For that whereas the defendant, on the — day of —, in the year of our Lord —, at London (1) [*or in the county of —*], made his promissory note in writing, and delivered the same to the plaintiff (2), and thereby promised to pay to the plaintiff £ — { ^{days} ^{weeks} ^{months} } after the date thereof [*or, as the fact may be*], which period has now elapsed (3) [*or if the note be payable to A. B.*], and then and there delivered the same to A. B., and thereby promised to pay to the said A. B. or order £ — { ^{days} ^{weeks} ^{months} } after the date thereof [*or, as the fact may be*], which period has now elapsed; and the said A. B. then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice (4), and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

1. By Reg. Gen. H. T. 4 Will. 4. s. 8. (*post*, 2858.) the venue in the margin is to be taken to be the venue intended, and no venue is to be stated in the body of the declaration. The introduction of a venue is not ground of demurrer; but in order to have the irregularity rectified, an application should be made to a judge at chambers. *Farrow v. Champneys* (Bart.), 1 C. M. & R. 369. 2 Dowl. P. C. 680. *Fisher v. Snow*, 3 ibid. 27. *Townsend v. Gurney*, 1 C. M. & R. 590.
2. This allegation is not essential. *Churchill v. Gardner*, 7 T. R. 596.
3. By stat. 2 Will. 4. c. 39. the suing out the writ is the commencement of the suit. *Vide Abbott v. Adlett*, 1 M. & W. 209. *Owen v. Waters*, 2 ibid. 91.
4. It is not requisite that an allegation of notice to the defendant of the indorsements should be made. *Reynolds v. Davies*, 1 B. & P. 624.

Count on a
promissory note
against payee
by an indorsee.

2. Whereas one C. D., on the — day of —, in the year of our Lord, — at London [*or in the county of —*], made his promissory note in writing, and thereby promised to pay the defendant, or order £ —, { ^{days} ^{weeks} ^{months} } after the date thereof [*or, as the fact may be*], which period has now elapsed, and the defendant then and there indorsed the same to the plaintiff [*or, and the defendant then and there indorsed the same to X. Y.*, and the said X. Y. then and there indorsed the same to the plaintiff] (5), and the said C. D. did not pay the amount thereof, although the same was there presented to him on

the day when it became due, of all which the defendant then and there had due notice (6).

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5. It is requisite to allege, in the declaration, that the note was indorsed to the plaintiff. *Cunliffe v. Whitehead*, 3 Bing. N. C. 828.

6. The legal liability of a payee to his indorsee is to pay the note when due, after default in payment of the maker and notice of dishonour; where, however, the declaration, after stating the making of the note, and the indorsement by the defendant to the plaintiff, alleged that the defendant promised the plaintiff to pay the same according to the tenor and effect thereof, and averred as a breach that neither the maker nor the defendant paid the note when it became due, of which the defendant had notice: — It was holden, after verdict, that the promise and breach were sufficiently stated. *Hodger v. Stevenson*, 2 M. & W. 799.

3. Whereas one C. D., on —, at London [or, in the county of —], made his promissory note in writing, and thereby promised to pay to X. Y. or order £ — { ^{days} ^{weeks} ^{months} } after the date thereof [or, as the fact may be], which period has now elapsed, and then and there delivered the said note to the said X. Y., and the said X. Y. then and there indorsed the same to the defendant, and the defendant then and there indorsed the same to the plaintiff [or, and the defendant then and there indorsed the same to Q. R., and the said Q. R. then and there indorsed the same to the plaintiff], and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due, of all which the defendant then and there had due notice.

Count on a promissory note against indorser by indorsee.

4. Whereas the plaintiff, on —, at London [or, in the county of —], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant (7) to pay to the plaintiff £ — { ^{days} ^{weeks} ^{months} } after the { ^{date} ^{eight} } thereof, which period has now elapsed, and the defendant then and there accepted the said bill and promised the plaintiff to pay the same according to the tenor and effect thereof and of his said acceptance thereof (8), but did not pay the same when due (9).

Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

7. This allegation is not essential.

8. When a general unqualified acceptance is stated, it would be sufficient against the acceptor, to state a promise to pay according to the tenor of the bill.

9. These forms equally apply to actions of debt and *assumpsit*, if from the relation of the parties debt will lie; but it is requisite in actions of debt, that there should be the usual conclusion in debt.

5. Whereas the plaintiff, on —, at London [or, in the county of —], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to O. P. or order £ — { ^{days} ^{weeks} ^{months} } after the { ^{date} ^{eight} } thereof, which period has now elapsed, and then and there delivered the same to the said O. P.; and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof, yet he did not pay the amount hereof although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff, of all which the defendant then and there had notice.

Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

6. Whereas one E. F., on —, at London [or, in the county of —], made his bill of exchange in writing and directed the same to the defendant and thereby required the defendant to pay to the said E. F. [or to H. G.] or order £ — { ^{days} ^{weeks} ^{months} } after { ^{eight} ^{date} } thereof, which period is now elapsed, and the defendant then and there accepted the said bill, and the said E. F. [or the said H. G.] then and there indorsed the same to the plaintiff [or, and the said E. F. or the said H. G. then and there indorsed the same to K. J., and the said K. J. then and there indorsed the same to the plaintiff], of all which the defendant then and there had due notice and then and there promised the plaintiff to pay the amount thereof according to the tenor and effect thereof and of his acceptance thereof.

Count on an inland bill of exchange against the acceptor by indorsee.

7. Whereas one E. F., on —, at London [or, in the county of —], made his bill of exchange in writing and directed the same to the defendant and thereby required the defendant to pay to the plaintiff £ — { ^{days} ^{weeks} ^{months} } after the

Count on an inland bill of exchange against the ac-

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ceptor by the
payee.

Count on an
inland bill of
exchange
against the
drawer by
payee on non
acceptance.

Count on an
inland bill of
exchange
against drawer
by indorsee on
non accept-
ance.

Count on an
inland bill of
exchange
against indorser
by indorsee on
non acceptance.

Count on an
inland bill of
exchange
against payee
by indorsee on
non acceptance.

Direction for
declarations
on bills where
action brought
after time of
payment
expired.

1. On bills
payable after
date.

2. On bills
payable after
sight.

Directions for
declarations on
bills or notes
payable at
sight.

On foreign bills.

{^{sight}_{date}} thereof, which period has now elapsed, and the defendant then and there accepted the same and promised the plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof.

8. Whereas the defendant, on —, at London [or, in the county of —], made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the plaintiff £ — {^{days}_{weeks months}} after the {^{sight}_{date}} thereof, and then and there delivered the same to the said plaintiff, and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same, of all which the defendant then and there had due notice.

9. Whereas the defendant, on —, at London [or, in the county of —], made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the order of the said defendant £ — {^{days}_{weeks months}} after the {^{sight}_{date}} thereof, and the said defendant then and there indorsed the same to the plaintiff [or, and the said defendant then and there indorsed the same to L. M., and the said L. M. then and there indorsed the same to the plaintiff], and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same, of all which the defendant then and there had due notice.

10. And whereas one N. O., on —, at London [or, in the county of —], made his bill of exchange in writing and directed the same to P. Q., and thereby required the said P. Q. to pay to his order £ — {^{days}_{weeks months}} after the {^{sight}_{date}} thereof, and the said N. O. then and there indorsed the said bill to the defendant [or to R. S., and the said R. S. then and there indorsed the same to the defendant], and the defendant then and there indorsed the same to the plaintiff, and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same, of all which the defendant then and there had due notice.

11. Whereas one N. O., on —, at London [or, in the county of —], made his bill of exchange in writing and directed the same to P. Q., and thereby required the said P. Q. to pay to the defendant or order £ — {^{days}_{weeks months}} after the {^{sight}_{date}} thereof, and then and there delivered the same to the defendant, and the defendant then and there indorsed the said bill to the plaintiff [or, to R. S., and the said R. S. then and there indorsed the same to the plaintiff], and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same, of all which the defendant then and there had due notice.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. *which period has now elapsed*; and instead of averring, that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] did not pay the said bill, although the same was there presented to him on the day when it became due.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words denoting the time appointed for payment, the following words, viz. *and the said drawee [naming him] then and there saw and accepted the same, and the said period has now elapsed*; and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] did not pay the said bill, although the same was presented to him on the day when it became due.

If a note or bill be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

Declarations on foreign bills may be drawn according to the principle of these forms, with the necessary variations.

Whereas the defendant, on —, at London [or, in the county of —], was indebted to the plaintiff in £ — for the price and value of goods then and there {bargained} and {sold} {delivered} by the plaintiff to the defendant at his request :

And in £ — for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant at his request :

And in £ — for money then and there lent by the plaintiff to the defendant at his request :

And in £ — for money then and there paid by the plaintiff for the use of the defendant at his request :

And in £ — for money then and there received by the defendant for the use of the plaintiff :

And in £ — for money found to be due from the defendant to the plaintiff on an account then and there stated between them.

Although the necessity for averments of place in declarations have been abolished, no such directions exist as to averments of time.

Except time be the essence of an agreement the real time need not be stated. *Steward v. Layton*, 3 Dowl. P. C. 430. *Arnold v. Arnold*, 3 Bing. N. C. 81. 5 Dowl. P. C. 203. And if, being immaterial, it be stated, so that the cause of action appear to be after the date of the writ, which, since the Uniformity of Process Act, is the commencement of the suit, no objection can, upon such grounds, be taken to the declaration. *Steward v. Layton*, 3 ibid. 430.

And whereas the defendant afterwards, on &c., in consideration of the promises respectively, then and there promised to pay the said several moneys respectively to the plaintiff on request, yet he hath disregarded his promises, and hath not paid any of the said moneys or any part thereof to the plaintiff's damage of £ —, and thereupon he brings suit &c.

This form of conclusion may be applied to all personal actions; but if executors or assignees sue, it must be applied accordingly.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said last mentioned several moneys respectively.

II. HILARY TERM, 2 WILL. 4. 1832.

Whereas it is expedient, that the practice of the courts of King's Bench, Common Pleas, and Exchequer of Pleas should, as far as possible, be rendered uniform, it is ordered, that the practice to be observed in the said courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,

1. Warrants of attorney to prosecute or defend, shall not be entered on distinct rolls, but on the top of the issue roll.

No entry can be made on record of any warrants of attorney to sue or defend, consequently this rule is repealed. *Vide post*, 2854. Reg. Gen. H. T. 4 Will. 4. r. 2. s. 4.

2. A special admission of *prochein amy*, or guardian, to prosecute or defend for an infant (*vide ante*, 2063, 2064. tit. INFANT), shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

3. No affidavit of service of process shall be deemed sufficient, if made before the plaintiff's own attorney, or his clerk.

If an illiterate person be sworn in court, or before a commissioner, the fact of the affidavit being read over to him, and his understanding it, must be stated in the jurat. *Haynes v. Powell*, 3 Dowl. P. C. 599.

Actual service of process is sometimes dispensed with, if the service be equivalent. *Rhodes v. Innes*, 1 ibid. 215. But in order to entitle the plaintiff to file common bail, the service on the defendant must be personal. *Thomson v. Phenev*, ibid. 441. An affidavit of service by leaving a rule at the defendant's chambers, with a female servant there, has been held sufficient. *Alanson v. Walker*, 3 ibid. 258.

4. An affidavit sworn before a judge of any of the courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such

T. T. 1 WILL. 4. 1831.

COMMON COUNTS.

Goods bargained or delivered.

Work and materials.

Money lent.

Money paid.

Money received.

Account stated.

General conclusion.

Directions as to the general conclusion.

H. T. 2 WILL. 4. 1832.

AUTHORITY TO PROSECUTE OR DEFEND.

Warrant of attorney to be entered on issue roll.

A special admission of *prochein amy* confined to the particular action.

AFFIDAVIT.

Of service of process.

Affidavit not entitled when received.

H. T. 2 WILL. 4. judge belongs, though not entitled of that court; but not in any other court, 1832. unless entitled of the court in which it is to be used.

By stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 4. every judge of the courts may transact such business at chambers or elsewhere, depending in any of the courts, as relates to matters over which the courts have a common jurisdiction. Vide *Phillips v. Drake*, 2 Dowl. P. C. 45.

An affidavit sworn before a commissioner of the court of Exchequer may be read, though not entitled. *Perse v. Browning*, 1 M. & W. 362. *White v. Irving*, 2 ibid. 197.

An affidavit entitled in the court of Queen's Bench, which appears by the jurat to have been sworn before a commissioner of the court of Exchequer, cannot be used in a matter pending in the court of Queen's Bench. But a rule having been discharged on this objection, an application to renew or amend the affidavit was allowed. *Shaw v. Perkin*, 1 Dowl. P. C. N. S. 306.

A rule obtained on an affidavit, the jurat of which is without date, will be discharged with costs. *Blackwell v. Allen*, 7 M. & W. 146.

Addition of deponent in affidavit.

5. The addition of every person making an affidavit shall be inserted therein.

In a cause between J. S. and G. S. "the elder," an affidavit entitled in the names of the parties, omitting the words "the elder," was held to be sufficient. *Singleton v. Johnson*, 1 Dowl. P. C. N. S. 356.

"Bath, in the county of Somerset, Esq.," is a good description in the Common Pleas of a deponent in an affidavit of debt. *Coppin v. Potter*, 2 Dowl. P. C. 785. It is no objection to an affidavit in support of a plea in abatement, that the addition of the defendant is not stated, though this rule is general. *Poole v. Pembrey*, 1 ibid. 693.

If in a joint affidavit the additions of some of the deponents are properly stated, and of others omitted, it is doubtful whether the affidavit can be used. *Jervis's New Rules*, 59.

In *Rex v. Carnarvonshire (Justices of)* (5 N. & M. 364.) the court of King's Bench refused to allow it; but in *Nathan v. Cohen* (3 Dowl. P. C. 370.) Mr. Justice Patteson, and in *Exp. Edmonds* (5 ibid. 702.) Mr. Justice Coleridge allowed so much as was stated by the deponent properly described to be read.

It is not sufficient in an affidavit by the defendant in a cause to describe himself as "the above-named defendant," without any other addition. *Lawson v. Case*, 1 C. & M. 481, sed vide *Jackson v. Chard*, 2 Dowl. P. C. 469.

The court declined to act upon an affidavit which was entitled *A. v. B.* executor, &c., without specifying the party to whom the defendant was executor. *Clark v. Martin*, 3 ibid. 222.

"Phillips, assignee, &c.," is an irregular mode of describing a plaintiff in intitling an affidavit. *Phillips v. Hutchinson*, ibid. 90.

If a defendant describe his place of abode, he need not also give his addition of degree. *Poole v. Pembrey*, 1 ibid. 693. *Jackson v. Chard*, 2 ibid. 469. *Brooks v. Farler*, 5 ibid. 361. *Sharp v. Johnston*, 2 Bing. N. C. 246. And it would seem, observes Mr. Jervis (*New Rules*, 59.), although there is no case upon the question, that a similar construction would apply, where the affidavit is made by a plaintiff.

The additions required are of two kinds, place and degree. In a joint affidavit by an attorney and his clerk, if the residence of the attorney be stated, it will be sufficient if the other deponent described himself as clerk to the said, &c. *Bottomley v. Belchamber*, 4 Dowl. P. C. 26.

An attorney's clerk in a separate affidavit may describe himself as clerk to A. B. of &c. (*Strike v. Blanchard*, 5 ibid. 216.), or as late clerk to A. B. of &c. (*Simpson v. Drummond*, 2 ibid. 473.); but he must state either his own residence, or the residence of his employer. *Daniels v. May*, 5 ibid. 83. *Alexander v. Milton*, 1 ibid. 570.

Where an affidavit upon an application for a *capias*, under stat. 1 & 2 Vict. c. 110. & s. 3. described the plaintiff as J. R., "one of the public officers of the Western District Banking Company for Devon and Cornwall," but the words "for Devon and Cornwall" were omitted in the *capias*, the court discharged, without costs, a rule nisi for the defendant's discharge out of custody, upon the plaintiff filing an affidavit corresponding with the writ. *Richards v. Disprail*, 1 Dowl. P. C. N. S. 384.

Affidavits not to be sworn before attorney, or agent, or clerk, except affidavit to hold to bail.

6. Where an agent in town or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

If an affidavit be duly entitled in the court, it is sufficient in the jurat to describe the person before whom it is sworn as "a commissioner, &c." *Burdett v. Potter*, 1 Dowl. P. C. N. S. 134.

When a deponent who applied to set aside a judgment in ejectment, and to defend as landlord, swore his affidavit before his attorney, it was holden not to be objectionable, because the commissioner was not when the affidavit was made the attorney in the cause. *Doe d. Grant v. Roe*, 5 Dowl. P. C. 409.

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1832.

7. After *non pros.*, nonsuit, or discontinuance, the defendant shall not be arrested a second time without the order of a judge.

ARREST.

No second
arrest without
leave.

By stat. 1 & 2 Vict. c. 110. (*ante*, 1276—1278. tit. DEBT) a defendant cannot, under any circumstances, be arrested except by the order of a judge.

An application for an order under stat. 1 & 2 Vict. c. 110. s. 3., for a *copias* to issue against a defendant, cannot be made to the court at Westminster, but it may be made to a single judge sitting there. *Bentley v. Berrey*, 7 M. & W. 146.

Where an order is obtained for a *copias* under stat. 1 & 2 Vict. c. 110. s. 3., before the suing out of the writ of summons, the affidavit on which it is applied for need not be entitled in the cause. *Schletter v. Cohen*, 7 M. & W. 389.

PROCEEDINGS
UNDER STAT.
1 & 2 VICT.
c. 110.

In *Bilton v. Clapperton* (1 Dowl. P. C. N. S. 386.) it appeared, that the defendant had been remanded under stat. 1 & 2 Vict. c. 110., and the plaintiff arrested him on a *copias*, issued under the 85th section. In the affidavit of debt the plaintiff was described as "W. B. jun.;" in the *copias* the word "jun." was omitted. The plaintiff's father bore the same names, and resided at the same place: — the court permitted the writ to be amended on payment by the plaintiff of the costs of the application.

Stat. 1 & 2 Vict. c. 110. does not authorise a party to issue execution for money awarded by an arbitrator. *Vide Burton v. Mendisabel*, 1 Dowl. P. C. N. S. 336.

The words in stat. 1 & 2 Vict. c. 110. s. 18. "moneys or costs, charges or expenses" mean, money decreed or ordered to be paid, together with the costs, &c., to be ascertained on taxation by the officer of the court, and that no order to pay costs is requisite after taxation. *Jones v. Williams*, 8 M. & W. 349.

Where the defendant was on the point of quitting England, and the plaintiff obtained a judge's order to hold him to bail for 422*l.*, but indorsed the *copias* for 422*l.* 13*s.* 4*d.*, which was the amount of the debt, the court allowed the *copias* to be amended on payment of costs, the defendant to be discharged out of custody on paying into court 422*l.*, and 20*l.* for costs, to be taken out on perfecting special bail. *Plock v. Pacheco*, 1 Dowl. P. C. N. S. 380.

If a defendant have been arrested and given bail to the sheriff, under stat. 1 & 2. Vict. c. 110., the plaintiff, by declaring in chief, does not waive his right to attach the sheriff for not bringing in the body. *Regina v. Montgomeryshire (Sheriff of)*, *ibid.* 388.

In *Greensfield v. Pritchard* (8 M. & W. 148.) the court refused, after the lapse of a year, to discharge a party who had been arrested under a *ca. sa.* in a wrong county, although he swore, that he was not aware of that fact until ten months after his arrest, and that he then applied immediately for his discharge to a judge, who refused to interfere.

Where a defendant has been regularly arrested on an attachment out of Chancery, the fact of an irregular writ of *ca. sa.* issuing out of the Common Pleas against the defendant, after the arrest, does not interfere with the right of another plaintiff to detain the defendant by virtue of a subsequent *ca. sa.* *Wright v. Stanford*, 1 Dowl. P. C. N. S. 272.

The marshal's return is no proof of the order in which writs, by virtue of which the defendant is in custody, were executed. *Ibid.*

In *Raynes v. Jones* (*ibid.* 373.) it appeared that a *ca. sa.*, issued against four joint defendants, under which, one was taken in execution and discharged under the Insolvent Act. The plaintiff afterwards issued a *fi. fa.* against the four defendants, under which the sheriff seized the goods of the one who had been discharged. It was held (*dubitante* Parke B.), that the writ was irregular, in having been issued against a party discharged under the Insolvent Act, and that it should have issued against the three, only suggesting the discharge of the one; but that, at all events, the writ should not have been executed against the goods of the defendant so discharged.

Where an affidavit was sworn in the usual way at a judge's chambers, but, through mistake, was not laid before the judge, and therefore the jurat was not signed by him, it was held to be irregular, and an order obtained upon such affidavit for a *copias*, and all the proceedings thereon were set aside; although after some days (but after the execution of the *copias*) the affidavit was laid before the judge, and signed by him. *Bill v. Bament*, 8 M. & W. 317.

8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant,

Affidavits for
work or money
paid must
state the request.

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Supplemental
affidavits not
allowed.

Variance be-
tween *ac etiam*
and declaration,
or want of *ac*
etiam, not to
discharge bail
or defendant.

Bond to stand
for 40l.

WRIT, WHEN
AND HOW TO BE
FILED.

Sheriff ruled
to return writ,
and omitting so
to do.

Officer to in-
dorse the day
and hour of
filing the writ.

BAIL.

Neither at-
torney nor his
clerk to be bail
except to
render.

When country
bail-piece to be
transmitted and
filed.

Plaintiff may
except to
sheriff's bail,
though after an
assignment of
the bail-bond.
Two days'
notice of justi-
fication sufficient
in all cases.

When bail, ex-
cepted to in

9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail.

10. A variance between the *ac etiam* and the declaration, or the want of an *ac etiam* where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail-bond or recognisance of bail shall be taken with a penalty or sum of 40l. only.

Vide post, 2841. Reg. Gen. E. T. 2 Will. 4.

Stat. 2 Will. 4. c. 39. has in effect repealed this rule, and bail will not be discharged for a variance between the process and declaration in the cause of action, but will merely set the declaration aside for irregularity. *Ward v. Tummon*, 1 A. & E. 619., *vide Lex v. Irvin*, 6 Dowl. P. C. 92.

11. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open.

Where a sheriff has been ruled to return a writ, and omits to do so, within the specified time, the plaintiff does not waive his right to attach him by afterwards directing him to proceed with the execution. *Howitt v. Rickby*, 1 Dowl. P. C. N. S. 889.

The rule to return the writ expires in four days after service in London and Middlesex, and in eight days (Reg. Gen. M. T. 7 Will. 4. *post*, 2868.) in any other city or county. The sheriff ought to return the writ of *capias* immediately after it has been executed by his officer (stat. 1 & 2 Vict. c. 110.); but the sheriff must be ruled to return the writ, if it be intended to take proceedings against him.

By stat. 2 Will. 4. c. 39. s. 15. a judge in vacation may make an order in vacation for the return of any writ issued out by authority of that act; and by Reg. Gen. M. T. 3 Will. 4. (*post*, 2844.) if a rule be made in vacation for the return of any writ issued by authority of that act, and the order duly served, the same may be made a rule of court in the next term, and, without fresh service, an attachment may issue.

Stat. 1 & 2 Vict. 110. does not contain an analogous provision for the return of writs in vacation; but as the rule to return the writ is a mode of compelling the putting in and perfecting special bail, it will probably be held that the fifth section extends to the former practice, under stat. 2 Will. 4. c. 39., to the present process. *Jervis's New Rules*, 61.

12. And the officer with whom it is filed shall indorse the day and hour when it was filed.

13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in the meantime.

14. In the case of country bail, the bail-piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from London, and in that case, within fifteen days after the taking thereof.

This rule did not apply to proceedings under stat. 2 Will. 4. c. 39. (*Alston v. Underhill*, 2 Dowl. P. C. 39.); and if a defendant were arrested more than forty miles from London, by *capias*, after that act, he was bound to transmit and file the bail-piece, and give notice on or before the eighth day after the arrest. *Hillary v. Rowles*, *ibid.* 301. *Grand v. Gibbs*, 3 *ibid.* 409. The *capias* given by stat. 1 & 2 Vict. c. 110. will bear the same construction. *Jervis's New Rules*, 62.

15. When bail to the sheriff become bail to the action, the plaintiff may except to them though he has taken an assignment of the bail-bond.

16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

This rule does not alter the notice required by the practice of the different courts, where the bail are put in in term, viz. in the King's Bench, one day, unless Sunday intervene, or the bail be added, and in the Common Pleas and Exchequer, two days; the notice in each case to be served before 11 o'clock, A. M. *Wilson v. Hawkins*, 5 Dowl. P. C. 436.

Neither does the rule alter the notice of bail to be put in and justified at the same time. *Jervis's New Rules*, 38. 63.

By stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 12. bail may now justify at chambers, as well in term, as in vacation.

17. If bail, either to the action or in error, are excepted to in vacation, and the notice of exception require them to justify before a judge, the bail shall justify

within four days from the time of such notice, otherwise on the first day of the ensuing term. H. T. 2 Will. 4. 1832.

This rule is repealed by Reg. Gen. H. T. 1 Vict. *post*, 2869.

18. Notice of more bail than two shall be deemed irregular, unless by order of the court or a judge.

19. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail.

This rule applies to all affidavits of justification.

An affidavit of justification must state, that the bail are worth the requisite property. *Rogers v. Jones*, 1 C. & M. 323. *Hutchinson's bail*, 1 Dowl. P. C. 571. And if bail justify under such an affidavit, the plaintiff will not have to pay the costs of his opposition. *Thompson's bail*, 2 *ibid.* 50.

20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognisance.

Formerly a defendant could have rendered himself; but now, the *capias* being returnable immediately, he must put in bail for that purpose (*Hodgson v. Mee*, 5 N. & M. 302.); he need not, however, give notice of bail for that purpose. *Wilson v. Griffin*, 2 C. & J. 683. *Short v. Doyle*, *ibid.* 202.

21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognisance.

Under this rule the bail will not be liable to the aggregate of the two separate recognisances, but only to the amount mentioned in each. *Vansandau v. Nash*, 2 *ibid.* 767.

22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

23. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant.

24. No bail-bond taken in London or Middlesex shall be put in suit until after the expiration of four days; nor, if taken elsewhere, till after the expiration of eight days, exclusive, from the appearance day of the process.

This rule was superseded by stat. 2 Will. 4. c. 39. (*Hillory v. Rowles*, 5 B. & Ad. 460. 2 Dowl. P. C. 201.); and the *capias* given by stat. 1 & 2 Vict. c. 110., in the same form, warns the defendant that if, having given bail to the sheriff, he omit to put in bail as required, that is, within eight days, the plaintiff may proceed against the sheriff or on the bail-bond.

25. The time allowed for excepting to bail put in upon a *habeas corpus* shall be twenty days.

A *habeas corpus* to remove a cause from an inferior court lies only, where the process is against the person of the defendant, and where he is actually or constructively in custody; and as by stat. 1 & 2 Vict. c. 110. s. 1. no person can now be arrested on meane process in any action in an inferior court, the writ of *habeas corpus* contemplated by this rule, and upon which bail was required, is obsolete. *Jervis's New Rules*, 65.

26. A recognisance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs.

27. In ejectment (*vide ante*, 1374—1490. tit. EJECTMENT) the recognisance of bail in error, shall be taken in double the yearly value, and double the costs.

28. An action may be brought upon a bail-bond by the sheriff himself in any court.

The action upon the bail-bond must be brought in the same court from whence the process issued on which the bond was taken, otherwise the parties could not have the relief intended by the stat. 4 Anne, c. 16.; and it seems, that this rule is confined to the sheriff.

29. In all cases where the bail-bond shall be directed to stand as security, the plaintiff shall be at liberty to sign judgment upon it.

Vide post, 2841. Reg. Gen. H. T. 2 Will. 4. s. V.

vacation, can justify.

When notice of more bail than two shall be deemed irregular.

When affidavits of justification will be deemed insufficient.

Rejected bail may render.

Amount for which bail will be liable.

Bail may render before prison doors close.

Proceedings on bail-bond cannot be had pending body rule.

Commencement of proceedings on bail-bond.

Twenty days to except to bail on *habeas corpus*.

Amount of recognisance of bail in error,

and in ejectment.

BAIL-BOND, AND ACTION THEREON.

Sheriff may sue on bail-bond in any court.

If bail-bond stand as security, plaintiff may sign judgment on it.

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Proceedings on
bail-bond
stayed on pay-
ment of costs of
one action.

30. Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more.

Where several actions are brought on the same bail-bond, it is too late after verdict to move to stay proceedings on payment of the costs of one action only. *Johnson v. McDonald*, 2 Dowl. P. C. 44.

If a security for debt and costs be taken by the plaintiff from the defendant, with consent of the bail, and that security fail, reasonable notice must be given to them of that failure, before proceedings can be taken against them. *Surman v. Bruce*, 3 ibid. 777.

To support a motion for staying proceedings on a bail-bond, the affidavits may be entitled either in the original action or in the action against the bail. *Lyles v. Chelwood*, 2 C. & J. 332. 1 Dowl. P. C. 321.

APPEARANCE.

When appear-
ance to original
to be entered.

31. A defendant who has been served with process by original shall enter an appearance within four days of the appearance day, if the action is brought in London or Middlesex, or within eight days of the appearance day in other cases; otherwise the plaintiff may enter an appearance for him according to the statute; and any attorney who undertakes to appear, shall enter an appearance accordingly.

The previous part of this rule is repealed by stat. 2 Will. 4. c. 39. The appearance is to be entered by the defendant or his attorney, if he undertake to do so within eight days after service; inclusive of the day of service; but if the defendant enter his appearance before that time, the plaintiff may immediately declare without waiting for the expiration of the eight days. *Morris v. Smith*, 1 Gale, 187. *Jervis's New Rules*, 66.

If application be made to set aside proceedings for irregularity after eight days, but within the eight days a similar application had been unsuccessfully made to a judge at chambers, the court cannot take notice of such application at chambers, unless it be shewn on affidavit, even though the judge, being in court, shall certify the fact. *Goren v. Tute*, 7 M. & W. 142.

An interlocutory judgment signed without an appearance entered, is a nullity, and cannot be waved. *Roberts v. Spurr*, 3 Dowl. P. C. 551.

IRREGULARITY IN PROCESS AND PROCEED- INGS.

When initials
or misnomers
not to affect,
arrest.

32. Where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody or the bail-bond delivered up to be cancelled on motion for that purpose, if it shall appear to the court, that due diligence has been used to obtain knowledge of the proper name.

Due diligence was held to have been used in inquiring the name of the defendant under this rule, though no inquiries had been made of the defendant, or of his immediate friends, or at his house or place of business; the debt being large, and the affidavit shewing, that there was ground to fear he might abscond, if he knew that proceedings were about to be instituted. *Hicks v. Marreco*, 1 C. & M. 85.

Where a defendant was arrested by a wrong name, the affidavit to ground a motion, that the bail-bond be delivered up to be cancelled, must be entitled in the defendant's right name. *Finch v. Cocker*, 2 C. M. & R. 412.

Whether a case is included within this rule, depends on various circumstances; and if it appear, that the defendant countenanced the plaintiff in calling him by a wrong name, or was likely to abscond if inquiry had been made of him personally, the court will not interfere. *Ante*, 2017—2046. tit. IMPRISONMENT; *ante*, 2265—2273. tit. MALICIOUS ARREST; *ante*, 2274—2289. tit. MALICIOUS PROSECUTION. *Hicks v. Marreco*, 1 C. & M. 84. *Newton v. Maxwell*, 1 Dowl. P. C. 315. *Lyon v. Wells*, 2 M. & Sc. 393. *Lindsay v. Wells*, 3 Bing. N. C. 777. Stat. 3 & 4 Will. 4. c. 42. s. 12.

Irregularity
when to be
complained of.

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

Upon this rule Mr. Jervis observes (*New Rules*, 68.)—An irregularity must be complained of in the writ of summons, before the time for entering the appearance has expired (*Chubb v. Nicholson*, 1 H. & W. 666. *Tyler v. Green*, 3 Dowl. P. C. 439. *Edwards v. Collins*, 5 ibid. 228. *Child v. Marsh*, 3 M. & W. 433. *Hinton v. Stevens*, 4 Dowl. P. C. 283.):—in the affidavit to hold to bail, or the capias, before the time for putting in bail has expired (*Tucker v. Colegate*, 1 ibid. 574. *Johnson v. Kennedy*, 4 ibid. 345. *Fowell v. Petre*, 5 ibid. 276. *Foot v. Dick*, 1 H. & W. 207.):—in the declaration within four days (*Hinton v. Stevens*, 4 Dowl. P. C. 283. *Golding v. Scarborough*, 2 H. & W. 94.):—in an interlocutory judgment, within a reasonable time after the defendant has notice of it. *Grant v. Flower*, 5 Dowl. P. C. 419. *Roberts v. Cusick*, 4 ibid. 204. *Lewis v. Brown*, 3 ibid. 700, vide *Scott v. Cogger*, ibid. 212. The ap-

plication must in all cases be made before the other party has taken a step, even though that step be irregular. *Smith v. Clarke*, 2 *ibid.* 218. *Fynn v. Kemp*, *ibid.* 620. *Rutty v. Arthur*, *ibid.* 36. If the irregularity occur in vacation, the application must be made within the like time to a judge at chambers. Vide *Woodcock v. Kilby* (Clerk), 4 *ibid.* 730. *Tyler v. Green*, 3 *ibid.* 439. *Cox v. Tullock*, 2 *ibid.* 47. In either case, however, the delay may be explained by affidavit; but the illness of a defendant (*Orton v. France*, 4 *ibid.* 726.), or the necessity of changing an attorney (*Golding v. Scarborough*, 2 H. & W. 94.), has been holden to be an insufficient excuse.

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In *Jeyes v. Hay* (1 M. & G. 390.) it appeared, that the defendant had obtained a rule to set aside a judge's order for irregularity, which was drawn up, without mentioning costs, and the plaintiff consented to its being made absolute. The defendant, however, stating that he had abandoned the first rule, obtained a second rule for setting aside the order with costs. The court, after intimating, that they would not have granted the second rule if they had been aware of the offer of the plaintiff, made the second rule absolute, the costs to be costs in the cause.

34. If a party plead several pleas, avowries or cognisances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment.

Judgment may be signed for double pleading without a rule.

A rule to plead is requisite, if several pleas be pleaded which amount only to one entire answer to the declaration, as the general issue to part, payment to the other part, &c. *Archer v. Garrard*, 9 M. & W. 63. 6 Dowl. P. C. 132. *Macher v. Billing*, 3 *ibid.* 246. *Vere v. Goldsborough*, 1 Bing. N. C. 553. But if pleas be added by order of a judge, no rule is essential. *Monk v. Shenstone*, 3 Scott, 661. *Jervis's New Rules*, 68.

35. A plaintiff shall be deemed out of court, unless he declare within one year after the process is returnable.

DECLARATION,
AND TIME FOR.

The process is returnable immediately after service, and from the day of service it would seem, that the time should be calculated. *Jervis's New Rules*, 69.

When plaintiff will be deemed out of court.

This rule applies to real as well as personal actions, viz. to actions *quare impedit*. Thus, where the writ was returnable January 8th, 1834, and part of the defendants appeared the 11th January, 1834, and plaintiff declared 10th January, 1835, the court set aside the declaration as to certain defendants as too late. *Barnes v. Jackson*, 1 Bing. N. C. 549.

If a plaintiff's proceedings on a writ of summons be stayed by rule, he is bound to declare within a year after the expiration of that rule, or he will be out of court. *Unite v. Humphrey*, 3 Dowl. P. C. 552.

Whether an appearance be entered in term time or vacation, the plaintiff has the whole of the term next following to declare in; and therefore, where an appearance was entered in Easter Term, and judgment of *non pros.* signed in Trinity Term, it was held, that the judgment was irregular. *Foster v. Pryme*, 8 M. & W. 664.

36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given.

Declaring against prisoners.

Before stat. 1 & 2 Vict. c. 110. (*vide ante*, 1276—1278. tit. D*ENT*), the proceedings against prisoners in non-bailable actions were the same, as against persons not in custody; and Mr. Jervis (*New Rules*, 69.) conceives, "that now the action, being commenced by summons, will proceed against a defendant who, for the plaintiff's security, has been arrested, as formerly, where the defendant was in custody at the suit of some other person."

37. Where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is returned.

Rule to declare on removal of causes.

38. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removals from inferior courts; but the plaintiff may have a rule for time to declare in the court of Exchequer as well as in the other courts.

Not requisite in general to have a rule to declare.

39. A rule to declare peremptorily may be absolute in the first instance.

Peremptory rule to declare.

This is moved for, where the plaintiff has obtained several rules for time to declare, and binds the plaintiff to declare before the end of the term in which such rule is made. *Jervis's New Rules*, 70.

40. A declaration laying the venue in a different county from that mentioned in the process, shall not be deemed a waiver of the bail,

Variance in venue no discharge of bail.

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**Damages need
not be expressed
in notice of
declaration.**

**After amend-
ment of decla-
ration, no new
rule to plead
requisite.**

**Amendment of
declaration ge-
nerally.**

**PLEA, AND
TIME FOR.**

**Demand of
plea may be
made, when the
declaration is
delivered.**

**Plaintiff may
insertoyer.**

If a plaintiff declare as executor on general process, the bail will be discharged and entitled to an *exoneretur*. *Manesty v. Stevens*, 1 Dowl. P. C. 711.

41. It shall not be deemed necessary to express the amount of damages in notice of declaration.

42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term.

Where a plaintiff amends his declaration, with liberty to the defendant to plead *de novo*, if the defendant do not plead *de novo*, the former plea will stand, if it be applicable to the declaration as amended. *Fagg v. Borsley*, 1 C. & M. 770. Taking out a summons for time to plead, is a waiver of a rule to plead. *Nuger v. McDonell*, 3 Dowl. P. C. 579. Proceedings in an action at the suit of assignees of a bankrupt were allowed to be amended by making the official assignee a joint plaintiff with the other assignees. *Baker v. Neaver (Bart.)*, 1 ibid. 616. Where a writ is issued in vacation, and a declaration was delivered and rule to plead given in the same vacation, but the plaintiff did not sign judgment until the ensuing term, it was held, that it was not necessary to give a new rule to plead in that term. *Mould v. Murphy*, 1 C. & M. 495. *Fryer v. Smith*, ibid. 855.

Where a notice of declaration was served, in which, by a mistake in inserting the year, such notice was made to bear date three months before the issue of the writ of summons; to which notice was attached a particular of the plaintiff's demand, dated on the same day and month as the notice of declaration, with the proper year: it was held to be no irregularity. *Coates v. Sandy*, 2 M. & G. 313.

On a plea of *nil tiel record* to a declaration in debt on a recognisance of bail, a variance appearing between the amount of the judgment recovered in the original action and that alleged in the declaration, Mr. Justice Patteson refused to amend the declaration under stat. 3 & 4 Will. 4. c. 42. s. 23., because the variance was material to the merits of the case. *Davis v. Dunn*, 1 Dowl. P. C. N. S. 317.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon.

Formerly, if the plaintiff demanded a plea, he thereby waived his bail. *Lau v. Stevens*, 1 Dowl. P. C. 425. But as the action is now commenced by summons, such result cannot henceforth ensue.

If a plaintiff give a greater number of days for pleading, than by the practice of the court is required, the defendant is entitled to avail himself of that greater number. *Solomonson v. Parker*, 2 ibid. 405.

The afternoon in the Exchequer, for the purpose of signing judgment, does not commence in term till three o'clock. Where a declaration was delivered on the 4th of August, with notice to plead in four days, it was held, that judgment could not properly be signed till the afternoon of the 9th, for want of a plea, and the office being shut in the afternoon, judgment could not be signed till the 10th without specially opening the office, which a party has a right to do, if he please. *Kemp v. Fyson*, 3 ibid. 265.

A plaintiff has no right to sign judgment for want of a plea before the time for pleading is out, although a bad plea may have been delivered; and it seems, that the word "till" is inclusive of the day to which it is prefixed. *Dakins v. Wagner*, ibid. 535.

Where the declaration was delivered on the 7th to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 19th, it was held, that judgment for want of a plea signed at ten o'clock on the 15th was regular. *Tate v. Bodfield*, ibid. 218.

A rule to plead may be entered before the delivery of the declaration, provided that both acts are done on the same day. *Chapman v. Davis*, 1 M. & G. 388.

Where a defendant obtained an order for time to plead, on the terms of taking short notice of trial for the sittings in or after Easter Term, it was held, that he was not thereby obliged to take short notice of trial for the sittings in or after any subsequent term; but the plaintiff must, in such case, give an ordinary notice. *Slatter v. Pender*, 8 M. & W. 672.

Where an order for time to plead has been made by consent, and the defendant has consented, that a reservation of his right to move to change the venue should be struck out of the order, the court will not grant a rule to restore that reservation, but will leave the defendant to wait, until issue is joined to make a special application to change the venue. *Keynes v. Keynes*, 1 Dowl. P. C. N. S. 287.

44. If a defendant, after cravingoyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer.

45. If the declaration be filed or delivered so late, that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea.

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Pleading without
imparlance.

By stat. 2 Will. 4. c. 39. imparlances have been abolished. If the plaintiff declare in London or Middlesex, and the defendant live within twenty miles of London, he shall have four days' time to plead; if he live beyond that distance, or the plaintiff declare in any other county, the defendant shall have eight days. No plea can be dated between the 10th of August and the 24th of October (stat. 2 Will. 4. c. 39. s. 11.); and by Reg. Gen. M. T. 3 Will. 4. s. 12. (*post*, 2844.), if the time for pleading do not expire before the 10th of August, the defendant shall have the same time after the 24th of October, as if the declaration had been delivered on that day; but in such case, it shall not be necessary to have a second rule to plead. The rule applies if further time have been granted by a judge's order which does not expire before the 10th of August (*Wilson v. Bradstocke*, 2 Dowl. P. C. 416.), in which case the time granted by the judge, though partly expired, is reckoned from the 24th of October. *Trinder v. Smedley*, 3 *ibid.* 87. *Jervis's New Rules*, 71.

An order for seven days' time to plead was obtained on May 15th; on the 22d pleas were delivered, but irregular in several respects; and on the evening of that day, the plaintiff signed judgment as for want of a plea:—the court set aside the judgment as having been signed too early. *Pepperell v. Burrell*, 2 Dowl. P. C. 674.

When a rule to plead expires on a Monday, on which day the offices are, in fact, closed, because the Sunday preceding was the queen's birth-day, the Monday is not excluded from the computation of time, and the defendant is bound to plead before the opening of the office on Tuesday. *Wilkinson v. Britton*, 1 M. & G. 557.

46. The defendant shall not be at liberty to waive his plea without leave of the court or a judge.

Without leave
no plea to be
waived.

A plea was allowed, under special circumstances, to be amended after the plaintiff had replied, and the cause was in the paper. *Jones v. Roberts*, 2 Dowl. P. C. 698.

47. A summons for particulars and orders thereon may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

PARTICULARS.
Summons for
particulars may
be obtained
before ap-
pearance.
Pleading after
particulars
delivered.

48. A defendant shall be allowed the same time for pleading after the delivery of particulars (*vide ante*, 2803—2807. tit. PARTICULARS OF DEMAND), under a judge's order which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge.

Where a plaintiff refused to deliver a particular in obedience to an order, the court of K. B. refused to allow the defendant to sign a *non pros.* (*Somers v. King*, 7 D. & R. 125.); and this was acted upon in *Sutton v. Clarke*, 1 Dowl. P. C. 259. and *Burgess v. Swayne*, 7 B. & C. 485.; an order for particulars therefore operates, as a stay of proceedings.

The bill of particulars cannot be enforced. *Kirby v. Snowden*, 4 Dowl. P. C. 191.

Where a declaration in *assumpsit*, indorsed to plead in four days, being delivered with particulars of demand annexed, and the plaintiff, two days afterwards finding that the particulars were wrongly entitled, delivered a fresh particular properly entitled, and, for want of a plea within the four days, signed judgment:—It was held, that the judgment was regular, the accepting the amended particulars being a waiver of the objection to the first. *Jones v. Fowler*, 4 Dowl. P. C. 232.

Signing judg-
ment.

Where a plaintiff recovered a greater sum than he claimed by his particular, and upon discussion the court of C. P. sanctioned the principle on which he recovered, and judgment was entered up accordingly, no objection having been made to the excess above the particular, either at the trial or on the argument, the court would not reduce the judgment to the sum claimed by the particular. *Bell v. Puller*, 2 Taunt. 285. 12 East, 496. n.

49. Where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the court.

NOTICES AND
RULES, AND
SERVICE
THEREOF.

Where the defendant's residence is unknown, the rule is absolute in the first instance, under this rule, on a proper affidavit (*Bridger v. Austin*, 1 Dowl. P. C. 272.); but it

When notice of

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declaration may
be stuck up in
the office.

must be shewn that due diligence has been used to find the defendant's residence. Vide *Fry v. Rogers*, 2 *ibid.* 412. *Heming v. Duke*, *ibid.* 637.

Where an attorney has been served with process at chambers, from which he afterwards goes away to an unknown residence, a rule to compute may be served by leaving a copy at those chambers, they being his last place of abode, and sticking another up in the King's Bench office (*Sealey v. Robertson*, *ibid.* 568.); but where the defendant changed his residence after action, and the notice of declaration was left for him at the place which was his residence when the action was commenced, and stuck up in the office without leave of the court, it was holden insufficient. *Troughton v. Croson*, 3 *ibid.* 436.

Where, on account of the defendant's residence being unknown, the court gives leave to serve him in a particular manner, they will not make a prospective rule, that service of future rules, &c., may be effected in the same way. *Martin v. Cobill*, 2 *ibid.* 694. *Layton v. Mason*, 6 *ibid.* 275.

Service of
rules and orders
to be made be-
fore nine o'clock
at night.

50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour.

A plea being delivered after nine o'clock in the evening, cannot be treated as a nullity; and a judgment signed on that ground, and no notice having been given of objection to the defendant, was set aside. *Horsley v. Purdon*, 2 *ibid.* 228.

Where, in an action on a joint promissory note against several defendants, they suffer judgment by default, service of the rule on one is service on all. *Figgins v. Ward*, 2 C. & M. 424.

Original rule
need not be
shewn unless
demanded.

51. It shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment.

In moving for an attachment against the sheriff for not bringing in the body, it is sufficient to swear, that the original rule, and not a copy, was served on the under-sheriff. *Leuf v. Jones*, 3 Dowl. P. C. 315.

Delivery of
notice, where a
term's notice of
trial is required.

52. Where a term's notice of trial or inquiry is required, such notice may be given at any time before the first day of term.

A term's notice is required, where no step has been taken in the cause for four terms, in order, that the party may not be taken by surprise. It is not, however, necessary to enable the defendant to try by proviso, nor before motion for judgment as in case of a nonsuit (*Shinfield v. Laxton*, 2 *ibid.* 778.), nor after verdict. *Deacon v. Fuller*, 1 *ibid.* 675. *Jervis's New Rules*, 73.

Rule to reply.
Demand of
replication.

53. A rule to reply may be given at any time when the office is open.

54. Service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading.

Rules to reply or to plead any subsequent pleading must be served, and judgment of *non pros.* was set aside where rule had not been served. *Pound v. Lewis*, 2 Dowl. P. C. 744. No separate demand of replication is requisite.

PAYMENT OF
MONEY INTO
COURT.

55. In all cases in which money may be paid into court, leave to pay it may be obtained by a side-bar rule.

Vide *post*, 2869. 2870. Reg. Gen. T. T. 1 Vict.

Side-bar rule to
pay money into
court.

By Reg. Gen. H. T. 4 Will. 4. R. 2. s. 18. (*post*, 2859.) no rule or judge's order to pay money into court shall be necessary, except under stat. 3 & 4 Will. 4. c. 42. s. 21.; but the money shall be paid to the proper officer of each court, who shall give a receipt for the same in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand. Vide *stat.* 3 & 4 Will. 4. c. 42. s. 21.; 7 Will. 4. & 1 Vict. c. 30. s. 2.

Undertaking of
the defendant
on payment of
money into
court.

56. On payment of money into court, the defendant shall undertake by the rule to pay the costs, and in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages.

If the defendant pay money into court he must plead it. Vide Reg. Gen. H. T. 4 Will. 4. s. 17. *post*, 2859. Reg. Gen. T. T. 1 Vict. *post*, 2869.

Stat. 11 Geo. 4.
& 1 Will. 4.
c. 68. s. 10.

Actions against
mail contract-
ors, carriers, &c.

By stat. 11 Geo. 4. & 1 Will. 4. c. 68. s. 10. "in all actions to be brought against any mail contractor, stage-coach proprietor, or other common carrier, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner, and with the same effect, as money may be paid into court in any other action." *Ante*, 1001. tit. CARRIERS.

By stat. 3 & 4 Will. 4. c. 42. s. 21. "it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the said superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading, as the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct."

Vide stat. 4 & 5 Will. 4. c. 62. s. 23. as to actions brought in the court of Common Pleas at Lancaster; and stat. 4 Anne, c. 16. s. 13. respecting the payment of money into court under a bond.

Although under stat. 3 & 4 Will. 4. c. 42. the defendant can pay money into court in many cases where he was not formerly allowed to do so, yet in an action by landlord against tenant for not repairing, the court refused to allow the defendant to pay a sum of money into court by way of compensation and amends; but that the same sum might be received into court, under a plea in the form given by the rule made thereon, and under a plea of tender before action brought. *Tidd's N. P.* 312. *Dearle v. Barrett*, 2 A. & E. 82. *Barrett v. Dearle*, 3 Dowl. P. C. 13.

In all cases where the claim is for a given sum, where, if the facts were ascertained, the amount would be determined by mere calculation, as the defendant might, before the commencement of the action, have made a tender, so he may afterwards pay into court such sum of money as he thinks fit, and leave the plaintiff to proceed at his will, if he will not accept it. *Hallet v. E. I. Comp.* 2 Burr. 1120. *Lush*, Pr. 732.

As the payment of money into court must be pleaded, it must of course be paid into court before plea pleaded. As the court, however, have the power of allowing a defendant to amend his pleas, by adding a new one, they may, if they think fit, allow him to pay money into court at any time before trial. They have done so, even after setting aside the execution of a writ of inquiry. *Day v. Edwards*, 1 Taunt. 491. Archb. C. Att. Prac. 496.

The plea of payment into court is a bar to the further maintenance of the action, the operation of which is analogous to that of the general issue, for if the plaintiff reply, that he has sustained damages, or that the defendant is indebted to him to a greater amount than the sum so paid into court, and the issue thereon be found for the defendant, he will be entitled to judgment, and his costs of suit. *Lutwyche* on Pleading, 111.

To a declaration on *indebitatus assumpsit* for four causes of action, with one promise and breach, the defendant pleaded as to 2l. "parcel of the said several sums," payment and acceptance in satisfaction of all the damages by reason of non-performance of the said premises as to the said 2l., which was held good on special demurrer, though the plea did not state to which cause of action the payment applied; Lord Denman observing, "The plaintiff had better amend; and he may do so without payment of costs, since, although *Mee v. Tomlinson* (4 A. & E. 363.) is clearly a wrong decision, it has not yet been overruled in this court, where it was pronounced." *Mitchell v. Townley*, 7 ibid. 164—166.

A contract specially declared upon is so far admitted by a payment into court, that the plaintiff is relieved from the proof of it, though it is competent to the defendant to dispose of it in part, for the purpose of limiting his liability, but not to give any evidence which goes to dispose of it *in toto*. A plea of payment on an *indebitatus* count, intended to represent but one indivisible contract, has the same effect; but where such count is meant to represent a plurality of contracts, the defendant admits no more than that he is liable on one or more of them to the extent of the money paid in. Moreover, in these cases the plaintiff has in general to prove the contract, that being the only means by which he can prove the issue of debt or damages *ultra*. A plea of payment in actions of tort has an effect similar to that in actions on a special contract: it admits the duty and a liability on the breach alleged to the extent of the money paid, and no farther. *Lush*, Pr. 742, 743. Archb. C. Att. Prac. 496. *Stovell v. Brewin*, 2 B. & A. 116. *Godsall v. Boldero*, 9 East, 72. *Watkins v. Towers*, 2 T. R. 275. *Burrough v. Skinner*, 5 Burr. 2640. *Hutton v. Bolton*, 1 Hen. Black. 299. n.

A plea of payment of money into court to a count in *indebitatus assumpsit* admits the existence of some contract or contracts falling within the description of the debt stated as the consideration of the promise laid in such count; but it does not amount to an admission of any particular contract—not even of the contract in respect of which the money is in fact paid in. Where, therefore, in an action against two, money is paid into court by both defendants with a plea of payment into court under Reg. Gen. T. T. 1 Vict. (*post*, 2869.), the plaintiff, in order to recover damages beyond the sum paid in, must shew, not only that his demand, in respect of which the money is in fact paid into court, exceeds the amount paid in, but that the defendants are joint contractors. *Archer v. English*, 1 M. & G. 873.

The same principles apply to a plea of payment in debt on simple contract, if the count be drawn in the loose *indebitatus* form now usually adopted, which is taken from the

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Stat. 3 & 4 Will.
4. c. 42. s. 21.

When the claim is for a given sum, and the amount ascertainable by mere calculation.

Time at which money should be paid into court.

Plea of payment, is a bar to the further maintenance of the action.

Where plea held good, although it did not state to which cause of action the payment applied.

WHAT IS ADMITTED BY A PAYMENT INTO COURT.

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Where defendants have paid money into court, it is incompetent for them to set up that one of them is not a party to the contract.

Judgment of Mr. Baron Alderson in *Ravencroft v. Wise*.

Authority of agent.

Special contract.

Covenant.

Debt.

Professional character.

WHAT IS NOT ADMITTED BY A PAYMENT INTO COURT.

Where plea of payment only admits, that

counts in *assumpsit*. But where the declaration states the contract specially in the old form, as that the plaintiff sold and delivered to the defendant twenty sheep, at the price of 33s. each, the admission in the plea of payment into court would extend to the particular bargain disclosed in the declaration; inasmuch, as upon the old plea of *nil debet*, the plaintiff must have proved the contract as laid. *Archer v. English*, 1 M. & G. 873. n.

In *Ravencroft v. Wise* (2 Dowl. P. C. 676. 1 C. M. & R. 208. 210.) it was held, that where defendants have paid money into court, it is incompetent for them to set up that one of them is not a party to the contract, the whole account being referrible to one contract; Mr. Baron Alderson observing, "The moment that it appears that there was in point of fact, but one contract, the payment of money into court admits the defendants to be parties to that contract. In the case of a general count, proof that there is only one contract places the party in the same situation as if the contract were stated specially on the face of the declaration, and then the payment of money into court admits such contract, leaving it open to dispute, whether any thing is due on the contract beyond the money paid into court. In the present case, proof was given, that there was only one contract to which the payment into court could be referred; and it follows, that the defendants were only at liberty to dispute whether any thing beyond the money paid into court was due under that contract." If goods have been sold to defendant by sample, at a stipulated place, he cannot, after paying money into court in an action of *indebitatus assumpsit*, insist on any defect in the goods. *Leggett v. Cooper*, 2 Stark. 103. *Speck v. Phillips*, 5 M. & W. 279. vide 8 Dowl. P. C. 198. But it is only an acknowledgment by the defendant, that the plaintiff is entitled to recover the sum so paid; it does not preclude him from taking any objection to the action beyond that sum, though, unless such sum were paid, such objection would be a bar to the whole demand. *Cox v. Perry*, 1 T. R. 464. *Stafford v. Clark*, 2 Bing. 371. 9 Moore, 724. 1 C. & P. 24. 403. *Baillie v. Cazelet*, 4 T. R. 579.

It seems that payment of money into court upon an *indebitatus* count for work and labour, where there has been but one transaction between the parties, admits the authority of the agent by whom the work was ordered; and that payment of money into court on a count which states a special contract admits that contract: but payment generally, on the *indebitatus* counts, does not admit the causes of action, notwithstanding the rule of court which directs the particulars to be annexed to the record. *Meager v. Smith*, 1 N. & M. 449. 4 B. & Ad. 673.

If money be paid into court on a count stating a special contract, it is an admission of such contract, and narrows the inquiry to the *quantum* of damages sustained by the breach thereof. *Dyer v. Ashton*, 2 D. & R. 19, 1 B. & C. 3. *Cox v. Perry*, 1 T. R. 464. *Guilford v. Nock*, 1 Esp. N. P. C. 347. *Bennett v. Francis*, 2 B. & P. 550. 4 Esp. N. P. C. 28.

In *assumpsit* on a special contract, and for money had and received, &c., defendant pleaded the general issue, and to the common counts a tender; and he paid money into court upon a rule in the common form, not applying in terms to any particular count:—It was held, that such payment could not be referred exclusively to the counts as to which a tender was pleaded, but that it applied to the whole declaration, and admitted the special contract. *Bulwer v. Horne*, 1 N. & M. 117. 4 B. & Ad. 132.

In a special count on a policy, the risk was stated to continue until the ship was unloaded, and there were common counts:—It was held, that the premium having been paid into court generally, was an admission of the contract stated in the special count. *Andrew v. Palgrave*, 9 East, 325.

If the payment be made on any one of the breaches in an action of covenant, it is unnecessary to prove the deed. *Randall v. Lynch*, 2 Camp. 357.

After payment of money into court by a defendant, in an action brought against him on stat. 2 & 3 Edw. 6., by a farmer of tithes, he cannot object to the plaintiff's title to the tithes, because he has admitted the plaintiff's right generally, and has reduced the cause to a mere question of the amount of damages. *Broadhurst (Clark) v. Baldwin*, 4 Price, 58.

So, in an action by a surgeon, it admits the plaintiff's title to sue as such. *Lipscombe v. Holmes*, 2 Camp. 441.

To a declaration in *assumpsit* for non-performance of a contract to receive and pay for a copper, made to order at a specified price per pound weight, the defendants pleaded, *inter alia*, the payment into court of 15*l.*, and that the plaintiff had not sustained damage to a greater amount:—It was held, that they could not, under this plea, give in evidence that they had countermanded the order, when only a part of the work had been done. *Stevens v. Ufford*, 7 C. & P. 97.

To counts in *indebitatus assumpsit*, for rent and for fixtures, &c., the defendant pleaded, as to all except 12*l.* non *assumpsit*; and as to that sum, payment into court of that amount:—It was held in *Kingham v. Robins* (5 M. & W. 103.), that the plea of payment into court only admitted, that something was due on a contract for fixtures; and the plaintiff having proved merely that the value of the fixtures exceeded 12*l.*, without proving any contract entered into by the defendant to take those fixtures, that he was not entitled to recover; and that a plea of payment of money into court under the

general *indebitatus* counts, only admits a liability upon some one or more contracts to the extent of the sum paid in; Mr. Baron Maule observing, "I entirely concur with the rest of the court. It seems to me, that there could be no doubt, under the old practice and authorities, as to the effect of this plea. The doubt has arisen from the expression of Tindal C. J. in *Walker v. Rawson* (1 M. & Rob. 250.), and the observations of my brothers Parke and Littledale in *Meager v. Smith*, 4 B. & Ad. 673. 1 N. & M. 449. We should cast great difficulty upon the defendants, if we were to hold, that a payment of money into court admitted any contract which the plaintiff might suggest. It is contended, that the plea admits some transaction between the parties: but what is a *transaction*? The word '*transaction*' is a loose expression, which it is difficult to define, unless referred to something known. It is preposterous to say, that if a plaintiff proves some *transaction*, the payment of money into court admits a *contract*. There is some analogy between payment of money into court, and payment before action brought. Suppose a witness came and said, that the defendant paid money to him—would he be competent to infer upon what account the money was paid? So here, the payment into court is only an admission of a liability upon some one or more contracts, which the plaintiff is bound to prove."

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something is
due on a con-
tract.

Judgment of
Mr. Baron
Maule in *King-
ham v. Robins*.

Payment of money into court under an *indebitatus* count by two or more defendants is no admission of a joint liability: thus, in *Stapleton v. Noel* (8 Dowl. P. C. 198.) Mr. Baron Alderson observed, "If this was the first case after *Ravenscroft v. Wise* (1 C. M. & R. 203.), in which the point had been presented to the court, whatever my own opinion might be respecting the authority of that decision, I should have been disposed to grant a rule, in order that the question might be reconsidered; for it would be a strong proposition to say, that a case so similar to the present was not worthy of great consideration. But the authority of the subsequent case of *Kingham v. Robins* (5 M. & W. 94.), the full discussion the matter then underwent, and principles there laid down by the judges who delivered their opinions, have virtually overruled *Ravenscroft v. Wise*, and placed the law on this subject on a simple and clear foundation. Nor were those principles then recognised for the first time. I well recollect Bayley J. on the Northern Circuit laying down the same rule in a similar case. Payment into court, in an action on a special contract, admits the contract alleged in the declaration, and for the reason, that, unless the defendant means to admit it, he ought not to pay the money into court. By admitting something to be due, he admits the contract as alleged; but the same rule does not apply to an *indebitatus* count, for such count is not confined in its operation to one contract, but may extend over any number of contracts between the same parties; and consequently payment into court, under such a count, only admits in substance, that on some one or more of those contracts the defendants are jointly liable to the plaintiff. But it is no admission of any particular contract, because an *indebitatus* count states no particular contract. Then what is the real issue between the parties? The plaintiff says, 'on some one or more causes of action I have a claim against you for so much.' The defendants say, 'on some one or more, you have to the extent of 10*l.*, but for the residue you have no such claim.' It is for the plaintiff then to shew affirmatively, that there is some contract on which both the defendants are liable, and to an extent beyond the sum paid by them into court. If, on the one hand, he does not prove a liability in both, he will fail altogether; and if, on the other, he succeeds in proving them liable, but not beyond the amount paid into court, he will also fail, for the defence is then established. Here, then, the plaintiff proves a *prima facie* case against one defendant, and no case whatever against the other: but then he says, 'As you, John Noel, have paid money into court, you must be considered as having admitted this contract, to which I have proved and shewn Jonathan Noel to be liable.' It is obvious, that there might be some one contract on which both defendants are liable, and another upon which Jonathan Noel alone was liable. The plaintiff undertakes to satisfy the jury, that he has some claim against both; as, therefore, the facts laid before the jury are equally consistent with both defendants being liable for a certain debt, and Jonathan Noel alone for another; and as the jury cannot say whether John Noel is liable under the present contract or not, they ought to find for the defendants, as liability has not been fixed on them. On this principle, I nonsuited the plaintiffs at the trial, considering that there was no evidence from which the jury could find a joint liability, and I still think I was right in so doing."

Where a plaintiff brought *indebitatus assumpsit* for work and labour, &c., as an attorney, and delivered a particular claiming 26*9*l.** for defending two prosecutions; and the defendants paid 52*l.* into court, stating that they paid it to cover all the items previous to a certain day; and pleaded the payment, with a denial of damage *ultra*, on which issue was taken:—It was holden, that the payment into court admitted nothing but a liability to the amount of 52*l.*; and that in the defence as to the residue, the defendants might deny having at any time retained the plaintiff as their attorney. *Stevenson v. Berwick-upon-Tweed* (Mayor of), 1 A. & E. N. S. 154.

Work and la-
bour.

Payment of money in court in *assumpsit*, for goods sold and delivered, only amounts to an admission by the defendant of the plaintiff's right of action to the amount of the sum paid in, and applies only to a legal demand, and not to all the items contained in a bill of particulars, in which the goods are stated to have been supplied at different

Goods sold and
delivered.

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When plaintiff
alleges multifar-
ious and in-
consistent facts.

Payment of
money by a
justice, does not
admit the right
of action.

When right of
property not
admitted.

Policies of in-
surance.

Bills of ex-
change.

Statute of Li-
mitations.

Infancy.

PLEA OF PAY-
MENT.

Payment must
be pleaded spe-
cially.

Plea of pay-
ment must fol-
low the form
given by the
new rules.

times. *Seaton v. Benedict*, 2 M. & P. 66. 5 Bing. 28. And if the declaration contain a legal and an illegal demand, the money paid in shall be applied to the legal demand only. *Ribbans v. Crickett*, 1 B. & P. 264.

Although a payment into court admits every legal cause of action stated, yet where the plaintiff alleges in his declaration multifarious and inconsistent facts as the grounds for one and the same claim, it is not competent for the plaintiff to apply the defendant's payment into court of a sum insufficient to meet all the demands alleged, as evidence to prove such one of the plaintiff's claims as he may elect; but he must prove his case by other evidence of the fact. *Everth v. Bell*, 1 Moore, 158. 7 Taunt. 450. Therefore, in an action to recover a subscription from an underwriter, if the declaration state the vessel to have been stranded, bulged, damaged, and wrecked, and money be paid into court generally thereon, such payment cannot be applied by the plaintiff (who offered the rule of court as evidence of the loss), as an admission of a stranding only, as such payment might apply to any other loss. *Ibid.*

In an action against a justice of the peace for an act done in his official capacity, the bringing money into court by virtue of the statute does not, it is said, admit the right of action. *Boyfield v. Porter*, 13 East, 300.

Payment of money into court on a declaration for goods sold, and after a particular stating, that the action is brought for the price of a certain lot of goods sold to the defendant on such a day by A. B., the plaintiff's broker, does not admit, that the goods purchased by the defendant of A. B. on the day specified, were the property of the plaintiff. *Blackburn v. Scholes*, 2 Camp. 341.

A. and B. were jointly indebted to C.; after more than six years had elapsed since the debt accrued, A. promised in writing, signed by him, to pay his proportion when applied to. Payment of money into court on a special count, framed on such a promise to pay the defendant's proportion, and averring the amount of such proportion under a *videlicet*, does not admit or preclude the defendant from disputing the amount of such proportion. *Lechmere (Bart.) v. Fletcher*, 1 C. & M. 623. 3 Tyrw. 450.

Payment of money into court to the amount of a partial loss upon a valued policy is not an admission of a total loss. *Rucker v. Palgrave*, 1 Taunt. 419. 1 Camp. 557., *vide etiam Waldron v. Coombe*, 3 Taunt. 162. And in an action on a valued policy, the payment of money into court upon a count which states a total loss, is not an admission of such total loss by capture. *Ibid.* But it admits the interest of the plaintiff as averred. *Bell v. Anley*, 16 East, 146.

Although payment of money into court generally upon a declaration containing a count on a policy of insurance, and the money counts, is only an admission of the contract, it does not preclude the defendant from disputing his liability, beyond such payment, for goods which were not loaded according to the terms of the policy. *Mellish v. Alhutt*, 2 M. & S. 106.

Payment of money into court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the drawer's handwriting. *Gutteridge v. Smith*, 2 Hen. Black. 374., *vide etiam Barber v. Backhouse*, Peake's N. P. C. 86. And, after such payment, the defendant cannot object to the insufficiency of the stamp, on which the bill is drawn. *Israel v. Benjamin*, 3 Camp. 40.

Where, upon a count on a promissory note payable by instalments, averring non-payment of such instalments, the defendant pleads *non assumpsit*, and brings into court a sum of money less than the amount of the instalments, he thereby admits the special contract but does not admit the non-payment of the instalments, except to the extent of the money brought in. *Reid v. Dickson*, 2 N. & M. 369. 5 B. & Ad. 499.

And, if he also plead the Statute of Limitations, he will be entitled to a verdict, unless the plaintiff prove a sufficient acknowledgment of a liability to pay something above the sum brought into court. *Ibid.*

If money be paid in generally, it does not exclude the benefit of the Statute of Limitations. *Long v. Greville*, 4 D. & R. 632. 3 B. & C. 10.

Nor preclude a defendant from availing himself of a plea of infancy. *Hitchcock v. Tyne*, 2 Esp. N. P. C. 481. n.

A defendant cannot avail himself of a payment for any purpose, without pleading it specially, unless where it is admitted by the plaintiff's particulars of demand; but whether the giving of credit in the particulars is to operate in the same manner as a plea of payment, or as if so much of the demand were struck out of the declaration, is uncertain. *Kennedy on Pleading*, 127.

A plea of payment into court must follow the form given by the new rules; and if other pleas are pleaded to part of the plaintiff's demand, the plea of payment into court should be put last, and pleaded to the residue. *Sharmen v. Stevenson*, 3 Dowl. P. C. 709. 2 C. M. & R. 75. 5 Tyrw. 564.; but the form of the plea of payment of money into court, does not preclude a defendant from applying to enter a suggestion to deprive the plaintiff of costs. *Jorden v. Benwick*, 1 Dowl. P. C. N. S. 102.

A special demurrer to a plea of payment of money into court, that "it varies from the form given by the rule," is sufficient to raise an objection, that the plea is bad for want

- of a proper conclusion of a prayer of judgment. *Sharman v. Steynson*, 3 Dowl. P. C. 709. 2 C. M. & R. 75. 5 Tyrw. 564.
- When there are several counts, it seems a plea of payment should not be pleaded to the whole declaration, without specifying in respect of what items of demand the money was paid. *Lorymer v. Vixeu*, 3 Bing. N. C. 427. *Mee v. Tomlinson*, 4 A. & E. 262. Kennedy on Pleading, 128.
- A plea of payment of a less sum of money into court on a general *indebitatus* count or counts is good, though the amount intended to be appropriated to each count is not shewn. *Jourdain v. Johnson*, 4 Dowl. P. C. 534. 1 Gale, 312. 5 Tyrw. 524.
- Upon this case, Mr. Kennedy (on Pleading, 140.) observes, "A doubt is thrown out in the judgment in *Jourdain v. Johnson* (2 C. M. & R. 564. 5 Tyrw. 524. 4 Dowl. P. C. 534.), whether to a count on a bill there can be a plea of payment into court of a sum less than the amount for which the bill was drawn. There seems to be no ground for this doubt. The allegation, 'that the plaintiff has not sustained damage to a greater amount, &c.' is not equivalent to a plea of *non assumpsit* as to the residue, so as to be a violation of the rule which prohibits the pleading of *non assumpsit* to a count on a bill; because it admits the making of the bill as alleged in the declaration for the full amount therein mentioned, and therefore admits the inception of the contract declared upon, but denies only, that the plaintiff is under the circumstances entitled to recover the whole sum."
- Where to a plea of payment, 3*l.* 8*s.* 2*d.* in satisfaction and discharge of the defendant's promise, it was replied, that the defendant did not pay it in satisfaction and discharge, nor did the plaintiff receive it in satisfaction and discharge: — It was held to be, on demurrer, unobjectionable. *Webb v. Weatherby*, 1 Bing. N. C. 503.
- To a count in debt, alleging, that the defendant was indebted to the plaintiffs in 10*l.* for work, &c., it was pleaded that the defendant never was indebted to the plaintiffs in a greater amount than 4*l.* in respect of the causes of action in the declaration mentioned; and, as to 4*l.*, payment into court: to these pleas it was replied, that the defendant was indebted to the plaintiffs in a greater amount, &c., in respect of the causes, &c.: which was held bad on special demurrer. *Faithfull v. Ashley*, 1 A. & E. N. S. 183.
- In an action of debt for goods sold and delivered it was pleaded, that before the commencement of the suit, and when the said sum of 20*l.* became due and payable, to wit, on &c., the defendant paid the plaintiff the said sum of 20*l.* according to the defendant's said contract and liability; concluding to the country: which was held bad on special demurrer, for not concluding with a verification. *Goodchild v. Pledge*, 1 M. & W. 363.
- Payment cannot be given in evidence under the general issue, even though the defendant can prove admissions by the plaintiff. *Linley v. Polden*, 3 Dowl. P. C. 780. *Milligan v. Thomas*, 4 *ibid.* 373.
- Reg. Gen. H. T. 4 Will. 4. (*post*, 2859.), which direct payment and acceptance to be pleaded and replied, make no difference as to the operation of the Statute of Limitations. *Brooks v. Rigby*, 2 A. & E. 21.
- A plea of payment of money into court under stat. 3 & 4 Will. 4. c. 42. s. 1. and Reg. Gen. T. T. 1 Vict. (*post*, 2869.), in bar of the further maintenance of the action, cannot be pleaded to the same cause of action to which other pleas are pleaded, in denial of the existence of that cause of action at the time of action brought. *Thompson v. Jackson*, 1 M. & G. 242.
- The court will sometimes compel a defendant to give particulars of a plea of payment. *Ireland v. Thompson*, Jur. June 23. 1838. Kennedy on Pleading, 129.
- The plea of payment is divisible, so that a verdict may be found for the defendant for the whole, or for the part actually paid, according to the fact. *Cousins v. Paddon*, 2 C. M. & R. 547.
- Where it appeared that a sum of money had been paid to the plaintiff after action brought, and there was no plea of payment, the court, on motion, the payment not being denied, allowed the damages to be reduced by that sum. *Richardson v. Robertson*, 1 M. & W. 463.
- Quære*, Whether payment, either before or after action brought, is admissible in evidence in reduction of damages? *Ibid.*
- On a plea of payment, if that be the only one, the defendant is bound to begin. *Richardson v. Fell*, 4 Dowl. P. C. 10.
- If the defendant pay money into court upon the whole declaration, and plead also, the plaintiff may take out of court the amount so pleaded, and be entitled to the whole costs. *Topham v. Kidmore*, 5 *ibid.* 676. But if the defendant pay money into court as to part, and plead to the remainder of the declaration, the defendant, by accepting the money, is entitled to the costs of that part of the declaration only; and if he do not plead to the residue, he may be non-prossed. *Goodes v. Goldsmith*, 2 M. & W. 202. 5 Dowl. P. C. 288. *Topham v. Kidmore*, *ibid.* 676.
- If money be paid into court by a defendant, who dies before verdict or interlocutory judgment, whereby the suit abates, the money can be paid out of court only to the personal representatives of the defendant, and an application on the part of his attorney will not be entertained. *Palmer v. Reiffenstein*, 1 M. & G. 94.

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1832.When there are
several counts.

Payment cannot be given in evidence under the general issue.

Statute of Limitations not affected by Reg. Gen. H. T. 4 Will. 4.

Defendant will be compelled to give particulars of a plea of payment.

Plea of payment divisible.

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1832.

Plaintiff, when
entitled to
judgment *non
obstante veredicto*.

Stay of pro-
ceedings.

Costs.

Where replica-
tion of damages
ultra the money
paid into court.

When judgment
will not be ar-
rested, on a
verdict for the
defendant, upon
a demurrable
plea.

TRIAL AND NO-
TICE THEREOF.

Notice of trial
and inquiry,
where given.

Where in *indebitatus assumpsit* for various debts, amounting in the whole to 500*l.*, the declaration admitted payment of 158*l.* on account, and alleged, that the residue remained unpaid to plaintiff's damage of 200*l.*; to which it was pleaded, that, as to the said residue, the defendant paid and plaintiff accepted 6*l.* 10*s.* in full satisfaction thereof, and of all causes of action in respect thereof; and the replication denied the payment in satisfaction; and, upon issue joined, the jury found for the defendant:—It was held, that the plea, alleging the acceptance of a less in satisfaction of a larger sum, was bad after verdict; and that the plaintiff was entitled to judgment, *non obstante veredicto*. *Down v. Hatcher*, 10 A. & E. 121.

To a declaration in debt in the common form for work and labour, with particulars of demand for contract work and extra work, it was pleaded, that the plaintiff and the defendant, by consent, gave up a contract originally made between them for work, the plaintiff agreeing to accept certain work which had been done under that contract at a reduced price; that, by virtue of such agreement, the defendant became indebted to the plaintiff in the amount mentioned in the declaration, and that the defendant in pursuance of that agreement paid the plaintiff, and he accepted the said amount. The replication traversed the payment and acceptance:—It was holden, that, upon these pleadings, the plaintiff could not give evidence of any demand not a subject of the second agreement; and that to enable himself to recover for extra work he should have new assigned; and that the particulars of demand, even if it had been confined to extra work, could not aid the pleadings. *Rogers v. Cusance*, 1 A. & E. N. S. 77.

In actions for a liquidated sum, it is not unusual for the defendant to take out a summons before declaration to stay proceedings on payment of a given amount, with costs up to that time. If the plaintiff refuse to accept it, and if the defendant afterwards pay it in and plead the payment, and then the plaintiff take it out in satisfaction, that will be *prima facie* proof, that his conduct was vexatious, and unless it be satisfactorily explained, will entitle the defendant to his costs from the date of the summons. *Lush*, Pr. 733., vide *James v. Raggett*, 2 B. & A. 776. *Roberts v. Lambert*, 2 Taunt. 283. *Johnson v. Houlditch*, 1 Burr. 578. *Ackwood v. Read*, 7 Dowl. P. C. 810.

In *Feuster v. Boggett* (1 Dowl. P. C. N. S. 406.), the plaintiff claimed by his writ 57*l.* 2*s.* 7*d.*; the defendant pleaded payment of part before action brought, and paid into court 19*l.* 12*s.* 8*d.*; at the trial it appeared, that 13*l.* part of the sum paid, was paid after action brought, and a verdict was entered for 13*l.*:—It was held, that the plaintiff was entitled to costs on the higher scale.

Where money has been paid into court in satisfaction of the cause of action, and there was a replication of damages *ultra*, and the plaintiff had not proceeded to trial pursuant to a peremptory undertaking, the court permitted the plaintiff to accept the money paid into court, upon paying the defendant the costs subsequent to such payment. *Kelly v. Flint*, 5 Dowl. P. C. 293.

After a plea of payment of money into court, in an action of *assumpsit*, the plaintiff obtained an order to sue in *forma pauperis*. A judge thereupon made an order, that the money should remain in court to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendants having obtained the verdict, the court ordered, that the money should be paid out to them in satisfaction of their costs, antecedent to the order to sue in *forma pauperis*. *Cassidy v. Tomlin*, 7 M. & W. 189.

It is not a ground for arresting a judgment, *non obstante veredicto*, that a plea, in which a verdict has been found in favour of the defendant, alleges money to have been paid into court, pursuant to stat. 3 & 4 Will. 4. c. 42. s. 21., before declaration.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice of trial, or inquiry, may be given either in town or country, unless otherwise ordered by the court or a judge.

The notice of trial in country causes is ten days, one inclusive the other exclusive; in town causes, when the defendant resides within forty miles, eight days; if beyond that, fourteen days, even though at the commencement of the action he resided in London, but has removed permanently to the plaintiff's knowledge, forty miles from thence before trial.

For the adjournment day in London, in all the courts, the notice is four days before the first sitting in term, if the defendant reside within forty miles of London, and eight days if he reside beyond that distance (Reg. Gen. E. T. K. B. 51 Geo. 3. Reg. Gen. H. T. C. P. 32 Geo. 3. Reg. Gen. H. T. Exch. 1 Will. 4.); where the defendant resides within forty miles of London, notice of continuance may be two days before the sittings; if he reside beyond that distance, it is six days. *Forbes v. Croft*, 1 M. & W. 465. *Jervis's New Rules*, 74.

In all cases of peremptory undertaking to try, a fresh notice of trial should be given, though the cause remain in the paper. *Sulsh v. Cranbrook*, 1 Dowl. P. C. 148.

A defendant who is under terms to take short notice of trial is, notwithstanding, entitled to full notice of countermand. *King v. Jones*, *ibid.* 640.

A continuance of notice of trial must be given two days before the expiration of the original notice; and where the notice of trial was for *Monday*, and the notice of continuance was given on *Saturday*, it was held bad, for Sunday was no day for that purpose. *Wardle v. Ackland*, 2 Dowl. P. C. 28.

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A continuance of notice of trial on *Friday* for *Monday* is sufficient. *Stewart v. Abraham*, *ibid.* 709.

In country causes, the notice of trial in the King's Bench should be given to the agent in town (*Hayes v. Perkins*, 3 East, 568.); but in the Common Pleas it seems it might have been given either to the agent in town, or to the attorney in the country. *Tashburn v. Havelock*, Barnes, 306.

If a defendant be served with a notice of trial by continuance, where no issue has been delivered, and no original notice of trial has been served, and shall omit to return the notice of trial by continuance, and shall give no intimation to the plaintiff of the irregularity for an unreasonable time, and until it is too late to correct it in time to go to trial at the same sittings, the irregularity will be waived. *Brown v. Wildbore*, 1 M. & G. 276.

Reports having reached this country of the death of the plaintiff abroad, the defendant obtained a rule nisi for postponing the trial; the attorney for the plaintiff having given notice, that he did not mean to oppose the motion, the court made the rule absolute, to postpone the trial until the court or a judge should direct it to proceed. *Chesser v. Ridgway*, *ibid.* 955.

Where the defendant's attorney on the first day of term was served with notice of trial, for the first sittings in term, and about a week before the day of trial the defendant was personally informed, that the cause was to be tried "next week," and two days before the day of trial the defendant and his attorney were both served with notice to produce; the court refused to grant a new trial on payment of costs, the cause having been taken pursuant to notice, as an undefended cause in the absence of the defendant's attorney, an affidavit being produced, in which it was sworn, that the clerk who had the management of the cause had mistaken the notice of trial to be for the sittings after term, and had, therefore, omitted to make the necessary preparations for trial, and in which merits were sworn to by the clerk, who stated, that "the defendant had informed him, that he has been advised by counsel, that he has a good defence on the merits, which this deponent verily believes to be true." *Nash v. Swinburne*, 1 Dowl. P. C. N. S. 190.

In an action by the public officer of a banking company, under stat. 7 Geo. 4. c. 46., for the balance of an account, the court allowed notice of executing a writ of inquiry to be served at the last place of abode of the defendant, and by sticking the same up in the master's office. In M. T. 1841 (interlocutory judgment for want of a plea having been signed on the 11th of January, 1839, and it being sworn, that the defendant had gone to South Australia to evade payment of his debts) the court granted a rule for serving notice by the same means upon the defendant, of a suggestion having been entered upon the record of the change of the name of the public officer of the banking company, under stat. 7 Geo. 4. c. 46. s. 9. *Probin v. Locock*, *ibid.* 197.

58. The expression "short notice of trial" shall, in country causes, be taken to mean four days. Short notice of trial at bar.

In town causes two days' notice of trial seems sufficient (*Tidd*, 757.); but it is usual to give as much more as the time will admit of. *Jervia's New Rules*, 74.

Short notice of trial in country causes, means in all cases four days peremptorily (*Lawson v. Robinson*, 1 C. & M. 499.), and does not mean short notice of executing inquiry. *Stephens v. Peel*, 2 C. & M. 710. Short notice of trial means four days before the commission day; and where a trial was had on a three days' notice, the court granted a new trial without an affidavit of merits. *Lawson v. Robinson*, 2 Dowl. P. C. 69. But if the notice be served after post time, and the cause be tried on the fourth day, it is no ground for a new trial, although the defendant may not appear. *Pound v. Penfold*, 3 A. & E. 655.

The defendant is only bound to take short notice of trial at the next sittings; if the plaintiff allow a sittings to pass, he must give the ordinary notice. *Dignam v. Robertson*, 3 M. & W. 431.

The usual order binding the defendant to short notice of trial (if necessary), at a particular sittings, does not apply to notice of a subsequent sittings. *Slatter v. Painter*, 1 Dowl. P. C. N. S. 35.

59. In all cases, where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but, if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and Notice of trial in certain stages of proceeding.

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forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

The notice must be given to the attorney or agent in London. Reg. Gen. H. T. 2 Will. 4. s. 57. *anté*, 2828.

Notice of trial
at bar.

60. Notice of a trial at bar shall be given to the proper officer of the court, before giving notice of trial to the party.

By stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 7. it is competent to the court to appoint days for trials at bar; and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term. *Vide etiam* Tidd, 750.

Notice of coun-
termand in
country causes.

61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given.

Notice of *countermand*, like notice of trial, ought to be in writing, and may be given to the attorney in the country as well as the agent in town; or it may be given by the acting attorney, though he be not the attorney on the record. *Cheslyn v. Pearce*, 1 M. & W. 56. 4 Dowl. P. C. 693.

The notice in country causes may be given, unless otherwise ordered, either in town or country. Reg. Gen. H. T. 2 Will. 4. s. 57. *anté*, 2828.

In town causes two days' notice is sufficient. Reg. Gen. H. T. 2 Will. 4. s. 57. *anté*, 2828.

If the defendant be under terms to take short notice of trial, and the plaintiff avail himself of it, he cannot countermand it, but must pay the costs up to the time of countermand. *Doncaster v. Cardwell*, 2 M. & W. 390. 5 Dowl. P. C. 582.

In town two
days sufficient.

62. In town causes, where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient.

Vide Reg. Gen. H. T. 2 Will. 4. s. 57. *anté*, 2828. *Doncaster v. Cardwell*, 2 M. & W. 390.

If notice of trial be given for the adjournment day, the notice of countermand must be given two days before that day, notwithstanding the court only sits on that day to adjourn to some future day. *Jervis's New Rules*, 76.

Rule for a view
may be had,
without affida-
vit or motion.

63. The rule for a view may in all cases be drawn up by the officer of the court, on the application of the party, without affidavit or motion for that purpose.

NEW TRIAL,
MOTION IN AR-
REST OF JUDG-
MENT, &c.

Costs of new
trial.

64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

Where costs are to abide the event, it does not mean the actual event, but the legal event in all the courts. Tidd, 915, 916. *Canham v. Fisk*, 2 C. & J. 128.

Where the defendant had a verdict on one of two issues in a cause, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the latter issue, on the ground of misdirection, whereupon the plaintiff discontinued:—It was held, that the defendant was not entitled to the costs of the trial. *Macclesfield (Earl of) v. Bradley*, 7 M. & W. 570.

If the plaintiff have obtained a rule for a new trial, but has neglected to take the cause down to trial for more than four terms, it is necessary to give a term's notice of motion to discharge such rule. The change of attorney does not vary this rule. *Deacon v. Fuller*, 1 C. & M. 349.

After a motion for a new trial has been granted on certain points, it is irregular to make another motion upon another point respecting the same cause, to come on at the same time. *Robertson v. Barker*, 2 Dowl. P. C. 39.

Where a rule absolute for a new trial on payment of costs had been granted, but the costs were not paid within a reasonable time, the court made a rule absolute in the first instance for discharging that rule. *Champion v. Griffiths*, 1 Dowl. P. C. N. S. 319.

After the time has expired for moving for a new trial on a writ of trial, a judge has no power to stay the proceedings of the plaintiff, in order to enable the defendant to move for a new trial. *Price v. Trenchard*, 1 Dowl. P. C. N. S. 298.

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65. No motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term.

Motions in arrest of judgment, when to be moved.

If a cause be tried in vacation, the motion must be made within the first four days of the next term. *Thomas v. Jones*, 4 M. & W. 28. *Weston v. Foster*, 2 Bing. N. C. 701. But a motion for a new trial, where the cause has been tried in term, may be made within four days after the return of the *distringas*. *Ames v. Lettice*, 6 M. & W. 216.

A rule for a new trial having been moved for by mistake in the court of King's Bench instead of the court of Exchequer, and the mistake not having been discovered till after the first four days of the term had elapsed, the barons of the Exchequer, under the circumstances, allowed the motion to stand good as of their court. *Piggott v. Kemp*, 2 Dowl. P. C. 20.

66. Judgment for want of a plea after demand may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before.

JUDGMENT, AND TIME FOR SIGNING.

This rule only applies where the time for pleading has expired.

Where an administrator who was under terms of pleading issuably pleaded *plene administravit*, and his own bankruptcy, and the plaintiff signed judgment, treating the pleas as a nullity, being inconsistent with each other, and one of them at least being false; the court refused to set aside the judgment. *Searle v. Bradshaw*, 2 Dowl. P. C. 289.

Where a defendant pleaded *numquam indebitatus* to the whole declaration, and a special plea concluding with a verification, and to which therefore counsel's signature was requisite, but delivered them without counsel's signature:—It was held, that the plaintiff might treat the whole pleading as a nullity, and sign judgment as for want of a plea. *Shield v. Quick*, 8 M. & W. 289.

Judgment for want of a plea was signed on the 17th of April, and a summons was taken out for setting it aside, which was discharged on the 23d. Execution was issued on the 27th, and on the 28th, the defendant moved the court to set aside the judgment for irregularity:—It was holden, that the application was too late. *Ibid*.

In debt on bond against A. and B. the defendant A. being under terms to plead issuably, pleaded, that the plaintiff ought not further to maintain his action, because the defendants were in partnership as attorneys, and after the commencement of the suit, in consideration that the defendant, at the request of the plaintiff and of the defendant B., would dissolve the partnership, the plaintiff agreed to forbear all further proceedings in the action; and the partnership was dissolved accordingly. The plaintiff signed judgment as for want of a plea, and on motion to set aside the judgment, the court discharged the rule with costs (*Blackburn v. Edwards*, 10 A. & E. 21.), because the plea was clearly frivolous, for an issuable plea must admit of an issue being taken on some material fact—here no such issue could be taken.

A plea denying the acceptance of a bill of exchange, and that the plaintiff gave no more than a certain limited value for the bill, is not an issuable plea within the meaning of a judge's order for further time, to plead on the usual terms. *Myers v. Lazarus*, 1 Dowl. P. C. N. S. 316.

In the case of *Simeon v. Thompson* (8 T. R. 71.) it was held, that under a judge's order to plead issuably, the defendant can only put in a plea which goes to the merits, Lord Kenyon observing, "The meaning of the term 'pleading issuably' in a judge's order is not merely pleading a plea on which issue may be taken, but such an one as goes to the merits; but this is purely for delay, and does not at all effect the merits of the question between the parties."

67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and after a verdict, or nonsuit, on the day after the appearance day of the return of the *distringas*, or *habeas corpora*, without any rule for judgment.

Judgment when signed after inquiry or verdict.

Stat. 1 Will. 4. c. 7. gives a speedy mode of acquiring execution upon writs of inquiry and verdicts. *Vide etiam stat. 3 & 4 Will. 4. c. 42. s. 16. et ante, 1822. tit. EVIDENCE.*

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings.

JUDGMENT AS IN CASE OF NONSUIT WITHOUT PREVIOUS NOTICE.

There can be no rule for judgment as in the case of a nonsuit, when the cause is not

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completely at issue, although it may have been so at a former period. Where, therefore, the plaintiff, after giving notice of trial, had withdrawn the record, and afterwards amended their replication, to which the defendant had delivered a fresh rejoinder, concluding to the country, but no surrejoinder had been delivered, the court discharged a rule obtained by the defendant for judgment as in case of a nonsuit. *Richards v. Middleton*, 1 M. & G. 53.

In shewing cause against a rule nisi for judgment, as in case of a nonsuit, it is not necessary, that the affidavit should state, that the plaintiff has a good cause of action. *Faulkner v. Whittall*, *ibid.* 472.

Where the affidavit, in answer to a rule for judgment as in case of a nonsuit, stated, that the plaintiff, after filing the declaration, was given to understand, that the defendant was insolvent, and therefore instructed his attorney not to proceed to trial: — It was holden, that this affidavit was not sufficient to compel the defendant to accede to a *set processus*, but that he was entitled to a peremptory undertaking. *Mann v. Williams*, 7 M. & W. 145.

Where upon a plea of *nulla tunc record*, the record is to be produced by the defendant, the plaintiff must rule him to do so, before he can sign judgment; but where the plaintiff is to produce the record, it is sufficient to serve a notice on the defendant. *Swainburn v. Taylor*, 1 Dowl. P. C. N. S. 349. *Semble*, otherwise in the Common Pleas.

Judgment cannot be moved for in a town cause, if no notice of trial has been given, till the second term after issue joined; in a country cause not until the term after the second assizes. Charnock's New Rules, 59.

A motion for judgment, as in case of a nonsuit, made in Trinity Term, is too early where issue had been joined (in a town cause) in Hilary Vacation, though upon a rule drawn up as of Hilary Term. *Doe d. Balls v. Margrave*, 1 M. & G. 334.

Where notice of trial has not been given, two clear terms after issue joined must elapse, before the defendant is entitled to move for judgment as in case of a nonsuit. *Higgins v. Stanley*, 2 *ibid.* 336.

Where issue is joined in Michaelmas Vacation, and no notice of trial is given, the defendant is not entitled to move for judgment as in case of a nonsuit, until Trinity Term. *Duggan v. Wilbraham*, 1 *ibid.* 240.

Where issue was joined in Easter Term, and notice of trial given for the second sittings in the same term, and the plaintiff did not proceed to try, but gave notice of countermand, and the defendant moved the same term for judgment as in case of a nonsuit: — It was held, that the motion was premature. *Isaacs v. Goodman*, 1 C. & M. 494.

If issue be joined in Trinity Term, and notice of trial be given for the sittings in Michaelmas Term, which notice is countermanded, it will be premature to move for judgment as in case of a nonsuit in that term. *Marshall v. Foster*, 2 *ibid.* 213.

Where the issue was joined in a country cause, two days before Trinity Term last, and no notice of trial was given for the assizes; a motion in Michaelmas Term for judgment as in case of a nonsuit was held, not to be too early. *Williams v. Edwards*, 3 Dowl. P. C. 183.

If issue be joined in an issuable term in a country cause, and no notice of trial be given for the ensuing assizes, the defendant cannot move for judgment as in case of a nonsuit until the term next after the second assizes. *Simonds v. Folkenham*, 1 *ibid.* 293. 1 C. & J. 513. 1 Tyrw. 501.

Where a plaintiff gives notice of trial sooner than he need, he must proceed to trial pursuant to the notice, or the defendant may move for judgment as in case of a nonsuit in the following term. *Hovell v. Powlett*, 8 Bing. 272. 1 M. & Sc. 355. 1 Dowl. P. C. 263.

If it appear, that issue is not joined by adding the *similiter*, the rule for judgment as in case of a nonsuit will be discharged. *Gilmore v. Melton*, 2 Dowl. P. C. 632. *Brown v. Kennedy*, *ibid.* 639. *Seabrook v. Cave*, *ibid.* 691.

Where the plaintiff has taken a cause down to the assizes, and it is made a *remand*, the defendant is not entitled to judgment as in case of a nonsuit. *Brown v. Rudd*, 1 *ibid.* 371.

It is no ground for discharging a rule for judgment as in case of a nonsuit, on a peremptory undertaking, that the attorney withdrew the record, because the plaintiff had promised to supply him with money, and having failed to do so, the attorney withdrew the record. *Cleasby v. Poole*, 3 Dowl. P. C. 162., vide *Nicholl v. Collingwood*, 2 *ibid.* 60.

The court will not open a rule upon a suggestion by affidavit, that the report of the master, upon which the court had acted in disposing of the rule, was erroneous. And where both parties had become insolvent since action brought, the court intimated, that they would discharge a rule nisi for judgment as in case of a nonsuit, unless the defendant would consent to a *set processus*. *Gingell v. Bean*, 1 M. & G. 555.

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, *i. e.* without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs

Judgment,
when to be
moved for.

of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule.

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This rule does not enable the court, where a rule for judgment as in case of a nonsuit for not proceeding to trial is made absolute, to grant the defendant the costs of the day on disposing of that motion; those costs must be made the subject of a separate motion. *Johnson v. Smith*, 1 Dowl. P. C. 421. But it is otherwise, where the rule is discharged.

Piercy v. Owen, *ibid.* 362. *Lenniker v. Barr*, 2 C. & J. 473. Charnock's New Rules, 59. In town causes, if the plaintiff do not give notice of trial, the motion cannot be made until the third term inclusive after issue joined: thus, if issue be joined in Hilary Term, the motion cannot be made until Trinity Term, because the plaintiff cannot be compelled to try in the term in which issue is joined, and, until the whole of the following term has elapsed, no default has been committed. If notice of trial, however, has been given, the motion may be made in the next term, but not in the same term. If issue be joined in vacation, it does not relate to the previous term, but the proceedings are calculated from the following term. *Heale v. Curtis*, 5 Dowl. P. C. 294. *Wingrove v. Hodson*, 2 *ibid.* 379. In country causes, if issue be joined before or in a non-issuable term, and no notice of trial be given, and the plaintiff do not try at the next assizes, the motion may be made in the term next after the assizes; but if issue be joined in an issuable term, the defendant must wait two assizes before the motion can be made. *Evans v. Barnard*, 3 M. & W. 276. The practice of the Queen's Bench is the same in this respect as that of the Exchequer. *Douglas v. Winn*, 4. Dowl. P. C. 559. But it is said, that in the Common Pleas the motion cannot be made in either case until after the second assizes. *Prentice v. Blott*, 2 Bing. 360. *Jervis's New Rules*, 78.

Where a rule *nisi* for judgment as in case of a nonsuit is discharged on a peremptory undertaking, either party may draw up the rule containing the undertaking. *Sawyer v. Thompson*, 1 Dowl. P. C. N. S. 449.

70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in a case of nonsuit, or to take the cause down to trial by proviso. No entry of issue necessary.

In *Gates v. Terry* (1 Dowl. P. C. 370.) Mr. Justice Taunton observed, "All, I apprehend, which has been done by the new rule, is to remove the necessity of entering the issue. The practice in every other respect remains the same. Unless notice of trial has been given, you cannot move for judgment as in case of a nonsuit in the next term." *Vide etiam Coalworth v. Martin*, 2 C. & J. 123.

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary. Trial by proviso, when.

Vide Tidd, 760, 761.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff, or other officer, upon *mesne* process, shall be of any force, unless there be present some attorney on behalf of such person in custody expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney.

WARRANT OF ATTORNEY AND COGNOVIT.

WARRANT of attorney or *cognovit* when executed by a prisoner, an attorney to be present.

This rule is incorporated in stat. 1 & 2 Vict. c. 110. s. 9; and it applies to actions of ejectment. *Doe d. Rees v. Howell*, 12 A. & E. 696.

It was holden that this rule must be strictly complied with, and that the assent of the defendant, that another attorney (who was requested to attend by the defendant's attorney's clerk) should act for him, was not a sufficient compliance with the rule, but that it was necessary, that the attorney should attend at the defendant's request. *Fisher v. Papanicholas*, 2 C. & M. 215. *Turner v. Shaw*, 2 Dowl. P. C. 244.

Under stat. 1 & 2 Vict. c. 110. s. 9. the attestation of the attorney to a *cognovit* must not only state, that he is the attorney for the party executing it, but also that he subscribes his name as such attorney. *Potter v. Nicholson*, 8 M. & W. 294.

Where a defendant, on being served with process in an action, went to the plaintiff's attorney, and without any attorney attending on his behalf, signed a consent for a judge's order for the payment of the debt and costs on a particular day, and in default thereof, that the plaintiff should be at liberty to sign judgment and issue execution, in consequence of which a judge's order was subsequently obtained by the plaintiff's attorney *ex parte*, and default having been made, judgment was signed and execution issued:—It was held, that the consent did not amount to a *cognovit*, or require to be attested, according to the provisions of stat. 1 & 2 Vict. c. 110. s. 9. *Baker v. Flower*, 8 M. & W. 670.

73. Leave to enter up judgment on a warrant of attorney, above one and under Judgment on

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old warrants of
attorney.

ten years old, must be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, upon a rule to shew cause.

Where a warrant of attorney is joint and not joint and several, and it is sought to enter up judgment against one of the parties giving the warrant, the affidavit must shew, that both defendants are alive, and not merely the one against whom it is sought to enter up judgment. *Lot v. Anderson*, 1 Dowl. P. C. N. S. 305.

Where a defendant had been seen alive in England on the 26th of August, the court granted a rule nisi for judgment on a warrant of attorney more than ten years old, when the application was made on the 10th of November; but *semble*, that it would not have granted the rule absolute in the first instance, had the warrant been less than ten years old. *Hawke v. Harris*, *ibid.* 261.

The affidavit need not now state as formerly, that the defendant was alive on a day in term; the day before the term will suffice. *Cockman v. Heltyger*, 1 Bing. N. C. 3. It is sufficient to shew, that the defendant was alive within a reasonable time before the motion was made. *Robinson v. Lester*, 3 Dowl. P. C. 531. *Watts v. Bury*, 4 *ibid.* 44. *Krell v. Joy*, *ibid.* 600. *Jordan v. Farr*, 4 N. & P. 347. *Stocks v. Wiles*, 5 Dowl. P. C. 221. And where the defendant is abroad, a great latitude is allowed. *Pemberton v. Browning*, 2 Bing. 204. *Hopley v. Thurston*, 2 D. & R. 12. *Johnson v. Fry*, 5 Dowl. P. C. 215. Thus, if a defendant be resident in the West Indies, a judgment may be signed against him on a warrant of attorney, if seen alive four months before. *Fursey v. Pilkington*, 2 Dowl. P. C. 452.

It is necessary to obtain leave of the court to enter up judgment against husband and wife on a warrant of attorney executed by the wife *dum sola*. *Staples v. Parer*, *ibid.* 764. 3 M. & Sc. 800.

Where an attesting witness to an old warrant of attorney is abroad, his affidavit need not be produced. *Taylor v. Leighton*, 2 Dowl. P. C. 746.

An affidavit by the plaintiff's attorney, that the debt is unpaid, is sufficient to support a motion to enter up judgment on an old warrant of attorney, where the attorney swears, that he has been employed in managing the money, and receiving and paying over the interest. *Ashman v. Bowdler*, 2 C. & M. 212.

Where the attesting witness to a warrant of attorney is the clerk of the attorney preparing it, the want of his affidavit, on signing judgment, is sufficiently supplied by that of his master verifying the handwriting of his clerk and of the defendant, and stating, that the former has absconded and cannot be found. *Young v. Showler*, 2 Dowl. P. C. 556.

The twenty-one days of filing warrants of attorney, under stat. 3 Geo. 4. c. 39. ss. 1 & 2. are to be reckoned *exclusively* of the day of execution. *Williams v. Burgess*, 12 A. & E. 635.

In order to obtain judgment on an old warrant of attorney, which has been filed pursuant to stat. 3 Geo. 4. c. 39. ss. 1 & 2., it is sufficient to prove the execution by an office copy of the affidavit of execution. *Bland v. Wilson*, 1 Dowl. P. C. N. S. 260.

Upon a motion to enter up judgment upon an old warrant of attorney, the absence of the affidavit of the attesting witness will not be required if the affidavit state unsuccessful endeavours to find him, and an admission by the defendant of his liability, and an acknowledgment by him of the handwriting of such witness. *Reid v. Ford*, *ibid.* 157.

Costs.

Costs of counts
not proved,
disallowed, &c.

74. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant, shall be deducted from the plaintiff's costs.

The court has not (as a rule) any power after verdict to compel a person not a party to the record to pay costs, even though he may really be the party interested in the decision of the suit. The exception to this rule is in actions of ejectment; in all other cases, the defendant, if desirous of obtaining costs from a person not a party to the record, should apply for security for costs. *Evans v. Rees*, 1 Dowl. P. C. N. S. 538.

The general issue pleaded to a declaration containing several counts, tenders a distinct issue on each count; the defendant, therefore, is entitled under this rule to the costs of the counts found for him. *Cox v. Thomason*, 1 Dowl. P. C. 572. *Knight v. Brown*, 3 Bing. 643. 1 Dowl. P. C. 730. So, if there be two demises in a declaration or ejectment, each demise raises a distinct issue (*Doe v. Webber*, 2 A. & E. 448. 4 N. & M. 581. 1 H. & W. 10.); or if there be one demise, to recover several tenements (*Doe v. Errington*, 4 Dowl. P. C. 602. 1 H. & W. 502.); or where a declaration in covenant assigns several breaches. *Daubus v. Rickman*, 4 Dowl. P. C. 129. The defendant is entitled to the costs not only of the pleadings, but of the witnesses and incidental expenses of the issues found for him. *Doe v. Webber*, 4 M. & N. 381. 1 H. & W. 10. But where several issues are found for the plaintiff and some for the defendant, the latter is entitled to the costs of issues found for him; but he is not entitled to the costs of his witnesses, unless their testimony be confined to the issues found for him. *Lardner v. Dick*, 2 C. & M. 389. 2 Dowl. P. C. 339. *Richards v. Cohen*, 1 *ibid.* 533. If the plea be bad on which the defendant succeeded, he will not be entitled to the costs of that issue (*Cartwright v. Cook*, *ibid.* 529.); if it be held good after argument, he will be entitled not only to the costs of the trial, but to the costs of the argument, &c. *Goodell v. Archer*, 1 H. & W. 559. But if the defendant plead the general issue, and several special pleas

and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas. *Hart v. Cuthbush*, 2 Dowl. P. C. 456. *Spencer v. Hamerton*, 6 N. & M. 22. *Dann v. Crease*, 2 Dowl. P. C. 269., vide *Vallance v. Adams*, *ibid.* 118. It was formerly the practice to nonsuit the plaintiff, or discharge the jury as to the other issues, where, upon one issue the defendant had a clear defence to the action: but since this rule, the practice has been to try the cause with a view to the costs; even though upon one issue, the defendant has a perfect answer to the action. *Jervis's New Rules*, 80.

If the jury find immaterial issues in favour of a defendant, and the plaintiff has afterwards judgment *non obstante veredicto*, neither party is entitled to the costs of those issues. *Goodburne v. Bowman*, 2 Dowl. P. C. 206.

Where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge. *Nanny v. Kenrick*, *ibid.* 334.

If upon a motion to review the taxation of the plaintiff's costs, upon the ground, that the action was brought for an act done under stat. 10 Geo. 4. c. 44. s. 41. (the Police Act); that the judge, who tried the cause, had not certified his approbation of the action and of the verdict, and that the plaintiff was not entitled to those costs; and if it be disputed, that the action was not commenced for any thing done in pursuance of that statute; the court will consult the notes of the judge to decide that question: but it seems, that they will not try it upon affidavit. *Bartholomew v. Carter*, 1 Dowl. P. C. N. S. 212.

Where several special counts are inserted in the same agreement, the plaintiff is entitled to a verdict on one count only, and to the costs of that count. But costs of a rule for reviewing taxation are not given, where the mistake is with the master. *Ward v. Bell*, 2 Dowl. P. C. 76.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment paper, *postea*, or inquisition, has been seen by the proper officer.

EXECUTION.

Writs of execution to be sealed only.

A plaintiff may sue out a *ca. sa.* before the return of a *fi. fa.* previously issued, if the latter writ has not been executed. *Dicas v. Warne*, 2 Dowl. P. C. 762. 3 M. & Sc. 814.

A mistake in a *ca. sa.* in stating the amount recovered may be amended on payment of costs.

76. A writ of *habere facias possessionem* may be sued out without lodging a *præcipe* with the officer of the court.

Hab. fac. pos. without *præcipe*.

77. In actions commenced by bill, a *ca. sa.* to fix bail shall have eight days between the teste and return, and in actions commenced by original fifteen, and must in London and Middlesex be entered four clear days in the public book at the sheriff's office.

Ca. sa. to fix bail—the teste and return, &c.

The proceedings by bill and original were abolished by stat. 2 Will. 4. c. 39.; and by stat. 3 & 4 Will. 4. c. 67. s. 2. all writs of execution may be tested on the day in which the same were issued, and be made returnable immediately after the execution thereof.

The recognisance of bail is taken in the same form as before stat. 1 & 2 Vict. c. 110., and therefore Mr. Jervis (*New Rules*, 81.) considers, that the same practice must be pursued to fix the bail as before: what that practice should be, however, is very doubtful. It has been decided that a *ca. sa.* returnable immediate, cannot be used as the foundation of proceedings to fix the bail. *Kemp v. Hyslop*, 1 M. & W. 58. 4 Dowl. P. C. 687.

The judgment has reference to the day on which it is signed; and it seems, that the *ca. sa.* may be issued immediately. It must be returnable on some day in the same or following term (*Ibid.*); and in the uncertainty of the practice, it will be prudent to allow fifteen days between the teste and return. *Jervis's New Rules*, 81.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs.

SCIRE FACIAS.

Plaintiff cannot quash his own *sci. fa.* without costs, if defendant have appeared.

The rule to quash a *scire facias* is a rule *nisi* only. *Ade v. Stubbs*, 4 Dowl. P. C. 282.

79. A *scire facias* to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a judge's order in vacation, nor, if more than fifteen, without a rule to shew cause.

The *scire facias* upon a judgment must be sued out of the court where the judgment was given; but if the record have been removed, then out of the court where the record is.

Scire facias to revive judgment, how obtained.

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If the judgment be under seven years old, the *scire facias* issues, of course, upon a *præcipe*, without rule or motion; if above seven and under ten, a side-bar or treasury rule is obtained. *Jervis's New Rules*, 82.

Where a plaintiff obtains judgment against the public officer of a joint stock banking copartnership, pursuant to stat. 7 Geo. 4. c. 46. s. 9., he may issue execution against the defendant without first suing out a *scire facias*. *Harwood v. Law*, 7 M. & W. 303. The rule *nisi* must be served on all the defendants (*Pauls v. Seaman*, 5 N. & M. 673.); and, when once attained, cannot be resisted for an irregularity in the judgment. *Thoms v. Williams*, 3 Dowl. P. C. 655. The affidavit of the existence of the debt to ground a motion for a *scire facias* to revive the judgment, must either be made by the plaintiff himself, or by some person who, from his connexion with the cause, has the means of knowing the facts. *Norfolk (Duke of) v. Leicester*, 1 M. & W. 204. 4 Dowl. P. C. 746.

Arrest on a writ of *ca. sa.* is no bar to a *scire facias* on the judgment, if the party have been discharged out of custody by reason of irregularity in issuing the writ on his own application. *Collins v. Beaumont*, 10 A. & E. 225.

Scire facias on recognisance to be brought in Middlesex only.

80. A *scire facias* upon a recognisance taken in Serjeant's Inn, or before a commissioner in the country and recorded at Westminster, shall be brought in Middlesex only, and the form of the recognisance shall not express where it was taken.

No judgment on *sci. fa.* for non-appearance without leave.

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of the *scire facias*.

The plaintiff's should give notice of the *scire facias* to the bail by summons, if the bail reside in Middlesex, or by notice, if they reside elsewhere; and if neither of these things can be done, the plaintiff must shew by affidavit, that he has attempted to summon the bail, or give them notice, and shew what endeavours he has made for the purpose. *Higgins v. Wilkes*, 1 Dowl. P. C. 447. *Newton v. Maxwell*, 2 C. & J. 65. *Sabine v. Field*, 1 C. & M. 466. *Wimall v. Cook*, 2 Dowl. P. C. 173. The language of the rule is general, and not limited to proceedings against bail. *Jackson v. Elm*, 1 ibid. 515. Respecting costs in *sci. fa.*, vide stat. 3 & 4 Will. 4. c. 42. s. 34.

A notice of motion for leave to sign judgment on a *scire facias* was left with a person at a house at H., who stated herself to be the defendant's housekeeper, that defendant was somewhere in London, and that she could not account for his absence, except that he was concealing himself in order to avoid his creditors: — was holden to be sufficient service. *Dixon v. Thorold*, 8 M. & W. 297.

Appearance by bail on *sci. fa.*

82. A notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail, or defendant on a *scire facias*.

ERROR.

Writ of error a *superseedeas* from allowance.

83. A writ of error shall be deemed a *superseedeas* from the time of the allowance.

SUPERSEDEAS.

Proceedings against prisoners, within what periods to be taken.

The court has no power to set aside the allowance of a writ of error. *Boreman v. Brown*, 1 Dowl. P. C. N. S. 281.

By Reg. Gen. H. T. 4 Will. 4. s. 9. (*post*, 2849.), no writ of error shall be a *superseedeas* of execution, until service of the notice of the allowance containing some particular ground of error intended to be argued; provided, that if the error stated in such notice shall appear to be frivolous, the court or a judge upon summons may order execution to issue.

This rule of Reg. Gen. H. T. 4 Will. 4. does not apply to errors in fact; and, therefore, a writ of error *coram vobis* is a *superseedeas* from the time of notice, that it is set out. *Levy v. Price*, 2 M. & W. 533.

When bail may stay proceedings in error.

84. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

85. The plaintiff shall proceed to trial, or final judgment against a prisoner, within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one.

If a plaintiff give notice of trial, and set down his cause in the third term inclusive after declaration, he has complied with this rule, and the defendant is not *superseedeable*. *Myers (Knt.) v. Cooper*, 2 Dowl. P. C. 423.

The words "final judgment," which are in the alternative, mean, as distinguished from trial, a final judgment after interlocutory judgment. *Heaton v. Wittaker*, 4 East, 345.

If a trial take place in Hilary Vacation, and the defendant surrender after it, and before the following term, he ought to be charged in execution in Easter Term, or he will be *superseedeable* under this rule. *Borer v. Baker*, 2 Dowl. P. C. 608. 1 A. & E. 860. *Baker v. Bailey*, 3 M. & W. 415. By the old practice of all the courts, a tender in vacation, after

trial or final judgment was deemed a render of the preceding term; and under the present rule, that practice is applicable. Reg. Gen. H. T. K. B. 26 Geo. 3. Reg. Gen. E. T. C. P. 8 Geo. 1. Reg. Gen. T. T. Exch. 26 & 27 Geo. 3. The plaintiff must charge the defendant in execution within the second term after the trial, without reference to the date of the declaration. *Foulkes v. Burgess*, 2 M. & W. 849. 6 Dowl. P. C. 109. A defendant who has once become supersedeable, for want of being charged in execution, cannot afterwards be charged in execution on the same judgment. *Hewitt v. Melton*, 1 C. & M. 579.

Where a defendant has surrendered in discharge of his bail after trial, and the plaintiff has not charged him in execution within two terms after the trial, the defendant may be superseded, and cannot afterwards be taken on a *ca. sa.* issued on a judgment afterwards signed. *Brown v. Gardner*, 1 Dowl. P. C. 426. Charnock's New Rules, 72.

86. The marshal of the King's Bench Prison and the warden of the Fleet shall present to the judges of the courts of King's Bench, Common Pleas, and Exchequer, in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable; shewing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable.

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List of supersedeable prisoners to be presented to the judges, when.

87. If by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any person detained in the actual custody of the marshal of the King's Bench Prison or warden of the Fleet, be not entitled to a *supersedeas* or discharge to which such prisoner would, according to the general rules and practice of the court, be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules and practice, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the marshal or warden shall forthwith after the receipt of such notice cause the matter thereof to be entered in the books of the prison, and shall also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable.

Cause of detainer to be stated to the marshal or warden, and to be entered.

88. All prisoners who have been or shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet Prison as to all such actions in which they have been or shall be supersedeable.

Prisoners to be discharged one month after they become supersedeable.

These rules apply only to prisoners within the walls. *Siggers v. Brett* (Clerk), 5 B. & Ad. 455.

89. The order of a judge for the discharge of a prisoner, on the ground of a plaintiff's neglect to declare, or proceed to trial, or final judgment, or execution in due time, may be obtained at the return of one summons served two days before it is returnable, such order in town causes being absolute, and in country causes, unless cause shall be shewn within four days, or within such further time as the judge shall direct.

Order to obtain discharge, a supersedeable prisoner.

The notice must be accurately entitled in the cause, and must be served upon the plaintiff (*Gordon v. Twine*, 4 Dowl. P. C. 560.); or if he cannot be found, upon his attorney. *Wilson v. Mokler*, 1 ibid. 549. *Biddulph v. Gray*, 5 ibid. 406. If the plaintiff be dead, it must be served on his personal representative, if he have one; if not, upon the attorney and the plaintiff's next of kin. Exp. *Richer*, 4 ibid. 275. Jervis's New Rules, 86.

Prisoner in execution under 20*l.*, rule or order to discharge absolute in first instance.

90. A rule or order for the discharge of a debtor who has been detained in execution a year, for a debt under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

Order to deliver or tax attorney's bill obtained on one summons.

Vide ante, 403—492. tit. ATTORNEY.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the same having been served two days before it is returnable.

ATTORNEY AND HIS BILL.

92. One appointment only shall be deemed necessary for proceeding in the taxation of costs, or of an attorney's bill.

Only one application necessary

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No set-off in
prejudice of
attorney's lien.

93. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

This rule is inflexible and applicable to all cases. *Hambleton v. Higginbottom*, *ca. Jervis's New Rules*, 86.

A reference of all matters in difference between parties will not, under this rule, affect the attorney's lien. *Cowell v. Betteley*, 2 Dowl. P. C. 780. *Charnock's New Rules*, 80.

It extends only to the costs of the particular cause (*Watson v. Maskell*, 1 Bing. N. C. 366.), but it gives the attorney a lien on a judgment obtained by him for his costs as between attorney and client. *Watson v. Maskell*, 3 Dowl. P. C. 638. 1 Bing. N. C. 727. It applies likewise to costs in adverse suits only; and if a plaintiff succeed against one defendant, but fail against the others, the defendant who fails may set off the costs of the defendants who succeed. *George v. Elston*, 3 Dowl. P. C. 419. 1 Bing. N. C. 513. *Lees v. Raffitt*, 3 A. & E. 707. *Latham v. Hyde*, 1 C. & M. 128. 1 Dowl. P. C. 594.

MISCELLA-
NEOUS.

Pluries capias
need not be
stamped for
exigent.

To charge de-
fendant in ex-
ecution not
necessary to
enter proceed-
ings.

Side-bar rules
on last day of
term.

Rules enlarged
without notice.

Security for
costs to be
moved for be-
fore issue
joined.

94. It shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants to authorise the *exigent* to make out an *exigent*.

For the mode of proceeding to outlawry after summons and *distringas*, *vide stat.* 1 Will. 4. c. 39. s. 5.

95. In order to charge a defendant in execution it shall not be necessary, that the proceedings be entered of record.

96. Side-bar rules may be obtained on the last, as well as on other days in term.

97. A rule may be enlarged, if the court think fit, without notice.

98. An application to compel the plaintiff to give security for costs, must in ordinary cases be made before issue joined.

The defendant must appear before he makes the application; but the affidavit upon which the application is founded need not disclose the stage of the proceedings. *Cole v. Beatty*, 5 Dowl. P. C. 161.

Before moving for security for costs, an application must be made to the opposite party to give security (*Adams v. Brown*, 1 *ibid.* 273. *Baillie v. De Bernales*, 1 R. & A. 331. *Jones v. Jones*, 2 C. & J. 207. 1 Dowl. P. C. 313. *Fountain v. Shek*, 5 *ibid.* 331.); and unless it be so made, the defendant will have to pay the costs. *Fletcher v. Lew*, 3 A. & E. 551. Without a previous application, however, the rule, when made absolute, will stay the proceedings until the security be given.

A plaintiff will not be compelled to give security for costs merely on the ground of his poverty. *Ross v. Jacques*, 8 M. & W. 135. But where the plaintiff assigned all his effects to N. for the benefit of his creditors, with power to sue in his name, and afterwards he became insolvent and also bankrupt, and had not obtained his certificate, and had no means of paying the costs of an action; and N. having commenced an action in the plaintiff's name and without his authority (except under the assignment), the court stayed the proceedings till N. should give the defendant security for costs. *Elliot v. Kendrick*, 12 A. & E. 597.

A plaintiff cannot be required to give security for costs, unless it appear, that he is gone abroad for more than a temporary absence. *Taylor v. Fraser*, 2 Dowl. P. C. 621. And if one of two plaintiffs be resident abroad and the other in this country, the court will not compel the absent plaintiff to give security for costs. *Anon.* 2 C. & J. 21. 1 Dowl. P. C. 300. If a plaintiff, after leaving this country, commence an action, he will be compelled to find security for costs: but a plaintiff may be excused finding security, where his absence is temporary, and where he left after the commencement of the action. *Wells v. Barton*, 2 *ibid.* 160.

A plaintiff resident out of the jurisdiction is bound to give security for costs, though no previous application has been made to the plaintiff's attorney, or notice of motion given; but without such application or notice the rule *nisi* will not stay proceedings. The stage of the proceedings at the time of the motion need not be stated by the defendant; it is for the plaintiff to shew, that it is too late. *Jones v. Jones*, 1 *ibid.* 313. 3 C. & J. 207.

The defendant can apply to the court at any time before issue joined. *Fletcher v. Lew*, 3 A. & E. 551. And even after issue joined, if the necessity for such security has then come first to his knowledge, and the application be made promptly. *Anon.* 2 C. & J. 21. 5 B. & A. 702. *Wainwright v. Bland*, 2 C. M. & R. 740. 4 Dowl. P. C. 34. But if the defendant plead, after it has come to his knowledge, that the plaintiff is abroad, the latter will not be compelled to give security for costs. *Brown v. Wright*, 1 *ibid.* 95.

Where security for costs has been given, the defendant will not be entitled to fresh security, if the sureties become insolvent. *Jones v. Jacobs*, 2 *ibid.* 442.

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A plaintiff went to reside abroad subsequently to his cause being set down for argument in the demurrer paper. On an application for security for costs, the court directed, that the demurrer should be allowed to be argued; and in the event of the judgment being in favour of the plaintiff, that proceedings should be stayed until he gave security for costs. *Kemble v. Mills*, 1 *M. & G.* 565.

The defendant cannot, after verdict, have security for costs upon a new trial (*Oxenden v. Cropper*, 4 *Dowl. P. C.* 574.); nor, if he have agreed to take short notice of trial. *Montellano (Duke of) v. Garcias*, 1 *Bing.* 67.

99. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer, but in other cases it may.

Leave to compound penal actions.

On a motion to compound a penal action, it must appear, that the defendant has pleaded.

Rez v. Collier, 2 *Dowl. P. C.* 581.

Leave of the court for compounding a penal action, where the crown is entitled to a portion of the penalty, cannot be obtained without the consent of the attorney general. *Rez v. Gibbs*, 3 *ibid.* 345. Charnock's New Rules, 83.

100. Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person without the appearance of the attorney or his clerk for that purpose before the officer of the court.

A defendant may withdraw his plea in person.

101. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose.

No rule for jury without a judge's order.

102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection.

An order to inspect court rolls absolute in first instance on affidavit, &c.

103. In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the venue shall not be brought back except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid.

Rule to change venue absolute in first instance.

The court will waive the strict rule as to change of venue in favour of liberty. *Keys v. Smith*, 2 *Dowl. P. C.* 210. But an allegation, that an impartial trial cannot be had must be satisfactorily made out to induce the court to interfere. *Briscoe v. Roberts*, 3 *ibid.* 434. If a defendant move to change the venue as of right, it is not sufficient to swear, that the cause of action did not arise in the county stated in the declaration, and that it will be inconvenient for him to try there. He must make the ordinary affidavit, shewing in which county the cause of action did arise. *Palmer v. Terry*, 2 *ibid.* 566. A motion to change the venue on special grounds ought to be made after plea pleaded. *Cotterill v. Dixon*, 1 *C. & M.* 661.

The motion cannot be made, except on special grounds, after the defendant has had time to plead, upon the terms of taking short notice of trial (*Shipley v. Cooper*, 7 *T. R.* 698. *Haythorn v. Bush*, 2 *Dowl. P. C.* 240. *Nun v. Taylor*, 1 *Bing.* 186. *Tonks v. Fisher*, 2 *Dowl. P. C.* 22.); nor where the order for time is drawn up in the "usual terms," one of which is taking short notice of trial; but if the terms be merely to plead issuably, the motion may be made. The venue cannot be changed on the usual affidavit, where part of the demand arises on a bill of exchange. *Walshew v. Syers*, 1 *C. M. & R.* 596. If a defendant apply to change the venue after plea, the onus of shewing special grounds for the change lies on him. *Higgins v. Houseman*, 3 *Dowl. P. C.* 549.

In an information of intrusion, the crown has not the right, as of its prerogative, to lay the venue in any county, or to issue the *venire facias juratores* into a different county from that in which the venue is laid. *Att. Gen. v. Churchill (Lord)*, 8 *M. & W.* 171.

104. Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others up to the time of paying money into court.

Paying money into court, where actions are consolidated.

105. After judgment by default, the entry of any subsequent continuances shall not be required.

After judgment by default, continuances not necessary.

By the Reg. Gen. H. T. 4 Will. 4. R. 2. s. 2. (post, 2853.) continuances were abolished in every case except the *jurata ponitur in respectu*.

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Plaintiff discontinuing after plea to undertake, &c.

106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation defendant shall be at liberty to sign a *non pros*.

Where, after a rule to discontinue, the defendant moved for judgment, as in case of a nonsuit, the court discharged the rule (*Cooper v. Holloway*, 1 Hodges, 75.); and where the plaintiff, instead of paying the costs, took the cause to trial against a verdict, the court refused to disturb it. *Edgington v. Proudman*, 1 Dowl. P. C. 152.

Pleadings to the country not to be signed.

107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.

Respecting pleas which did or did not require counsel's signature, *vide* Tidd, 672. The pleas of *plend administravit* in the Exchequer and Queen's Bench (*Reed v. Spar*, 2 M. & W. 76. 5 Dowl. P. C. 330.), and *nul tiel record* in the Common Pleas (*Hubert v. Weymouth* (Lord), 2 Hen. Black. 816.), do not require signature by counsel.

Where no new matter can be pleaded, no rule to rejoin.

108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin.

No distinct roll for imparlance.

109. It shall not be necessary that imparlances should be entered on any distinct roll.

It has been previously stated, that imparlances were abolished by the Uniformity of Process Act.

Pauper, when to pay costs.

110. Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to shew cause, why he should not pay costs, though he has not been dispaupered.

A rule requiring a pauper to pay the costs of the day, for not proceeding to trial is nisi in the first instance (*Doe d. Lindsey v. Edwards*, 2 Dowl. P. C. 468.); and if he withdraw his record, because he is not prepared with a certain necessary document at the assizes, the court will compel him to pay the costs of the day. *Ibid*. 471.

A party may be permitted to sue in *formd pauperis* after the commencement of the suit. *Doe d. Allis v. Owens*, 1 Dowl. P. C. N. S. 404. *Casey v. Tomlin*, 7 M. & W. 189.

II.

Debt and costs to be indorsed on process.

II. And it is further ordered, that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The indorsement shall be written or printed in the following form:—"The plaintiff claims — for debt, and — for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

The writ of summons being now the commencement of the action, the indorsement must be on that process, and not on the *capias*. By Reg. Gen. M. T. 3 Will. 4. s. 5. (*post*, 2843.) this rule is extended to the writ of summons under stat. 2 Will. 4. c. 3., and applies only to actions for a liquidated debt. *Perry v. Patchett*, 2 Dowl. P. C. 667. The rule is not directory but compulsory; and, if not complied with, the process will be set aside (*Ryley v. Boissomas*, 1 *ibid*. 383.), for it cannot be amended. *Trotter v. Bea*, 1 Bing. N. C. 516. 3 Dowl. P. C. 407. Thus, a judge at chambers has no jurisdiction to amend the indorsement on a writ of summons, by changing the debt from 25*l*. to below 20*l*. that the action may be tried before the sheriff. *Ibid*. If the debt and costs be not paid within the four days, it cannot be done afterwards on the same terms. *Biddidge v. Slaney*, 2 Bing. N. C. 142. For construction of this rule, *vide etiam* *Esau v. Bidgood*, 4 Bing. 63. *Coppelo v. Brown*, 3 Dowl. P. C. 166. *Sealy v. Hume*, *ibid*. 196.

Form of indorsement

III. And it is further ordered, that in *Hilary* and *Trinity* Terms, a plaintiff in any country cause may file or deliver a declaration *de bene esse*, within four days after the end of the term, as of such term.

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There can be now no declaration *de bene esse*. *Vide stat. 2 Will. 4. c. 39. et antiq.*, 2787.

III.
Four days after
Hilary and
Trinity Terms,
plaintiff may
declare *de bene*
esse.

IV. And it is further ordered, that the rules heretofore made in the courts of King's Bench and Common Pleas respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied in the courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only in the nature of the action stated, in manner following, viz. A. B. was attached to answer C. D. in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs.

IV.
Original writs
not to be re-
cited in decla-
rations.

V. And it is further ordered, that, upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause in the term next after that in which the writ is returnable, and in a country cause at the ensuing assizes.

V.
When bail-bond
to stand as a
security.

Since stat. 2 Will. 4. c. 39. there can be no declaration *de bene esse*, *vide antiq.*, 2787.

VI. And it is further ordered, that the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

VI.
No costs of a
witness called
only to prove
a copy of a
public docu-
ment allowed,
unless admis-
sion previously
required.

Vide Reg. Gen. H. T. 4 Will. 4. s. 20. post, 2851.

VII. And it is further ordered, that the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before him, shall indorse upon such summons that he does not think it reasonable to require such admission.

VII.
No costs of
proving hand-
writing to any
document
stated on
pleadings,
without sum-
mons to admit.

Vide Reg. Gen. H. T. 4 Will. 4. s. 20. post, 2851.

VIII. And it is further ordered, that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day and exclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

VIII.
Computation
of time.

IX. And it is further ordered, that the above rules shall take effect on the first day of next Easter Term.

IX.
Commence-
ment of Rules.

III. EASTER TERM, 2 WILL. 4. 1832.

It is ordered, that the days between Thursday next before, and the Wednesday next after Easter-day, shall not be reckoned or included in any rules, or notices, or other proceedings, except notices of trial or notices of inquiry, in any of the courts of law at Westminster.

E. T. 2 Will. 4.
1832.

The days be-
tween Thurs-
day before and
Wednesday
after Easter-day
not reckoned,
except in
notices of trial
or inquiry.

Whereas by one of the rules made in Hilary Term last past, it was, amongst other things ordered, that the want of an *ac etiam*, where a defendant is arrested, shall not be deemed ground for discharging the defendant or the bail; but the bail-bond, or recognisance of bail, shall be taken with a penalty or sum of 40*l.* only. And whereas it was not intended, that the said rule should apply to writs of *quo minus*, or to other writs which heretofore have never had an *ac etiam*, it is therefore hereby declared and ordered, that the said part of the

Reg. Gen. H. T.
2 Will. 4. s. 10.

Not to apply to
writs of *quo*
minus.

E. T. 2 WILL. 4. 1832. said rule shall extend to those writs only in which there has heretofore been an *ac etiam* clause.

M. T. 3 WILL. 4. 1832.

Writ to contain the names of all the defendants in the action.

IV. MICHAELMAS TERM, 3 WILL. 4. 1832.

1. It is ordered, that every writ of summons, *capias*, and detainer, shall contain the names of all the defendants (if more than one) in the action, and shall not contain the name or names of any defendant or defendants in more actions than one.

This rule was made to remedy the practice of joining several distinct causes of action against different individuals, to the number of four, in the same process. *Thompson v. Cotter*, 1 M. & S. 55. *Yardly v. Burgess*, 4 T. R. 697. n. And it may be here observed, that a *distringas* may issue against a peer of the realm under stat. 2 Will. 4. c. 39. s. 3. *Davis v. Lichfield (Earl of)*, 1 Dowl. P. C. N. S. 363.

A plaintiff may issue several writs of summons for the same cause of action, of the same date, and upon the same *præcipe*, if all the defendants be named in each writ (*Aspe v. Coppard*, 3 M. & W. 57.); but where the names of two defendants were inserted in the writ of summons, separate proceedings against each were held irregular. *Pepper v. Whalley*, 1 Bing. N. C. 71. 2 Dowl. P. C. 821. The plaintiff may declare against some only of the defendants named in the writ (*Caldwell v. Blake*, 2 C. M. & R. 349. 3 Tyrw. 618. *Thomas v. Nokes*, 5 Dowl. P. C. 656. *Knowles v. Johnson*, 3 Bial. 653.); but he cannot afterwards declare against the others in a separate action.

Fees to be taken.

2. It is further ordered, that the following fees shall be taken:—

For signing all writs for compelling an appearance, whether of summons, <i>distringas</i> , <i>capias</i> , or detainer, and whether the same shall be the first writ, or an <i>alias</i> or <i>pluries</i> writ, and whether the same shall issue into the same county as the preceding writ, or into a different county—	2 6
For sealing the same	0 7
For entering an appearance for every defendant	1 0
Unless an appearance shall be entered for more than one defendant by the same attorney; and, in that case, for every additional defendant	0 4

The filacer need not sign a writ of summons, if the seal of the court be impressed upon it. Thus, in *Burt v. Jackson* (2 Dowl. P. C. 747. 3 M. & Sc. 553.) Chief Justice Tindal said, "Previous to the Uniformity of Process Act, signing by the filacer was unnecessary;" "and although by this rule the filacer is entitled to take certain fees for signing writs, it does not therefore follow, that he must sign them."

When day of service to be indorsed on the writ.

3. It is further ordered, that "the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant, according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made."

Service of writ of summons.

If the defendant improperly get possession of the writ of summons, the court will allow an appearance to be entered without any indorsement, and order the defendant to pay the costs. *Brook v. Edridge*, 2 Dowl. P. C. 647., *vide* stat. 2 Will. 4. c. 39. s. 1.

Where unsuccessful attempts were made to serve the defendant with a copy of the writ of summons, by application at his "warehouse" in the city, with regard to which the usual affidavit was made, in the course of which it was ascertained, that the defendant's residence was at Peckham, though the precise locality was refused to be disclosed by the informant of the deponent, the court granted a *distringas*, no further efforts to discover the residence of the defendant being sworn to. *Elburne v. Marshall*, 1 Dowl. P. C. N. S. 188.

Where the original writ of summons was sent by the plaintiff to the defendant at his request, but he kept it, and did not appear, the court refused to allow the plaintiff to enter an appearance for the defendant according to the statute, without indorsing on the writ the date of the service, pursuant to the rule of M. T. 3 Will. 4. *Athanas v. Howell*, 7 M. & W. 213.

Amendment of writ of summons, to save the Statute of Limitations, where no service had been effected.

The court amended a writ of summons by altering the cause of action from "debt" to "promises," in order to save the Statute of Limitations, although more than four months had elapsed from the date of the writ, and no service had been effected. *Eccles v. Cole*, 1 Dowl. P. C. N. S. 34.

4. It is further ordered, that the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return

thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, and in default thereof shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the court or a judge shall direct.

5. It is further ordered, that the second rule of Hilary Term, 1832, shall be applicable to all writs of summons, *distringas*, *capias*, and detainer, issued under the authority of the said act, and to the copy of every such writ.

Vide ante, 2840. Reg. Gen. H. T. 2 Will. 4. II.

The rule does not apply to the writ of *capias* under stat. 1 & 2 Vict. c. 110., nor does there appear in that case any necessity for such an indorsement; for, by the indorsement on the writ of summons, the defendant knows for what the action is brought. *Jervis's New Rules*, 95.

6. It is further ordered, that any *alias* or *pluries* writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the plaintiff in such case upon the *alias* or *pluries* writ of summons describing the defendant as late of the place of which he was described in the first writ of summons; and upon the *alias* or *pluries* writ of *capias* referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

The *alias* or *pluries* writs of summons and *capias* are given by stat. 2 Will. 4. c. 39. s. 10., and this rule, which was intended to regulate those writs, does not deprive the plaintiff of his right to issue concurrent writs into several counties. *Dunn v. Harding*, 10 Bing. 553. *Rodwell v. Chapman*, 1 C. & M. 70. *Angus v. Coppard*, 3 M. & W. 57.

7. It is further ordered, that the *alias* or *pluries* writ of summons into another county shall be in the following form:—

William the Fourth, &c.

To C. D. of —, in the county of —, late of —, in the county of — [*original county*]. We command you, as before [*or often*] we have commanded you, &c. [*as in the writ of summons No. 1. in the schedule of the said act*].

And that the *alias* and *pluries* writ of *capias* shall be in the following form:—

William the Fourth, &c.

To the sheriff of —. We command you, as heretofore we have commanded the sheriff of —, that you omit not, &c. [*as in the writ of capias No. 4. in the schedule of the said act*].

This rule is repealed by stat. 1 & 2 Vict. c. 110.

8. It is further ordered, that in every writ of *distringas* issued under the authority of the said act, a *non omittas* clause may be introduced by the plaintiff without the payment of any additional fee on that account.

The affidavits on which an application for a *distringas* is grounded must state where the house of the defendant, at which the calls were made, is situated. *Hallon v. White*, 2 M. & G. 295.

9. It is further ordered, that when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

Vide stat. 2 Will. 4. c. 39. s. 12. In *Lloyd v. Jones* (1 M. & W. 549. 5 Dowl. P. C. 161.) the indorsement was, "This writ was issued by W. Loaden, 32. Great James Street, Bedford Row, agent for the plaintiff in person, who resides at Barmouth;" which was holden bad, because it did not shew, that the writ was issued by Loaden as attorney, but merely as agent.

10. It is further ordered, that if the plaintiff or his attorney shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof, shall not on that account be held void, but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge.

The indorsements are required by stat. 2 Will. 4. c. 39. s. 12.

M. T. 3 Will. 4. 1832.

When day of execution to be indorsed on *capias*.

Reg. Gen. 2 H. T. 1832, as to the indorsing writs, to be applicable to all the new writs.

Alias and *pluries* writs may be issued into other counties.

Forms of writs.

Form of *alias* or *pluries* summons.

Alias or *pluries capias*.

No fee to be paid for a *non omittas* clause in a *distringas*.

Attorney's as well as agent's name to be indorsed on the writ.

Writ will be irregular for want of indorsement.

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When a writ of summons was indorsed, "The plaintiff claims 95l. 9s. 6d. for debt, and — for costs," leaving the amount of the costs in blank: — It was held to be irregular. *Truslove v. Whitechurch*, 1 M. & G. 426.

A defendant served with the copy of a writ of summons, which writ, if truly copied, would be irregular, may move "to set aside the service of the writ;" and in a case where it was not shewn, whether the copy served was or was not a true copy, the court made such rule absolute. *Ibid*.

Where defendant not in actual custody.

11. It is further ordered, that upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected; and if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail.

The plaintiff cannot, as previously stated (*ante*, 2787.), declare *de bene esse*.

Where the time to plead, &c. expires after 10th August, the party to have the same time after 24th October as if the pleading had been filed, &c. on that day.

12. It is further ordered, that in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose, after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th day of October; but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

If the time for pleading do not expire until after the 10th of August, although it may be *enlarged time*, the defendant has still the same time for pleading, as if the declaration had been filed or delivered on the 24th of October. *Wilson v. Bradstock*, 2 Dowl. P. C. 416.

If a defendant obtain an *enlarged time* for pleading previous to the 10th of August, but which does not expire on that day, he is entitled to the remainder of the *enlarged time* after the 24th of October, for the purpose of pleading. *Trinder v. Smedley*, 3 *ibid*. 87. Charnock's New Rules, 100.

Vide etiam stat. 2 Will. 4. c. 39. s. 11.

Where a defendant's time for pleading expires on the 10th of August, the plaintiff cannot sign judgment for want of a plea until the expiration of the limited time for pleading after the 24th of October. *Morris v. Hancock*, 1 Dowl. P. C. N. S. 320. 323. And it has been holden (*Ibid.*), that where the time for pleading has expired before the 10th of August, the plaintiff is at liberty to sign judgment at any time during the period between the 10th of August and the 24th of October, notwithstanding stat. 2 Will. 4. c. 39. s. 11. and Reg. Gen. M. T. 3 Will. 4. s. 12. Mr. Justice Patteson observing, "The object in framing the rule in its present form was this — in the ordinary way a defendant has a right to plead at any time during the last day of his time for pleading, and down to the time of opening the judgment office the next day, that is, until eleven o'clock the next morning. But if, in such instances as the present, the plaintiff was allowed to sign judgment on the 11th of August, the defendant would be deprived of his time for pleading on the morning of that day down to eleven o'clock, in consequence of the proviso contained in stat. 2 Will. 4. c. 39. s. 11. In order, therefore, to prevent the defendant from being deprived of that privilege, the time was taken one day back, and, therefore, the rule was framed in the form in which it now appears."

Judgment of Mr. Justice Patteson in *Morris v. Hancock*.

If an order to return writ in vacation be made a rule of court, an attachment may issue without service of that rule.

13. It is further ordered, that in case a judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime.

If the contempt be once perfect, it cannot be purged by a compliance with the rule after the time allowed and before the attachment be moved for. In the Exchequer, the order is made a rule of court, and the attachment is granted upon one motion. *Forster v. Kirkwall*, 4 Dowl. P. C. 370. *Howell v. Bulteel*, 3 *ibid*. 99. *n.* So, in the Queen's.

Bench, *Hinchliffe v. Jones*, 4 Dowl. P. C. 86.; sed vide *Stainland v. Ogle*, 3 ibid. 99.; but in the Common Pleas it is said, that two motions are necessary for this purpose. *Pilcher v. Woods*, 4 ibid. 329. *Jervis's New Rules*, 97.

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1832.

14. It is further ordered, that if any attorney shall, as required by the said act, declare that any writ of summons, or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed until further order.

Proceedings stayed, if issued without attorney's consent.

By stat. 2 Will. 4. c. 39. s. 17. upon demand in writing, the attorney whose name shall be indorsed on the writ shall declare, whether it was done with his authority or privity.

15. It is further ordered, that every declaration shall in future be entitled in the proper court, and of the day of the month and year on which it is filed and delivered, and shall commence as follows:—

Declarations to be entitled, of the day, &c. on which filed.

Ejectment is not within the rules of Michaelmas Term, 3 Will. 4., and the declaration must commence and conclude in the usual form. *Doe d. Gillett v. Roe*, 2 Dowl. P. C. 690. 1 C. M. & R. 19. And the same remark applies to replevin and other actions removed from inferior courts. *Dod v. Grant*, 4 A. & E. 485.

Declaration after Summons.

[*Venue.*] A. B. by E. F. his attorney [or, in his own proper person] complains of C. D., who has been summoned to answer the said A. B., &c.

Commencement of declaration by summons.

Declaration after Arrest, where the Party is not in Custody.

[*Venue.*] A. B. by E. F. his attorney [or, in his own proper person] complains of C. D., who has been arrested at the suit of the said A. B., &c.

The like of declaration on *capias*, where defendant is not in custody.

Declaration, where the Party is in Custody.

[*Venue.*] A. B. by E. F. his attorney [or, in his own proper person] complains of C. D. being detained at the suit of the said A. B., in the custody of the sheriff [or of the marshal of the Marshalsea, of the court of King's Bench, or of the warden of the Fleet].

The like where defendant is in custody.

Declaration after the Arrest of one or more Defendant or Defendants, and where one or more other Defendant or Defendants shall have been served only, and not arrested.

[*Venue.*] A. B. by E. F. his attorney [or, in his own proper person] complains of C. D., who has been arrested at the suit of the said A. B. [or, being detained at the suit of the said A. B., as before] and of G. H., who has been served with a writ of *capias*, to answer the said A. B., &c.

The like against several, some having been arrested and others served.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

No pledges in future.

By stat. 1 & 2 Vict. c. 110. all personal actions in the superior courts are to be commenced by writ of summons. The declaration, if not entitled in the proper court. can be set aside, but it cannot be demurred to as irregular. *Neal v. Richardson*, 2 Dowl. P. C. 89. The declaration must correspond with the writ; for if it do not, it may be set aside, though it cannot be demurred to. *Marshall v. Thomas*, ibid. 208. *Thompson v. Dicus*, 1 C. & M. 768. *Edwards v. Dignam*, 2 C. & M. 346. 2 Dowl. P. C. 240. *King v. Steffington (Bart.)*, 1 C. & M. 363. 1 Dowl. P. C. 686. If the writ be in case, the declaration may be in trover (*Bate v. Bolton*, 4 Dowl. P. C. 160.); but a writ in case will not support a declaration in *assumpsit*. *Cumming v. Elwin*, 5 Scott, 149. 3 Bing. N. C. 882. *Barker v. Weedon*, 1 C. M. & R. 396. 4 Tyrw. 860.; vide *Moore v. Archer*, 4 Dowl. P. C. 214. *Rotton v. Jeffery*, 2 ibid. 637.

16. It is ordered, that the writ of *capias* and *distringas*, which shall hereafter be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster or Durham, shall be directed to the chancellor of the county palatine of Lancaster, or his deputy there, or to the bishop of Durham, or his chancellor there, and shall be in the following form:—

[Forms of the writs of *capias* and *distringas* are then given, but the form of *capias* has been abolished by stat. 1 & 2 Vict. c. 110.]

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1833.

Rule or order to return *capias* expiring in vacation, with *capi corpus* returned.

Judge's order to issue to bring in the body by putting in and perfecting bail.

V. HILARY TERM, 3 WILL. 4. 1833.

It is ordered, that in case a rule of court or judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *capi corpus* thereon, a judge's order may thereupon issue, requiring the sheriff, or other officer, within the like number of days after the service of such order, as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of court in the term next following, it shall not be necessary to serve such rule of court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime.

In *Re v. Essex (Sheriff of)* (1 M. & W. 720.) Mr. Baron Alderson said, "We ought to assimilate, as far as possible, the practice in vacation, to that which prevailed in term before 1 M. T. 3 Will. 4." "In term the sheriff has notice of the plaintiff's intention to proceed against him by the rule for the attachment; and, in vacation, if the plaintiff means to make the sheriff liable for intermediate damages in consequence of his default, he should give the sheriff notice to that effect, and then should receive such damages as may occur between that notice and the notice which the sheriff must give when the defect has been cured. The expense of the notice to the sheriff will be part of the costs of the attachment obtained against the sheriff in the next term." *Vide etiam Regina v. Middlesex (Sheriff of)*, 3 M. & W. 64.

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1833.

Prisoners to be declared against before the end of the next term after arrest, detainer, or render, on entering an appearance, unless time given.

VI. TRINITY TERM, 3 WILL. 4. 1833.

1. It is ordered, that in all cases in which a defendant shall have been, or shall be detained in prison on any writ of *capias* or detainer, under stat. 2 Will. 4. c. 39., or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been, or shall be, rendered to prison before declaration, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest, or detainer, or render, and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in stat. 2 Will. 4. c. 39. Sched. No. 2., unless farther time to declare shall have been given to such plaintiff by rule of court or order of a judge.

Stat. 1 & 2 Vict. c. 110. has repealed this rule.

Prisoners to plead in like manner as other defendants.

2. It is ordered, that, from the present day, in all actions against prisoners in the custody of the marshal of the Marshalsea or the warden of the Fleet, or of the sheriff, the defendants shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

In actions of debt on recognisance of bail, they may stay proceedings on payment of costs of writ, if they render the principal within fourteen days after service of process.

3. It is ordered, that from and after the 10th day of July next, where the plaintiff proceeds by action of debt, on the recognisance of bail in any of the courts at Westminster, the bail shall be at liberty to render their principal at any time within the space of fourteen days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed upon payment of costs of the writ and service thereof only.

If a defendant, against whom a judgment has been recovered, afterwards become bankrupt, and obtain his certificate within fourteen days of service of process upon his bail, the bail are entitled, under the general rule of the 17th June, 1833, to have proceedings against them stayed, though no notice be given to the plaintiff, or application made to stay such proceedings till after the expiration of the fourteen days. In *Jones v. Ellis* (1 A. & E. 362.) Lord Denman observed, "I do not think that it was intended by the general rule to alter the effect of the certificate, or to prevent it from having, as before, the same operation as an actual render."

In calculating the time the intervening Sundays are reckoned. *Cresswell v. Green*, 14 East, 537.

The payment of costs is a condition upon which the proceedings are stayed; if they be not paid, the plaintiff may proceed in the action. *Horn v. Whitcombe*, 5 Dougl. P. C. 328.

VII. MICHAELMAS TERM, 4 WILL. 4. 1833.

It is ordered, that where a defendant is arrested upon an *alias* or *pluries capias*, issued into another county, pursuant to the rule of Michaelmas Term, 3 Will. 4. s. 7., the defendant must put in bail in the county where he was arrested.

Vide ante, 2843. Reg. Gen. M. T. 3 Will. 4. s. 6.

VIII. HILARY TERM, 4 WILL. 4. 1834.

It is ordered, that from and after the first day of Easter Term next inclusive, the following rules shall be in force in the courts of King's Bench, Common Pleas, and Exchequer of Pleas, and courts of error in the Exchequer Chamber.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the court, but the same shall always be delivered between the parties.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea.

The court will not set aside a demurrer as frivolous, when the point raised fairly admits of argument. *Dalton v. McIntyre*, 1 Dowl. P. C. N. S. 76.

This rule comprehends special as well as general demurrers, although the grounds of demurrer may be specially assigned in special demurrers. If it be inserted in the margin of a special demurrer, that the points intended to be argued are those specially assigned, it will be sufficient. *Lindus v. Pound*, 2 M. & W. 240. 5 Dowl. P. C. 459. *Berridge v. Priestly*, *ibid.* 306. Specific grounds must be alleged in a general demurrer. It is not requisite to point out the objections upon which a party relies, if there be many objections (*Whitmore v. Nicholls*, *ibid.* 521.); but a general allegation, that the plea contains no answer to the action will be insufficient. *Ross v. Robeson*, 3 *ibid.* 779. If an irregularity occur, a motion should be made to set aside the demurrer, otherwise the objection cannot be taken on the argument. *Lacey v. Umbers*, *ibid.* 732. To constitute a "frivolous statement," the objection must be clearly and beyond dispute against the party who takes it. *Tyndall v. Ulleshorne*, 3 Dowl. P. C. 2. *Undershill v. Fuller*, 5 Tyrw. 392. *Walker v. Catley*, 5 Dowl. P. C. 592. *Chevers v. Parkington*, 6 *ibid.* 75.

This rule does not apply to revenue cases. *Rex v. Woollett*, 2 C. M. & R. 256. 5 Tyrw. 786.

The court refused to set aside a demurrer as being frivolous, the cause of demurrer being, that, in debt on a promissory note, it did not appear, that the words "value received" were in the note. *Creswell v. Crisp*, 2 Dowl. P. C. 635. And where a plea had been demurred, to because it was dated 1832 instead of 1833, the court ordered the demurrer to be set aside with costs. *Neal v. Richardson*, *ibid.* 89.

A defendant, after having had time to plead, demurred to the declaration, which was in debt on a bill of exchange with the common counts in this form:—"The defendant by his attorney says, that the declaration is not sufficient in law; and also, that an action of debt will not lie, and that the bill should have been stated to be for value received:—" It was held, that the plaintiff was not justified in signing judgment as upon a sham demurrer. *Lyons v. Cohen*, 3 *ibid.* 243.

If a demurrer be frivolous, and a motion be made to set it aside, the court will grant "a rule for that purpose to be absolute, unless cause is shewn on a particular day." *Kinnear v. Keane*, *ibid.* 154.

A rule nisi for setting aside a demurrer as being frivolous, should be drawn up on reading the pleadings. *Howorth v. Hubbersty*, *ibid.* 455.

Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way.

The usual way of giving notice to the court of the points to be argued was, before this rule, by stating them in the margin. If this be not done, the point cannot in strictness be taken. *Darling v. Gurney*, 2 Dowl. P. C. 101. *Bayley v. Homan*, 3 Scott, 384. *Brogden v. Marriott*, 2 Bing. N. C. 479. If, however, the point be open on general demurrer, the court will dispose of it without argument, or in their discretion postpone the case, that the point may be stated. *Parker v. Riley*, 3 M. & W. 230. *Jervis's New Rules*, 106.

M. T. 4 Will. 4. 1833.

Defendant must put in bail in the county where arrested.

H. T. 4 Will. 4. 1834.

FIRST GENERAL RULES AND REGULATIONS.

Where demurrers must be delivered.

Before signed, points to be stated.

Points not stated may be argued.

H. T. 4 Will. 4.
1834.

No rule to join
in demurrer.

3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand to deliver the same, otherwise judgment.

Vide post, 2859. Reg. Gen. H. T. 4 Will. 4. R. 2. s. 14. for the form of a joinder in demurrer. If either party obtain a rule which operates as a stay of proceedings after the time for joining a demurrer has expired, but before judgment is signed, he has the whole of the day on which that rule is discharged to join in demurrer. *Jervis's New Rules*, 106.

The term of rejoining *gratis* does not extend to a joinder in demurrer. "There is good reason in this, for a party may want time to consider the law before he joins in demurrer, though he can join issue to the country without consideration." *Per curiam* in *Jones v. Key*, 2 C. & M. 340.

Although a defendant be under terms to rejoin *gratis*, and take short notice of trial, the plaintiff cannot sign judgment of *non pros.* for want of a rejoinder, unless a demand for that purpose has been made. *Seaton v. Skye*, 3 Dowl. P. C. 537.

Joinder need
not be signed.

4. To a joinder in demurrer no signature of a serjeant, or other counsel, shall be necessary, nor any fee allowed in respect thereof.

Vide Archbold v. Smith, 1 M. & W. 740.

Issue and demurrer how made up.

5. The issue, or demurrer book, shall, on all occasions, be made up by the senior, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the court.

Special case and demurrer set down without concilium.

6. No motion, or rule for a *concilium*, shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer and a secondary in the Common Pleas, upon payment of a fee of one shilling, and notice thereof shall be given forthwith by such party to the opposite party.

A sufficient notice of the case having been set down, must be given for the opposite party to prepare for the argument (*Britten v. Britten*, 2 Dowl. P. C. 239.); but if the demurrer be for delay, the court will permit it to be set down for argument, even on the last day of term. *Wilson v. Tucker*, *ibid.* 83. *Cooper v. Hawkes*, 1 C. & J. 219. If a demurrer be set down for argument previously to a joinder in demurrer, the opposite party will not receive the costs of his appearance, because the case though set down cannot be argued, there being no joinder in demurrer. *Howorth v. Hubberts*, 3 *ibid.* 45.

Paper books
how delivered.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, as the case may be, and the senior judge of the court in which the action is brought, and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

It is too late to deliver paper books on Saturday evening for an argument on Monday morning. *Darker v. Darker*, 2 Dowl. P. C. 88.

If a party seek to make his opponent pay the cost of copies of demurrer books pursuant to this rule, he must deliver them on the day after the time for his opponent's delivering them expires. It is no ground of demurrer to a declaration in an action by an attorney, that he seeks to recover for "materials" supplied by him to his client. *Fisher v. Snow*, 3 *ibid.* 27. If one side neglect to deliver his demurrer books to the judges, the other side should do so for him, and then he will be entitled to judgment; but otherwise the case will be struck out. *Abraham v. Cook*, *ibid.* 215.

"If the fifth judge should require a copy of the paper book, he would obtain it from one of the other judges, as might be arranged between them." *Per Patteson J.* 1 Dowl. P. C. 80.

The number of the roll must be stated in the margin of a plea of judgment recovered.

8. Where a defendant shall plead a plea of judgment recovered in another court, he shall, in the margin of such plea, state the date of such judgment; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall

be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is alleged to be recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea by leave of the court or a judge.

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1834.

Upon an issue of *nisi tunc record*, the plaintiff gave notice to the defendant to produce the record, and upon his neglect to do so, moved for judgment. The court held the notice to be irregular, and refused the rule. *Begbie v. Grenville*, 3 Dowl. P. C. 502. A four-day rule should have been given. The court refused to set aside a plea of judgment recovered, on an affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term. *Poole v. Salter*, 1 Dowl. P. C. 298. 2 C. & J. 85. 2 Tyrw. 139.

This rule does not, seemingly (*sed quare*), apply to a plea of judgment recovered against an administrator. *Power v. Izod*, 1 Bing. N. C. 304.

9. No writ of error shall be a *supersedeas* of execution, until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued: *PROVIDED*, that if the error stated in such notice shall appear to be frivolous, the court, or a judge upon summons, may order execution to issue.

No writ of error to be a *supersedeas* of execution.

Execution to issue if points be frivolous.

This rule does not apply to errors in fact. *Levy v. Price*, 2 M. & W. 533. A defendant cannot *non pro*, his own writ of error, except on payment of costs. *Wilkinson v. Main*, 1 Dowl. P. C. 628. Where the attorneys of both parties agree to be bound by the judgment of the court on demurrer, neither party can bring a writ of error upon that judgment. *Brown v. Granville (Lord)*, 2 ibid. 796.

A notice of the allowance of a writ of error in an action of slander, stating the grounds of error to be, that the declaration and every count thereof is bad, the words not being actionable without special damage, and the innuendoes bad in law, sufficiently complies with this rule. *Robinson v. Day*, ibid. 501.

Where the parties on the trial of an action for several penalties, agree that a verdict shall be given for one only, the defendant undertaking not to repeat the act complained of, and the plaintiff that, unless he does so, execution shall not issue, it is an implied term (nothing to the contrary being expressed), that the defendant shall not bring error; and, if he do so, the court will quash the writ, as issued against good faith. *Apothecaries' Company v. Harrison*, 12 A. & E. 642.

By stat. 1 Will. 4. c. 70. s. 8. no writs of error upon any judgment given by any of the courts shall hereafter be made returnable only before the judges or judges and barons, as the case may be, of the two other courts in the Exchequer Chamber.

10. No rule to certify or transcribe the record shall be necessary, but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *non pro*. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the clerk of the errors of the court of error.

No rule to certify and transcribe.

11. No rule to allege diminution, nor rule to assign errors, nor *scire facias quare executionem non*, shall be necessary, in order to compel an assignment of errors, but, within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the court of error, or to the signer of the writs in the King's Bench, in cases of error to that court, or within twenty days after the allowance of the writ of error, in cases of error, *coram nobis* or *coram vobis*, the plaintiff in error shall assign errors; and on failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of *non pro*.

Where no rule to allege diminution, nor rule to assign errors, *scire facias quare executionem non*, is requisite.

If an infant assign by an attorney for error, *coram nobis*, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error; still the court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. *Beven v. Cheshire*, 3 Dowl. P. C. 70.

12. The assignment of errors, and subsequent pleadings thereon, shall be delivered to the attorney of the opposite party, and not filed with any officer of the court.

Proceedings in error to be delivered, not filed.

13. No *scire facias ad audiendum errores* shall be necessary (unless in case of

No *sci. fa. ad*

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1854.

audiendum
errores requisite.

Joinder in error
within twenty
days.

Where twenty
days expire
after 10th
August.

Not to apply
to writs of
error to reverse
fines, &c.

Setting down
case for argu-
ment.

Delivery of
error books.

a change of parties); but the plaintiff in error may demand a joinder in error or plea to the assignment of errors, and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

Provided, that if, in any case the time allowed, as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time, for the same purpose, after the 24th day of October, without reckoning any of the days before the 12th of August.

Provided, also, that in all cases such time may be extended by a judge's order.

Provided, also, that in all cases of writs of error to reverse fines and common recoveries, a *scire facias* to the terre-tenants shall issue as heretofore.

14. When issue in law is joined, either party may set down the case for argument with the clerk of the errors of the court of error, or the clerk of the rules in the King's Bench as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a *concilium*.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the court below, and of the assignment of errors, and of the pleadings thereon, to the judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the judges of the Common Pleas, on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other judges of the court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench (as the case may be), a sufficient sum to pay for such copies.

If a plaintiff in error do not deliver his paper books in due time, and the defendant in error delivers them, the latter is entitled to judgment. *Best v. Prior*, 2 Dowl. P. C. 189.

Proceedings in
error need not
be entered
before argu-
ment.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument; but after judgment shall have been given in the court of errors in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the court below, on a certificate of a clerk of the errors of the Exchequer Chamber of the judgment given, for which a fee of 3s. 4d., and no more, shall be charged.

When notice of
taxing not ne-
cessary.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1 Will. 4. s. 12.

Nor is any notice of taxing necessary, where, by the practice of the courts, costs need not be taxed; as where the only costs for which judgment was signed, were those included in the *cognovit*, and the costs of signing judgment, it was held, not necessary to give the notice required. The rule cannot apply to cases where no taxation is necessary. In the case of a warrant of attorney, it is not necessary to tax the costs of signing judgment, because they are a fixed sum which cannot be reduced; and the like observation applies to the costs of signing judgment on *cognovit*, where the costs of the action are included in the instrument. *Griffiths v. Liversedge*, 2 Dowl. P. C. 143. Charnock's New Rules, 120.

Repassing *nisi*
prius record,
abolished.

18. It shall not be necessary to repass any *nisi prius* record which shall have been once passed, and upon which the fees of passing shall have been paid; and if it shall be necessary to amend the day of the *teste* and return of the *distringas* or *habeas corpora*, or of the clause of *nisi prius*, the same may be done by the order of a judge obtained on an application *ex parte*.

Writs of trial
to be sealed
only.

19. Writs of trial shall be sealed only, and not signed.

Vide stat. 3 & 4 Will. 4. c. 42. s. 17. Reg. Gen. H. T. 4 Will. 4. R. 2. Sched. No. 5. post, 2863.

20. Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required by summons to shew cause before a judge why he should not consent to such admission, or, in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

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Proof of documents.

Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided, also, that the judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the judge shall order the same to be made.

The court has not jurisdiction under the foregoing rule to order the admission of documents. *Smith v. Bird*, 3 Dowl. P. C. 641. Application must be made to a judge at chambers.

In an action by the coroner of the county of Lancaster for disturbance in his office, the plea set forth a charter granted by the crown to the borough of Manchester, pursuant to stat. 1 Vict. c. 78. s. 49., and the issue in the cause was, whether the petition for such charter, was the petition of the inhabitant householders of the borough, and whether the charter was accepted by them. The defendant had witnesses in attendance at the trial, to prove the genuineness of the signatures to the original charter, which was lodged at the Privy Council Office:—It was held, that the charter was a document which the defendant ought to give a notice to admit and inspect, within the rule of H. T. 4 Will. 4. s. 20., and that not having done so, he was not entitled to the costs of the witnesses as above mentioned. That rule extends to every document which a party proposes to adduce in evidence, and is not confined to documents in his custody or control. *Rutter v. Chapman*, 8 M. & W. 388. 1 Dowl. P. C. N. S. 118.

If an indorsement be made on a deed after its execution, the defendant is not entitled to a copy of that indorsement on oyer, although it be admitted, that it may alter the effect of the deed. *Smith v. Goldworthy*, *ibid.* 288.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons, that he does not think it reasonable to require it. Costs.

A judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection, and in the absence of a special order the same shall be costs in the cause.

Form of Notice referred to.

A.

In the K. B. }
C. P. } A. B. v. C. D.
or Exchequer. }

Form of notice
to produce documents.

Take notice, that the plaintiff [*or defendant*] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his attorney or agent, at —, on —, between the hours of —, and that the defendant [*or plaintiff*] will be required to admit that such of the said documents as are

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herein specified to be originals were respectively written, signed, or executed as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H., attorney for plaintiff [or defendant].

To E. F., attorney or agent for defendant [or plaintiff].

[Here describe the documents, the manner of doing which may be as follows:—]

ORIGINALS.

Description of Documents.	Date.
Deed of covenant between A. B. and C. D. 1st part, and E. F. 2d part	1st January, 1828.
Indenture of lease from A. B. to C. D.	1st February, 1828.
Indenture of release between A. B., C. D. 1st part, &c.	2d February, 1828.
Letter — defendant to plaintiff	1st March, 1828.
Policy of insurance on goods by ship <i>Isabella</i> , on voyage from Oporto to London	3d December, 1827.
Memorandum of agreement between C. D., captain of said ship, and E. F.	1st January, 1828.
Bill of exchange for 100 <i>l.</i> , at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	1st May, 1829.

COPIES.

Description of Documents.	Date.	Original or Duplicate, served, sent, or delivered, when, how, and by whom.
Register of baptism of A. B., in the parish of X.	1st Jan. 1808.	
Letter — plaintiff to defendant	1st Feb. 1828.	Sent by General Post, 2d Feb. 1828.
Notice to produce papers	1st March, 1828.	Served 2d March, 1828, on defendant's attorney, by E. F. of —.
Record of a judgment of the court of King's Bench, in an action, <i>J. S. v. J. N.</i>	Trinity Term, 10th Geo. 4.	
Letters patent of King Charles II. in the Rolls Chapel	1st Jan. 1680.	

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PLEADING
RULES.

Recital of
3 & 4 Will. 4.
c. 42. s. 1.

IX. HILARY TERM, 4 WILL. 4. 1834. — R. 2.

Rules and Regulations pursuant to Stat. 3 & 4 Will. 4. c. 42. s. 1.

Whereas it is provided by stat. 3 & 4 Will. 4. c. 42. s. 1. that the judges of the superior courts of common law at Westminster, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which rules, orders, and regulations were to be laid before both houses of parliament, as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both houses of parliament, but after that time should be binding and obligatory on the said courts, and all other courts of common law, and be of the like force and effect, as if the provisions contained therein had been expressly enacted by parliament.

Provided, that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence in any case wherein he then was or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force.

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Not to affect the right of pleading general issue given by act of parliament.

Vide stats. 3 & 4 Will. 4. c. 42. s. 1. and 1 & 2 Vict. c. 110. s. 1. This rule, generally speaking, only applies to cases where the right of pleading the general issue and giving the special matter in evidence, is expressly permitted by statute. *Barnett v. Glossop*, 1 Bing. N. C. 633. *Potts v. Sparrow*, *ibid.* 594. *Alcock v. Taylor*, 6 N. & M. 296.

Exceptions, however, occur to this rule. Thus, in an action by an apothecary it has been holden, upon the wording of the Apothecaries' Act, that the certificate must be proved, though the general issue be only pleaded. *Shearwood v. Hay*, 5 A. & E. 383. *Morgan v. Ruddock*, 4 Dowl. P. C. 311. *Wagstaffe v. Sharpe*, 3 M. & W. 521.

If the general issue be pleaded, the defendant may avail himself of every kind of defence under it. *Haine v. Davey*, 4 A. & E. 892. 6 N. & M. 356. *Wells v. Ody*, 2 C. M. & R. 128. 5 Tyrw. 725.

A special plea of justification, besides the general issue, will not now be allowed, where the special matter may, by statute, be given in evidence under the latter plea. *Neale v. M'Kenzie*, 2 Dowl. P. C. 702. 1 C. M. & R. 61.

These rules do not apply to real or mixed actions. *Doe d. Williams v. Williams*, 2 A. & E. 381.

It is therefore ordered, that from and after the first day of Easter Term next inclusive, unless parliament shall in the meantime otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force:—

Commence-
ment of rules.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration, and other pleading, shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge.

FIRST GENERAL
RULES AND
REGULATIONS.
Pleadings to be
entitled of the
day and year
when pleaded.

Respecting the date of the declaration, *vide ante*, 2845. *Reg. Gen. M. T. 3 Will. 4. s. 15. Worthington v. Wigley*, 5 Dowl. P. C. 209. *Ikin v. Plevin*, *ibid.* 594. *Whipple v. Manley*, *ibid.* 100. *Wight v. Perrers*, *ibid.* 463. A plea, though wrongly entitled, is not therefore demurrable; the proper course is to apply to amend it at the costs of the defendant. *Neal v. Richardson*, 2 *ibid.* 89.

A *similiter* added by a party in a cause to his adversary's pleading, does not require a date under *Reg. Gen. H. T. 4 Will. 4. General Rules and Regulations, 1. Edden v. Ward*, 12 A. & E. 428. A *similiter* is not a pleading within that rule. *General Rules and Regulations, 1. Shackel v. Ranger*, 3 M. & W. 409. Both parties will be bound at the trial by the dates of the proceedings, as entered on the record. The defendant may avail himself of a variance in respect of them, though they be stated inaccurately. *Worthington v. Wigley*, 5 Dowl. P. C. 209. *White v. Farrer*, 2 M. & W. 288. 5 Dowl. P. C. 463. *Ball v. Hamlet*, 1 C. M. & R. 575. 3 Dowl. P. C. 188. But if the inaccurate statement be against his interest, he ought not to appear at the trial, for by so doing, he may waive the objection. *Percival v. Connell*, 3 Bing. N. C. 877. *Farwig v. Cockerton*, 3 M. & W. 169. *Lycett v. Tenant*, 4 Bing. N. C. 168. 6 Dowl. P. C. 436. His proper course is to apply to amend the record, at the expense of the plaintiff's attorney. *Whipple v. Manley*, 1 M. & W. 432. 5 Dowl. P. C. 100. *Jervis's New Rules*, 115.

2. No entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.

No entry of
continuances.

Provided, that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Provided, also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in Banc or at Nisi Prius, the same defence may be pleaded, with an allegation, that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Not to affect
the times of
proceeding.

Pleas *puis
darrein con-
tinuance*.

Provided, also, that no such plea shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, or unless the court, or a judge, shall otherwise order.

Affidavit to
verify.

The affidavit will not be dispensed with (*Powell v. Duncan*, 5 Dowl. P. C. 550.); but

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if it be made, the plea, as it seems, must be received, though it appear to be pleaded for delay. *Ludlow (Corporation of) v. Tyler*, 7 C. & P. 537. After an action against executors had been referred upon their plea of *plene administravit*, they were allowed to plead *puis darrein continuance* before the arbitrator a plea of judgment recovered. *Alder v. Park*, cit. *Jervis's New Rules*, 116.

Judgment to be entered of the day when signed.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Vide ante, 2633. Reg. Gen. H. T. 2 Will. 4. s. 73.

Nunc pro tunc.

Provided, that it shall be competent for the court, or a judge, to order a judgment to be entered *nunc pro tunc*.

This provision applies only to cases where the delay is occasioned by act of the court. *Lanman v. Audley (Lord)*, 2 M. & W. 535.

Warrants of attorney not to be entered.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

Vide ante, 2813. Reg. Gen. H. T. 2 Will. 4. s. 1.

Several counts and pleas, where allowed.

5. And whereas by the mode of pleading hereinafter prescribed, the several disputed facts, material to the merits of the case, will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and by the said act of the 3 & 4 Will. 4. c. 42. s. 23., the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, are greatly enlarged.

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognisances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Where the declaration charged the defendants in one count as liable by themselves, and in another count as jointly liable, the court ordered one count to be struck out (*Chamondeley v. Payne*, 3 Bing. N. C. 708. 4 Scott, 418.); but a count for double rent can be joined with a count for use and occupation. *Thoroton v. Whitehead*, 1 M. & W. 14. 4 Dowl. P. C. 747. In an action upon a horse-race the court of Exchequer refused to allow two counts, one founded on the Newmarket rules, and the other on the Ludlow rules; and where the plaintiff averred in one count a promise by the defendant, that he was authorised by a third person to sell shares, and in another count a promise by the defendant personally to sell on his own account, the court doubted whether both could be allowed. *Roy v. Bristow*, 5 Dowl. P. C. 452.

Where the declaration contained a count on a promise to carry goods from Dublin to London, and a count on a promise to carry the same goods from the wharf at which they should be landed in London, to the plaintiff's place of business: — It was holden, that the joining these two counts was not an apparent violation of Reg. Gen. H. T. 4 Will. 4. Mr. Justice Bosanquet observing, "I am also of opinion, that this second count has not been pleaded in violation of the new rules. The two counts seem to me to be apparently founded on different subject-matters of complaint. It is true they are founded on the same transaction, the loss of the goods to be delivered; and I remember, that when the new rules were framed, the word transaction was found inadequate, and subject-matter of complaint was substituted for it. If these two counts were on the same contract, I should say they were on the same subject-matter of complaint, within the rule, which am not disposed to relax: but the two counts are framed on different contracts — one, to bring the goods from Belfast to Dublin, and from Dublin to London, for a certain freight; the other, to convey them from the landing-place in London to the plaintiff's premises, for another and a different reward; a money consideration for cartage, to commence from the time when the first contract terminated. These, therefore, are apparently distinct contracts; and if so, the same transaction may be the occasion of different subject-matters of complaint, as upon several breaches of the same covenant. In *Jenkins v. Treloar* the court decided, that the subject-matter of complaint in the two counts was the same; and I think rightly, because it was the same thing described by different names."

A plea, that 200*l.*, part of the consideration for which the action is brought, was money lent, in the shape of counters, for the purpose of gaming, and a plea, that the 200*l.* was money lost at play at one time, form distinct defences, although there may have been but one transaction, and are therefore not an "apparent violation" of the rule of H. T. 4 Will. 4. s. 5. *Temple v. Kelly*, 1 M. & G. 904.

Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

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Ex. gr. Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

Examples of declarations.
Contract with conditions.

So counts for not giving, or delivering, or accepting, a bill of exchange, in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods, to be paid in money, are not to be allowed.

Non-delivery of bill in payment.

So counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

Not accepting and paying for goods.

But counts upon a bill of exchange, or promissory note, and for the consideration of the bill or note, in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

Bills and notes.

Two counts, upon the same policy of insurance, are not to be allowed.

Policies.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Premium.

Two counts on the same charter-party are not to be allowed.

Charter-parties.

But a count for freight upon a charter-party, and for freight *pro ratâ itineris*, upon a contract implied by law, are to be allowed.

Freight.

Counts upon a demise, and for use and occupation of the same lands, for the same time, are not to be allowed.

Demise, and use and occupation.

In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

Misfeasance.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed.

Nonfeasance.

Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

Trespass.

Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters — *ex. gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like; the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule, which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Indebitatus assumpsit.

Provided, that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

Account stated.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract, in the same count.

Several breaches.

Ex. gr. Pleas, avowries, and cognisances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed.

Instances of pleas and avowries, &c.

A defendant may plead to the same demand, 1st, the general issue, and 2dly, that the demand accrued for carrying into effect illegal wagers. Thus, in *Trickner v. Duerr*, (1 Bing. N. C. 260.) Chief Justice Tindal observed, There is nothing unreasonable in allowing the defendant to plead these pleas. "The word inconsistent does not appear in the new rules, and pleas are authorised which on the face of them do not appear consistent as 'pleas of payment', and of 'accord and satisfaction', or of 'release'; 'pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D.'; 'pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there.' The object of these rules was to prevent the record from being loaded with unnecessary repetitions of pleas, which were the same in effect, and addressed only to one ground of defence; not to prevent a party from putting in distinct answers to the same claim;" and Mr. Justice Bosanquet added, "The application did not rest on the new rules, but on the statute of Anne, by which the court, at its discretion, may regulate the

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number of the defendant's plea. The object of the new rules was to prevent the same defence from being repeated under several different forms. Here the defences are not the same; the first turns on matter of fact, that there was no contract between the parties; the second, on matter of law, that the contract, if any existed, was illegal."

But if the court will not allow a plea which is clearly bad, they will not, merely because the validity of the plea is doubtful, refuse to allow the defendant to put it on the record. *Jervis's New Rules*, 119.

The court allowed the assignees of a bankrupt to plead in covenant on a lease, first, that the lessee's interest did not pass to them; secondly, that they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury*, 1 Bing. N. C. 396.

It is no objection to the pleas, that they are inconsistent (*Tridner v. Duerr*, 1 Bing. N. C. 266. 1 Scott, 102. *Wilkinson v. Small*, 3 Dowl. P. C. 564. *Ross v. Den*, 3 N. & M. 464.); but vexatious and inconsistent pleas will not be permitted. *Sail v. Sturry*, 1 Scott, 101. 3 Dowl. P. C. 133. The defendant cannot in case of an action plead not guilty, and also a special plea, that the indictment was for reasonable and probable cause, setting out the circumstances. *Cotton v. Browne*, 3 A. & E. 312. 4 N. & M. 851.

Payment.

Pleas of *solvit ad diem* and of *solvit post diem* are both pleas of payment varied in the circumstance of time only, and are not to be allowed.

Accord, satisfaction, and release.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Liability of third party.

Pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed.

Agreement to forbear in consideration of liability of third party.

But pleas of an agreement to accept the security of a third person, in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

Lib. ten. easement, right of way, right of common, common of pasture, common of turbary and estovers.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there; pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

Right of common.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

Right of way.

So pleas of a right of way over the *locus in quo*, varying the *termini*, or the purposes, are not to be allowed.

Distress for rent and damage feasant.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

Distress for rent.

But avowries for distress for rent, varying the amount of rent reserved, or the time at which the rent is payable, are not to be allowed.

The above cases instances only.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

How to take advantage of a violation of these rules.

6. Where more than one count, plea, avowry, or cognisance shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognisances are founded on the same subject-matter of complaint, or ground of answer, or defence, for an order that all the counts, pleas, avowries, or cognisances introduced in violation of the rule be struck out, at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject-matter of complaint is bona fide intended to be established, in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances; in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied, and shall also specify the counts, pleas, avowries, or cognisances mentioned in such application, which shall be allowed.

Where, on summons to strike out a count, as founded on the same subject-matter of complaint with other counts of the same declaration, a judge allows the count objected to

on the plaintiff's allegation, that he *bond fide* intends to establish distinct matters of complaint under each; if the plaintiff succeed only on the count so allowed, and the judge at Nisi Prius certifies that it was not *bond fide* intended to establish distinct matters of complaint on the several counts, such plaintiff under Rule 7. is liable to pay the defendant's costs of the issues found for him, and is not himself entitled to any costs of the cause, except costs of a special jury, if a certificate be given for that purpose. *Dewar v. Swabey*, 11 A. & E. 913. In such a case it is too late, after taxation of costs, to object that the judge, on the summons, had not jurisdiction to allow or disallow the counts, inasmuch as they were not pleaded in apparent violation of Rule 5. *Ibid*.

If there be three counts, and, on summons, counts 1. and 2. are objected to, but allowed on the ground of plaintiff's intention to prove distinct matters of complaint on each, and the plaintiff at Nisi Prius succeeds on count 2., but fails on counts 1. and 3., a certificate under Rule 7., that plaintiff did not intend to prove a distinct matter of complaint in respect of either of the counts on which he has failed, is insufficient to deprive him of costs. *Ibid*.

Where a judge is applied to on summons under the foregoing rule, to strike out counts of a declaration, as founded on the same subject-matter of complaint with other counts of the same, but allows those objected to, on the plaintiff's allegation that he *bond fide* intends to establish distinct matters of complaint under each, the plaintiff is liable to loss of costs by Rule 7., even on the counts so objected to, on which he may have succeeded. But this is only, where issues of fact have been tried upon the counts respectively, on which issues, a verdict might have passed for or against the plaintiff. It is not therefore where, upon one of two such counts, issues of fact are tried and found for the plaintiff, and, upon the other, issues in law only are depending, and nominal damages are assessed at the trial, contingently; although the judge who tried the cause certify, that the plaintiff did not, *bond fide*, intend to establish distinct matters of complaint under the two counts. *Head v. Baldrey*, 11 A. & E. 906.

7. Upon the trial, where there is more than one count, plea, avowry, or cognisance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognisance, which he shall have so failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognisance, including those of the evidence, as well as those of the pleadings. And, further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognisance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bond fide* intended to be established at the trial, in respect of each count so allowed, or some distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, if the court or judge before whom the trial is had shall be of opinion, that no such distinct subject-matter of complaint was *bond fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognisance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognisance with respect to which the judge shall so certify.

Verdict and costs of several counts and pleas.

Vide antè, 2834. Reg. Gen. H. T. 2 Will. 4. s. 74. Stat. 3 & 4 Will. 4. c. 42. ss. 32 & 33.

The general issue, if pleaded to several counts, raises a distinct issue on each count. *Cox v. Thomason*, 2 C. & J. 498. 1 Dowl. P. C. 572. *Knight v. Brown*, 9 Bing. 643. 1 Dowl. P. C. 730. *Prudhomme v. Fraser*, 2 A. & E. 645.

A declaration contained a special count on a charter-party, from which it appeared, that a certain number of days on demurrage were allowed, and a breach was assigned in detaining the vessel for a period beyond the laying and demurrage days, — a general count for demurrage was also introduced; but no breach in non payment of demurrage was assigned: — It was held, that the two counts must be considered as substantially for the same cause of action, and therefore ought not to be allowed. *Temperley v. Brown*, 1 Dowl. P. C. N. S. 310.

Respecting the costs of witnesses, the master is invested with discretionary authority, whether the witness was called solely to prove that issue, upon which the party succeeded. *Eades v. Everett*, 3 Dowl. P. C. 68. *Crowther v. Elwell*, 4 M. & W. 71. It is not necessary to entitle the defendant to the costs of his witnesses, that they should have been examined exclusively in support of the issues found for him. It is a question for the master, what costs were really and reasonably incurred in preparing the defence upon

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those issues. *Doe d. Smith v. Webber*, 2 A. & E. 448. In libel, where the defendant pleaded not guilty and a justification, and, succeeding on the first plea, called no witnesses to prove the second, it was holden, that the plaintiff was entitled to his costs in respect of that plea. *Empson v. Fairfax*, 3 N. & P. 385. The rule applies, if the cause be referred to an arbitrator who is to certify. *Woof v. Hooper*, 4 Bing. N. C. 449. "The circumstance of the issue upon the plea of 'not guilty' being found for the plaintiff, is not sufficient to exclude the defendant from having the general costs of the cause, if the material issues are found for the defendant." The fallacy consists in calling "not guilty" the general issue. *Frankum v. Falmouth*, (Lord) 4 Dowl. P. C. 65. As to where the defendant is entitled to the general costs of the cause, *vide Jarvis's New Rules*, 122. *Probert v. Phillips*, 2 M. & W. 40. 5 Dowl. P. C. 473. *Cousins v. Paddon*, 3 C. M. & R. 547. *Staley v. Long*, 3 Bing. N. C. 781. 5 Dowl. P. C. 616. *Frankum v. Falmouth* (Lord), 4 *ibid.* 65. *Smith v. Edwards*, *ibid.* 621. *Knight v. Moore*, 3 Bing. N. C. 3. 534. 5 Dowl. P. C. 487. *Goode v. Goldsmith*, 2 M. & W. 302. 5 Dowl. P. C. 288. *Topham v. Kidmar*, *ibid.* 676.

Special venue.

8. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff; and no venue shall be stated in the body of the declaration, or in any subsequent pleading.

Local description.

Provided, that in cases where local description is now required, such local description shall be given.

It is not a ground of special demurrer, that the venue is inserted in a pleading (*Harper v. Chumneys*, 2 Dowl. P. C. 680.); but the proper course is to apply to a judge at chambers to strike it out. *Ibid.* *Fisher v. Snow*, 3 *ibid.* 27. *Townsend v. Gurney*, *ibid.* 168. 1 C. M. & R. 590.

In local actions concerning land, though the venue be laid in the wrong county, yet, if there be no issue concerning the locality of the premises, the defendant is not entitled to nonsuit. *Boyes v. Hewetson*, 2 Bing. N. C. 575. If the abutments be not described with sufficient certainty, the defendant should demur, or apply to a judge at chambers; by pleading over, he adopts them as stated. *Lempriere v. Humphrey*, 3 A. & E. 181.

The venue in the margin of the declaration in ejectment is immaterial, if the venue in the body of the declaration be correct. *Doe d. Goodwin v. Roe*, 3 Dowl. P. C. 323.

Commencement and conclusion of pleas, &c.

9. In a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary, in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the whole action. Provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.

The object of this rule is, that if a plea be pleaded to part only of a declaration, it must be stated (*Putney v. Swann*, 2 M. & W. 72. 5 Dowl. P. C. 396.); but it must appear to what it is, that the plea professes to be an answer to (*Worley v. Harrison*, 3 A. & E. 669. *Trower v. Chadwick*, 3 Bing. N. C. 353.); if it do not, the plaintiff cannot sign judgment (*Vere v. Goldsborough*, 1 *ibid.* 353.); but should demur specially. *Harvey v. Grabham*, 5 A. & E. 61. If the plea commence in the old form, it is not demurrable on that account; the proper course is to strike out the superfluous matter on motion. *Bacon v. Ashton*, 5 Dowl. P. C. 94.

To an action of debt on a bail-bond, a plea that there was no affidavit of debt filed in the action against the principal, was held bad on special demurrer. A plea must still conclude with a verification or to the country, notwithstanding the rule H. T. 4 Will. 4. *Snow v. Stevens*, 2 *ibid.* 664.

The foregoing rule of H. T. 4 Will. 4. s. 9. that a plea pleaded in bar of the whole action generally, need not commence with *actionem non*, nor pray judgment, applies to a plea answering the whole of the count to which it is pleaded, though there are other counts to which it does not answer. *Bird v. Higginson*, 6 A. & E. 824.

Commencement of pleas.

10. No formal defence shall be required in a plea; and it shall commence as follows:—"The said defendant by — his attorney [or 'in person,' &c.] says that."

11. It shall not be necessary to state, in a second or other plea or avowry, that

it is pleaded by leave of the court, or according to the form of the statute, or to that effect. H. T. 4 Will. 4. 1834.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made. Second plea.
Protestation.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country. Special traverses.

Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial. Opposite party may plead over.

The plaintiff cannot traverse the inducement, where the special traverse is not wholly immaterial; but if the inducement be necessary to the defendant's defence, the defendant must prove it, though the special traverse only is denied. *Craven v. Sanderson*, 4 A. & E. 666. *Harrington (Earl) v. Lichfield (Bishop of)*, 4 Bing. N. C. 70., vide *Cross Keys Bridge Comp. v. Rawlings*, 3 ibid. 71. *Robinson v. Vaughton*, 8 C. & P. 252. *Jervis's New Rules*, 123.

14. The form of a demurrer shall be as follows: — "The said defendant by — his attorney [or 'in person,' &c., or 'plaintiff'] says, that the declaration [or 'plea,' &c.] is not sufficient in law;" shewing the special causes of demurrer, if any. Form of demurrer.

The form of a joinder in demurrer shall be as follows: — "The said plaintiff [or 'defendant'] says, that the declaration [or 'plea,' &c.] is sufficient in law." Joinder in demurrer.

A demurrer, though trivial, cannot be treated as a nullity, where the defendant is not under terms to plead issuably; but, if he is, he cannot demur specially; and where good grounds are stated, the court will sometimes allow the special causes of demurrer to be struck out. *Nanney (Clerk) v. Kenrick*, 1 Dowl. P. C. 609.

15. The entry of proceedings on the record for trial, or on the judgment roll, (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever. Entry of proceedings on record.

16. No fees shall be charged in respect of more than one issue by any of the officers of the court, or of any judge at the assizes, or any other officer, in any action of *assumpsit*, or in any action of debt on simple contract, or in any action on the case. Charge for issue.

17. When money is paid into court, such payment shall be pleaded in all cases, and as near as may be, in the following form, *mutatis mutandis*: — Payment of money into court.

C. D. } The — day of —. The defendant by — his attorney [or
ats. } "in person," &c.] says, that the plaintiff ought not further to main-
A. B. } tain his action, because the defendant now brings into court the
sum of £ —, ready to be paid to the plaintiff. And the defendant further
says, that the plaintiff has not sustained damages [or in actions of debt, "that he is
not indebted to the plaintiff"] to a greater amount than the said sum, &c. in re-
spect of the cause of action in the declaration mentioned, and this he is ready to
verify; wherefore he prays judgment if the plaintiff ought further to maintain
his action.

Vide post, 2869. Reg. Gen. T. T. 1 Vict., where this form is repealed.

18. No rule or judge's order to pay money into court shall be necessary, except under stat. 3 & 4 Will. 4. c. 42. s. 21.; but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand. No order to pay money into court, except, &c.

Vide stat. 3 & 4 Will. 4. c. 42. s. 21. et anté, 2822. tit. PAYMENT OF MONEY INTO COURT.

19. The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same, by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, "that he has sustained damages (or 'that the defendant is indebted to him,' as the case may be) to a greater

Plaintiff's proceedings after payment of money into court.

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amount than the said sum;" and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

This rule has been repealed, *vide post*, 2869. Reg. Gen. T. T. 1 Vict.

Commence-
ment of de-
claration after
plea of non-
joinder.

20. In all cases under stat. 3 & 4 Will. 4. c. 42. s. 10., in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

"[*Venue.*] A. B., by E. F. his attorney [*or, 'in his own proper person,' &c.*] complains of C. D. and G. H., who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. &c.;" the same form to be used *mutatis mutandis* in cases of arrest or detainer.

Unless specially
denied, cha-
racter of as-
signees, execu-
tors, &c. not to
be considered
as at issue.

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorised by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as an issue, unless specially denied.

In an action by assignees of a bankrupt, admissions of their title as assignees by the defendant in letters addressed to the solicitor to the commission, and to one of the assignees, are *prima facie* evidence of title, so as to dispense with strict proof, though there is a plea denying the title of the plaintiffs as assignees, and notice to dispute has been given. *Inglis v. Spence*, 1 C. M. & R. 432., *vide etiam Jones v. Brown*, 1 Bing. N. C. 484.

Where a writ of summons described the plaintiff "executor," not stating, that he was "as executor," and the declaration was general without such description:—It was held to be no variance. *Tree v. White*, 1 Dowl. P. C. N. S. 586.

PLEADINGS IN
PARTICULAR
ACTIONS.

I.

ASSUMPSIT.

Effect of *non*
assumpsit.

Instances:
warranty,
policy.

Carriers, bailees,
and agents.

Goods sold.

Money had.

To actions on
bills and notes
no general issue
to be pleaded.

In every species
of *assumpsit*,
matters in con-
fession and
avoidance to be
pleaded
specially.

1. In all actions of *assumpsit* (*antè*, 229—402. tit. ASSUMPSIT), except in bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact, from which the contract or promise alleged may be implied by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given, upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indobitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact: in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes (*vide anti*, 754—960. tit. BILLS OF EXCHANGE AND PROMISSORY NOTES), the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing or making, or indorsing or accepting, or presenting, or notice of dishonour of the bill or note.

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* Infancy (*antè*, 2047—2067. tit. INFANT); coverture (*antè*, 709—753. tit. BARON AND FEME); release; payment; performance; illegality of consideration either by statute or common law; drawing, indorsing, accepting, &c. bills or notes (*antè*, 760—960. tit. BILLS OF EXCHANGE).

AND PROMISSORY NOTES) by way of accommodation; set-off; mutual credit; unseaworthiness; misrepresentation; concealment; deviation (*antè*, 2087—2218. tit. INSURANCE); and various other defences, must be pleaded. H.T. 4WILL.4. 1834.

4. In actions on policies of assurance, the interest of the assured may be averred thus:—"that A., B., C., and D., or some or one of them, were or was interested," &c.; and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested." Statement of interest of assured.

1. In debt (*antè*, 1173—1278. tit. DEBT.) on specialty or covenant (*antè*, 1053—1172. tit. COVENANT), the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. II. COVENANT AND DEBT. *Non est factum*.

Where a declaration alleged in excuse of *proferet*, that, the indenture "being in the possession of the defendant, the plaintiff cannot produce the same;" and it was pleaded, that the indenture "is not in the possession" of the defendant in manner and form, &c.:—It was held bad on special demurrer, as referring to the time when the plea was pleaded, and not to the time pointed to in the declaration. *Fisher v. Ford*, 12 A. & E. 654.

2. The plea of *nil debet* shall not be allowed in any action. *Nil debet*.

In debt for goods sold and delivered, money had and received, and on an account stated, *nil debet* was pleaded before Reg. Gen. T. T. 1 Vict. requiring the words "by statute;" to which there was a special demurrer:—It was held, that, since the new rules, the plea could not be good as to the last count; and that, being pleaded to the whole declaration, it was bad for the whole. *Cubert v. Moggs*, 10 A. & E. 632.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged;" and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of *assumpsit*. General issue in debt. Matters in confession and avoidance to be pleaded specially.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial, shall be admissible under that plea (*antè*, 1309—1314. tit. DETINERE). III. DETINERE. *Non detinet*.

1. In actions on the case (*antè* 1002—1026. tit. CASE) the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. IV. CASE. Effect of not guilty; other pleas.

Ex. gr. In an action on the case for a nuisance (*antè*, 2359—2374. tit. NUISANCE) to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only, that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. Instances: nuisance.

In an action on the case for obstructing a right of way (*antè*, 2758—2773. tit. WAY), such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods (*antè*, 2658—2716. tit. TROVER), the conversion only, and not the plaintiff's title to the goods. Right of way. Trover.

In an action of slander (*antè*, 2551—2582. tit. SLANDER) of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely, as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged. Slander.

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Escape.
Carriers.

Matters in confession and avoidance to be pleaded specially.

V.
IN TRESPASS.
Abutments in declaration.
Effect of not guilty in trespass *quare clausum fregit*.
In trespass *de bonis asportatis*.
Right of way.

Common of pasture.

Like pleas.

Commencement of rules.

In actions for an escape (*antè*, 1212—1222. tit. *DEWY*) it will operate as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceedings.

In this form of action against a carrier (*antè*, 961—1001. tit. *CARRIERS*), the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose in which they were received.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit* (*antè*, 229—402. tit. *ASSUMPSIT*).

1. In actions of trespass (*antè*, 2629—2657. tit. *TRESPASS*) *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name, or abutments, or other description, in failure whereof the defendant may demur.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial, that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession, of that place, which, if intended to be denied, must be traversed specially.

3. In actions of trespass *de bonis asportatis* (*antè*, 2658—2716. tit. *TROVER*), the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way (*antè*, 2758—2773. tit. *WAY*), with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way, with cattle or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture (*antè*, 1027—1052. tit. *COMMON*) for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon; if a right of common, for some particular kind of commonable cattle only, be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Provided, nevertheless, that nothing contained in the 5th, 6th, or 7th, of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations, relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of Easter Term next.

Issues, Judgments, and other Proceedings in Actions commenced by Process under Stat. 2 Will. 4. c. 39., shall be in the several Forms in the Schedule herewith annexed, or to the like effect, mutatis mutandis: provided, that in case of Non-compliance, the Court or a Judge may give leave to amend.

No. 1.

No. I.
Form of an issue in the King's Bench, Common Pleas, or Exchequer.

In the King's Bench; or,
In the Common Pleas; or,
In the Exchequer.

The [date of declaration] day of —, in the — year of our Lord, 18—.

[*Venue.*]—A. B. by E. F. his attorney [or, in his own proper person; or, by E. F., who is admitted by the court here to prosecute for the said A. B., who is an infant within the age of twenty years, as the next friend of the said A. B., as the case may be], complain of C. D., who has been summoned to answer the said A. B. [or, arrested or detained in custody] by virtue [or, served with a copy, as the case may be] of a writ issued on [date of first writ] the — day of —, in the year of our Lord, 18—, out of the court of our lord the king, before the king himself at Westminster [or, out of the court of our lord

the king, before his justices at Westminster; or, out of the court of our lord the king, before the barons of his Exchequer at Westminster, as the case may be]; For that

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1834.

[Copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue.]

Thereupon the sheriff is commanded that he cause to come here, on the — day of —, twelve &c., by whom &c., and who neither &c., to recognise &c., because as well &c.

The latter part of the issue must be in a different form, if there be issues in law also.

Care should be taken to enter the pleadings, &c. correctly; and if the issue be not correct in date or in the pleadings, an application should be made to amend it at the plaintiff's costs. The date is conclusive of the time when the action was commenced (*Whipple v. Manley*, 5 Dowl. P. C. 100. 1 M. & W. 432. *Ikin v. Plevin*, 5 Dowl. P. C. 594.); and if incorrectly stated, may be taken advantage of at the trial, though correctly stated on the roll. *Worthington v. Wigley*, 5 Dowl. P. C. 209. *White v. Farrer*, 2 M. & W. 288. *Ball v. Hamlet*, 1 C. M. & R. 576. 3 Dowl. P. C. 188.

No. 2.

[The *plecits* are to be omitted. — Copy the issue to the end of the award of the venire, and proceed as follows]:

Afterwards, on the [testes of *distringas* or *habeas corpora*] day of —, in the year —, the jury between the parties aforesaid is respited here until the [return day of *distringas* or *habeas corpora*] day of —, unless — shall first come on the [first day of sittings or commission day of assizes] day of —, at —, according to the form of the statute in such case made and provided for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly.

[The *postea* is to be in the usual form.]

No. 2.

Form of Nisi Prius record in the King's Bench, Common Pleas, or Exchequer.

No. 3.

[Copy the issue to the end of the award of the venire, and proceed as follows]:

Afterwards, the jury between the parties is respited until the [return of *distringas* or *habeas corpora*] day of —, unless — shall first come on the [day of sittings or Nisi Prius] day of —, at —, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.

Afterwards, on the [day of signing final judgment] day of — come the parties aforesaid, by their respective attorneys aforesaid [or, as the case may be]; and —, before whom the said issue was tried, hath sent hither his record, had before him, in these words:

[Copy *postea*.]

Therefore, it is considered, that the said A. B. do recover against the said C. D., his said damages, costs, and charges, by the jurors aforesaid, in form aforesaid, assessed; and also £— for his costs and charges, by the court here adjudged of increase to the said A. B. with his assent, which said damages, costs, and charges in the whole amount to —, and the said C. D. in mercy, &c.

No. 4.

[After the joinder of issue proceed as follows]:

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon, on the [testes of writ of trial] — day of — in the year —, pursuant to the statute in that case made and provided, the sheriff [or, the judge of —, being a court of record for the recovery of debt in the said county, as the case may be] commanded, that he summon twelve &c., who neither &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly; and when the same shall have been tried, that he make known to the court here what shall have been done by virtue of the writ of our lord the king to him in that behalf directed, with the finding of the jury thereon indorsed, on the — day of —, &c.

If this issue conclude with an award of a venire, it may be set aside for irregularity (*Ward v. Peel*, 1 M. & W. 743. 5 Dowl. P. C. 169.); or it may be amended upon payment of costs. *Attwill v. Baker*, 5 Dowl. P. C. 462.

No. 5.

William the Fourth, by &c., to the sheriff of our county of — [or, to the judge of —, being a court of record for the recovery of debt in our county of —, as the case may be].

Whereas A. B., in our court before us at Westminster [or, in our court before our justices at Westminster; or, in our court before the barons of our Exchequer at Westminster, as the case may be], on the [date of first writ of summons] day of — last, impleaded C. D. in an action on promises [or, as the case may be]; for that whereas one, &c. [here recite the declaration as in a writ of inquiry], and thereupon he brought suit. And

No. 4.

Form of the issue when it is directed to be tried by the sheriff.

No. 5.

Form of writ of trial.

H. T. 4 WILL. 4.
1834.

whereas the defendant, on the — day of — last, by —, his attorney [or, as the case may be] came into our said court and said [*here recite the pleas and pleadings to the joinder of issue*], and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*; and it is fitting that the issue above joined should be tried before you the said sheriff of — [or, judge, as the case may be], we therefore, pursuant to the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in nowise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and when the same shall have been tried in manner aforesaid, we command you that you make known to us at Westminster [or, to our justices at Westminster; or, to the barons of our said Exchequer, as the case may be] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the — day of — next.

Witness, —, at Westminster, the — day of —, in the — year of our reign.

The dates must be correctly stated; if not, the writ will be void. *White v. Farn,* 2 M. & W. 288. *Worthington v. Wigley,* 5 Dowl. P. C. 209.

No. 6.

Form of indorsement thereon, of the verdict.

Afterwards, on the [day of trial] day of —, in the year —, before me, sheriff of the county of — [or, judge of the court of —] — came, as well the within-named plaintiff as the within-named defendant, by their respective attorneys within-named [or, as the case may be], and the jurors of the jury by me duly summoned, as within commanded, also came, and being duly sworn to try the said issue within mentioned on their oath, said, that —

No. 6.

No. 7.

Form of indorsement thereon, in case a nonsuit takes place.

[After the words, "duly sworn to try the issue within-mentioned," proceed as follows]:

And were ready to give their verdict in that behalf; but the said A. B., being solemnly called, came not, nor did he further prosecute his said suit against the said C. D.

No. 7.

No. 8.

Form of judgment for the plaintiff after trial by the sheriff.

[Copy the issue, and then proceed as follows]:

Afterwards, on the [day of signing judgment] day of —, in the year —, came the parties aforesaid, by their respective attorneys aforesaid [or, as the case may be], and the said sheriff [or, judge, as the case may be], before whom the said issue came on to be tried, had sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words: to wit—

[Copy the indorsement.]

Therefore it is considered &c. [in the same form as before].

No. 8.

H. V. 4 WILL. 4.
1834.

X. HILARY VACATION, 4 WILL. 4. 1834.

These rules contain directions to taxing officers, as to all writs issued on or after the 15th March, 1834. *Vide* 5 B. & Ad. Rules XIX—XXII.

H. T. 6 WILL. 4.
1836.

XI. HILARY TERM, 6 WILL. 4. 1836.

Holidays.

Whereas, by the act of the 3 & 4 Will. 4. c. 42. s. 43. it is enacted, that none of the several days mentioned in the statute passed in the sessions of parliament holden in the 5th and 6th year of the reign of King Edward the Sixth, intituled, "An act for keeping holidays and fasting days," shall be observed or kept in the courts of common law, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord and the three following days, and Monday and Tuesday in Easter week, it is hereby ordered, that henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said courts, viz. Good Friday and Easter Eve, and such of the five days following as may not fall in the time of term, but not otherwise; the birthday of our lord the king, the birthday of our lady the queen, the day of the accession of our lord the king, Whit Monday, and Whit Tuesday.

Examination,
&c. of attor-
neys.

1. Whereas, by stat. 4 Hen. 4. c. 18. it was enacted, "that all the attorneys shall be examined by the justices, and by their discretions their names put on the roll, and they that be good and virtuous, and of good fame, shall be received, and sworn well and truly to serve in their offices." And whereas, by

stat. 3 Jac. 1. c. 7. s. 2. it was enacted, "that none shall from henceforth be admitted attorneys in any of the king's courts of record, but such as have been brought up in the same courts, or otherwise well practised in soliciting of causes, and have been found, by their dealings, to be skilful and of honest disposition; and that none be suffered to solicit any cause or causes in any of the courts aforesaid, but only such as are known to be men of sufficient and honest disposition." And whereas, by a rule made in Michaelmas Term, 1654, in the courts of King's Bench and Common Pleas, it was ordered, "that the courts should, once in every year in Michaelmas Term, nominate twelve or more able and credible practisers, to continue for the ensuing year to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination; and the persons desiring to be admitted were first to attend with their proofs of service, then repair to the persons appointed to examine, and, being approved, to be presented to the court and sworn." And whereas, by stat. 2 Geo. 2. c. 23. s. 2. it was enacted, "that the judges, or any one or more of them, should, and they were thereby authorised and required, before they should admit such person to take the oath, to examine and inquire, by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively, should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said judge or judges of the said courts respectively should, and they were thereby authorised to administer to such persons the oath thereafter directed to be taken by attorneys; and, after such oath taken, to cause him to be admitted an attorney of such court respectively." And whereas, in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the judges, in manner hereinafter mentioned, it is ORDERED, that the several masters and prothonotaries for the time being, of the courts of King's Bench, Common Pleas, or Exchequer respectively, together with twelve attorneys or solicitors, be appointed by a rule of court in Easter Term in every year to be examiners for one year, any five of whom (one whereof to be one of the said masters or prothonotaries) shall be competent to conduct the examination; and that from and after the last day of next Easter Term, subject to such appeal as hereafter mentioned, no person shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate, signed by the major part of such examiners, actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a judge.

H.T. 6 WILL. 4.
1836.

Examiners
appointed.

2. It is further ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the judges.

Regulations to
be made.

3. And it is further ordered, that, in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the judges, to be delivered to the clerk of the lord chief justice of the court of King's Bench, upon which no fee or gratuity shall be received; which application shall be heard in Serjeants' Inn Hall by not less than three of the judges.

Petition of
appeal.

4. And whereas the hall or building of the Incorporated Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examination, and the said society have consented to allow the same to be used for that purpose, IT IS FURTHER ORDERED, that, until further order, such examinations be there held on such days, being within the last ten days of every term, as the said examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said society at their said hall, which notice shall also state his place or places of residence or service for the last preceding twelve months; and in case of application to be admitted, on a refusal of the certificate, shall give

Where exami-
nation to be had.

Term's notice.

H. T. 6 WILL. 4.
1836.

Notices of
application.

ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5. And it is further ordered, that three days at the least before the commencement of the term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the master's or prothonotary's office, as the case may be, instead of affixing the same on the walls of the courts, as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the master or prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned, into an alphabetical table or tables, under convenient heads, and affix the same, on the first day of term, in some conspicuous place within or near to, and on the outside of, each court.

Vide ante, 2800. Reg. Gen. E. T. 3 Vict. 1840.

Formerly, in addition to the notices here mentioned, five copies were to be entered in books kept for that purpose at the chambers of the judges of the Queen's Bench, for the space of one full term previous to the application (Reg. Gen. T. T. 31 Geo. 3.); and in the Common Pleas, a copy was to be affixed in a conspicuous place in each of the chambers of the judges of that court; and one copy was also to be affixed before the term in the usual place in the offices of each of these courts. Under particular circumstances these rules were sometimes relaxed: for instance, where the applicant was going to practise abroad (*Exp. Hulme*, 4 Dowl. P. C. 88.), or had been prevented by illness from giving the notice in time (*Exp. Herbert*, 2 *ibid.* 179.), or through inadvertence had entered his notice only in the book kept at the chambers of the chief justice. *Exp. Woodright*, 4 *ibid.* 274. *Jervis's New Rules*, 147.

Re-admission
of attorneys.

6. And whereas it is expedient that, upon the re-admission of attorneys, the judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinued to practise, and as to their conduct and employment during the time of such discontinuance, IT IS FURTHER ORDERED, that at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted with the master or prothonotary, as the case may be, which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also at the same time cause to be left a copy of such affidavit with the clerk of the lord chief justice of the court of King's Bench. And the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

E. T. 6 WILL. 4.
1836.

Appointment
of examiners.

XII. EASTER TERM, 6 WILL. 4. 1836.

It is ordered, that the several masters and prothonotaries for the time being of the courts of King's Bench, Common Pleas, and Exchequer respectively, together with Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White, Edward Archer Wilde, gentlemen, attorneys, be, and the same are hereby appointed, examiners for one year now next ensuing, to examine all such persons as shall desire to be admitted attorneys of all or either of the said courts, from and after the last day of this present term; and that any five of the said examiners, one of them being one of the said masters or prothonotaries, shall be competent to conduct the said examination in pursuance of and subject to the provisions of the rule of all the courts made in this behalf in Hilary Term last past.

Regulations for
the examination
of persons
applying to be
admitted as at-
torneys of the
courts of
King's Bench,
Common
Pleas, or

Whereas, by a rule of the courts of King's Bench, Common Pleas, and Exchequer, made in Hilary Term, 1836, it was ordered, that the several masters and prothonotaries for the time being of the said courts respectively, together with twelve attorneys or solicitors, should be appointed by a rule of court in Easter Term in every year to be examiners for one year of persons applying to be admitted attorneys of the said courts, any five of whom (one whereof to be one of the said masters or prothonotaries) should be competent to conduct the examination; and that from and after the last day of the present Easter Term, subject

to such appeal as thereafter mentioned, no person should be admitted to be sworn an attorney of any of the said courts except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time should be specially extended by the order of a judge: And it was further ordered, that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the judges; and that, until further order, such examinations should be held in the hall or building of the Incorporated Law Society of the United Kingdom in Chancery Lane, on such days (being within the last ten days of every term) as the said examiners, or any five of them, should appoint; and that any person not previously admitted of any of the three courts, and desirous of being admitted, should give a term's notice of his intention to apply for examination, by leaving the same with the secretary of the said society at their said hall.

E. T. 6 WILL. 4.
1836.

Exchequer,
pursuant to the
rule of court
made in
Hilary Term,
1836.

And whereas, by a rule of all the said courts, made in this present Easter Term, it was ordered, that the several masters and prothonotaries for the time being of the said courts, respectively, together with Thomas Adlington, Jonathan Brundrett, George Frere, James William Freshfield, James Hall, Bryan Holme, William Lowe, Edward Rowland Pickering, Samuel White Sweet, William Tooke, Richard White, and Edward Archer Wilde, gentlemen, attorneys, should be, and the same were thereby appointed examiners for one year then next ensuing, to examine all such persons as should desire to be admitted attorneys of all or either of the said courts from and after the last day of that term; and that any five of the said examiners, one of them being one of the said masters or prothonotaries, should be competent to conduct the said examination, in pursuance of and subject to the provisions of the said rule of Hilary Term last.

In pursuance of the said rules, the following regulations for conducting the said examinations have been submitted to and approved by the judges of the said courts:—

1. That every person applying to be admitted an attorney of any of the said courts pursuant to the said rules shall, within the first seven days of the term in which he is desirous of being admitted, leave, or cause to be left with the secretary of the said Incorporated Law Society, his articles of clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship.

Articles, &c. to
be left with the
secretary of the
Incorporated
Law Society.

2. That, in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation, that they may think fit and reasonable.

Unless dis-
pensed with.

3. That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanation touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any question touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

Other questions
may be put.

4. That every person so applying shall also attend the said examiners at the hall of the said society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him by written or printed papers, touching his fitness and capacity to act as an attorney.

Attendance for
examination.

5. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being one of the said masters or prothonotaries) shall be satisfied as to the

Certificate of
examiners.

E. T. 6 WILL. 4.
1836.

fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands in the following form, viz. :—

“ In pursuance of the rules made in Hilary and Easter Terms, 1836, of the courts of King’s Bench, Common Pleas, and Exchequer, we, being the major part of the examiners actually present at, and conducting the examination of A. B. of &c., do hereby certify, that we have examined the said A. B. as required by the said rules ; and we do testify, that the said A. B. is fit and capable to act as an attorney of the said courts.”

Questions as to due Service, to be answered by the Clerk.

Questions as to
due service
to be answered
by the clerk.

1. What was your age on the day of the date of your articles ?
2. Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articulated or assigned carried on his or their business ? and, if not, state the reason.
3. Have you, at any time during the term of your articles, been absent without the permission of the attorney or attorneys to whom you were articulated or assigned ? and, if so, state the length and occasions of such absence.
4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articulated or assigned ?
5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney or solicitor ?

Questions as to due Service, to be answered by the Attorney.

Questions as to
due service to
be answered by
the attorney.

1. Has A. B. served the whole term of his articles at the office where you carry on your business ? and, if not, state the reason.
2. Has the said A. B., at any time during the term of his articles, been absent without your permission ? and, if so, state the length and occasions of such absence.
3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articulated clerk ?
4. Has the said A. B., during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor ?
5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment, other than the profession of an attorney and solicitor ?

And I do hereby certify that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be), bearing date, &c., for the term therein expressed ; and that he is a fit and proper person to be admitted an attorney.

Where an attorney to whom an articulated clerk has served part of his time has absconded, the court will allow him to be examined without producing the usual testimonials from him as to service, &c. Exp. *Henry Carr*, 1 Dowl. P. C. N. S. 565.

M. T. 7 WILL. 4.
1836.

Rules to return
writs, or to
bring in the
body, except in
London and
Middlesex, to
be eight instead
of six day rules.

XIII. MICHAELMAS TERM, 7 WILL. 4. 1836.

It is ordered, that, from and after the last day of this term, all rules upon sheriffs, other than the sheriffs of London and Middlesex, to return writs either of mesne or final process, and rules to bring in the bodies of defendants, be eight day rules, instead of six day rules.

XIV. EASTER TERM, 7 WILL. 4. 1837.

E. T. 7 WILL. 4.
1837.

[Appointment of examiners for the admission of attorneys ; which occurs in the Easter Term of every subsequent year.]

XV. HILARY TERM, 1 VICT. 1838.

It is hereby ordered, that on and after the fourth day of this present Hilary Term, all affidavits sworn before a commissioner in the country, or a judge of assize on the circuit, be read in the several courts of Queen's Bench, Common Pleas, and Exchequer, or before any judge of the same, or any of the masters thereof, in like manner as other affidavits, and without obliging the party filing them to obtain copies of the same.

And it is further ordered, that all affidavits read before a judge of any of the said courts, or before a master of the same, shall be filed with the masters of the said courts, and be alphabetically indexed; such affidavits to be delivered to the said masters, in order to be filed, four times in the year, that is to say, the last day of each term.

It is ordered, that the 17th article of the rule made in Hilary Term, 2 Will. 4., for regulating the practice of all the courts of King's Bench, Common Pleas, and Exchequer of Pleas, be henceforth annulled; and that in all cases special bail may be justified before a judge at chambers, both in term and vacation.

It is also ordered, that no rule for a special jury be granted on behalf of any defendant or plaintiff in replevin, except on an affidavit, either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day; provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.

It is further ordered, that henceforth every rule of court delivered out in vacation shall be dated the day of the month and week on which the same is delivered out, but shall be entitled as of the term immediately preceding such vacation.

[It is ordered, that judges' orders to return writs (whether of mesne or final process), and to bring in the body, be drawn up without any affidavit. Dated this 21st day of February, 1838.]

Where there are several defendants in a writ of *capias*, and warrants are issued, those by the under-sheriff against more than one defendant, no more shall be charged in any case for each defendant, after the first, than 2s. 6d.

XVI. TRINITY TERM, 1 VICT. 1838.

It is ordered, that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

Whereas it is expedient that certain rules and regulations made in Hilary Term, in the fourth year of his late majesty King William the Fourth, pursuant to stat. 3 & 4 Will. 4. c. 42. s. 1., should be amended, and some further rules and regulations made pursuant to the same statute, IT IS THEREFORE ORDERED, that from and after the first day of Michaelmas Term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute shall be in force:—

IT IS ORDERED, that the 17th and 19th of the general rules and regulations made pursuant to stat. 3 & 4 Will. 4. c. 42. s. 1. be repealed, and that in the place thereof the two following amended rules be substituted, viz.:—

For the 17th Rule.

When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis*:—

Form of Plea.

C. D. } The ——— day of ———
 ats. } The defendant, by——, his attorney [or, "in person," &c.] says [or,
 A. B. } in case it be pleaded as to part only, add, "as to £——, being part

H. T. 1 VICT.
1838.

Affidavits, if sworn before a country commissioner, or judge of assize, may be read in court without taking copies.

Filing affidavits.

Special bail to be justified before a judge at chambers.

Special jury in replevin.

Rules of court how dated.

Rules to return writs, how obtained.

SHERIFF'S FEES.

T. T. 1 VICT.
1838.

Staying actions on bills, &c.

Reg. Gen. H. T. 4 WILL. 4. ss. 17. & 19. repealed.

Payment of money into court.

Form of plea.

T. T. 1 Vicr.
1838.

of the sum in the declaration;" or — "count mentioned;" or, "as to the residue of the sum of £——"] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff; and that the defendant further says, that the plaintiff has not sustained damages [or, in actions of debt, "that he never was indebted to the plaintiff"] to a greater amount than the said sum of &c., in respect of the cause of action in the declaration mentioned [or, "in the introductory part of this plea mentioned"]; and this he is ready to verify: wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

For the 19th Rule.

Proceedings by
plaintiff after
payment of
money into
court.

The plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours to sign judgment for his costs of suit so taxed; or the plaintiff may reply "that he has sustained damages (or, "that the defendant was and is indebted to him," as the case may be) to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

Vide Reg. Gen. H. T. 4 Will. 4. s. 19. antè, 2859. The material difference in the two rules is the addition in the latter of the words, "and is," in the form of the replication. Whatever be the result of the cause, the plaintiff is entitled to the money paid into court. If the plaintiff accept the money paid into court with the plea, he is entitled to his costs, even though the sum be under 40s., for by the acceptance the suit is at an end, and the defendant cannot enter a suggestion (*Ferrand v. Morgan*, 1 Gale, 156); but if there be also other pleas, the defendant will be entitled to the costs of them. *Goode v. Goldsmith*, 2 M. & W. 302. 5 Dowl. P. C. 288. If the plaintiff proceed, he will have the costs of the suit if he succeed; but if the defendant get a verdict, he will be entitled to the costs of the cause, and not, as formerly, merely those incurred since the payment into court. The plaintiff will not be liable to any costs by reason of the defendant's having taken out a summons to stay proceedings on payment of a certain sum, which the plaintiff refused, alleging more to be due, the defendant not having afterwards brought the money into court. *Gover v. Elkins*, 3 M. & W. 216. *Jervis's New Rules*, 156.

General issue
by statute.

IT IS FURTHER ORDERED, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of any act of parliament, he shall insert in the margin of such plea the words "by statute," otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament; and such memorandum shall be inserted in the margin of the issue and of the Nisi Prius record.

Vide antè, 2862. Reg. Gen. H. T. 4 Will. 4.

The plea of not guilty "by statute," pleaded under stat. 11 Geo. 2. c. 19. s. 21., in an action for an excessive distress, puts in issue, not only the matter of justification, but the tenancy and ownership of the goods. *Williams v. Jones*, 11 A. & E. 643.

If a defendant plead not guilty "by statute" to the declaration, that plea also extends to a new assignment. If a defendant do not add the words "by statute" on the margin of his plea of not guilty, he cannot give special matter in evidence to bring himself within an act of parliament, which allows a plea of not guilty; but if, at the end of the plaintiff's case, it appear, that the defendant was entitled to notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in a wrong county, this is not aided by the defendant having omitted to add the words "by statute" on the margin of his plea. *Mason v. Newland*, 9 C. & P. 575.

Special pleas
will not be al-
lowed in addi-
tion to the
statutable plea
of the general
issue.

The court will not allow the defendant to put special pleas on the record, in addition to the statutable plea of the general issue. *Legge v. Boyd*, 1 M. & G. 898.

Where a statute enables defendants to plead the general issue, and to give the special matter of defence in evidence, the plea of not guilty so pleaded, is not affected by the new rules of H. T. 4 Will. 4., but operates as before they were framed, putting in issue not only the defences peculiar to the statute, but all that would have arisen at common law. Therefore, the court, in the exercise of its discretion under stat. 4 Anne, c. 16. s. 4. will not give leave to plead not guilty "by statute," together with a special plea, although such plea may raise a defence independent of the statute. *Ross v. Chyke*, 11 A. & E. 631.

In *Forman v. Dawes* (1 C. & Marsh. 127.), it appeared, on the trial of an action against officers of a court of requests, that the *Nisi Prius* record contained only a plea of not guilty, without the words "by statute" being added; the defendant's counsel wished to amend, by adding the words "by statute" to the *Nisi Prius* record, but the judge would not allow the amendment:—but it seems, that if it could have been shewn, that the words "by statute" had been in the issue delivered by the plaintiff's attorney, the judge would have allowed the amendment.

T. T. 1 Vict.
1838.

In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

Payments credited in particulars of demand need not be pleaded.

This and the two succeeding rules settle the doubts which were expressed in *Ernest v. Brown*, 3 Bing. N. C. 674. *Kenyon v. Wakes*, 2 M. & W. 764. *Nicholl v. Williams*, 2 M. & W. 758. *Coates v. Stevens*, 2 C. M. & R. 118. 5 Tyrw. 764. *Booth v. Howard*, 5 Dowl. P. C. 438. *Shirley v. Jacobs*, 2 Bing. N. C. 88.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

Rule not to apply to claim of balance.

Payment in reduction of damages or debt not to be allowed.

M. T. 2 Vict.
1838.

Admission of attorneys.

XVII. MICHAELMAS TERM, 2 VICT. 1838.

Whereas it is provided by the act of 1 & 2 Vict. c. 45. s. 3. that, after the 1st of November, 1838, any person entitled to be admitted an attorney of any of the superior courts of common law at Westminster shall, after being sworn in and admitted as an attorney of any one of the said courts be entitled to practise in any other of the said courts, upon signing the roll of such court and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such court, provided that no additional fee besides those payable under the act of 1 Vict. c. 56. shall be demanded or paid; and that the fees payable for such admissions shall be apportioned in such manner as the judges of the said courts, or any eight of them, shall, by any rule or order made in term or vacation, direct and appoint.

We therefore direct and appoint that the fees payable by virtue of the said last-mentioned act for the judge's fiat, be received in the first instance by the clerk of the judge granting the fiat, and paid over by him to the clerk of the chief justice or chief baron of the court, as the case may be; and the day after each term all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each judge; and further, that the fees payable by virtue of the said act to the ushers, shall be received in the first instance by one of the ushers of the court in which the admission shall take place, and shall, on the day after each term, be divided into three equal portions, one of which shall be paid to the ushers of each court.

XVIII. HILARY VACATION, 2 VICT. 1839.

IT IS ORDERED, that the following forms of writs, framed by the judges pursuant to stat. 1 & 2 Vict. c. 110 s. 20. be used from and after the first day of March next, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary, but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

H. V. 2 Vict.
1839.

Forms of writs as framed by the judges, pursuant to stat. 1 & 2 Vict. c. 110.

[The forms of the writs here follow, *vide* 9 A. & E. 986—998.]

A writ of *capias* may issue without a judge's order on a writ of summons, against a prisoner remanded by the Insolvent Debtors' Court under stat. 1 & 2 Vict. c. 110. s. 85. *Growcock v. Waller*, 11 A. & E. 165.

H. T. 3 VICT.
1840.

Regulations
respecting writs
under stat.
1 & 2 Vict.
c. 110. s. 20.

XIX. HILARY TERM, 3 VICT. 1840.

IT IS ORDERED, that the following forms of writs, framed by the judges pursuant to stat. 1 & 2 Vict. c. 110. s. 20., be used from and after the first day of next Easter Term in the cases to which they are applicable, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; and that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back or at the foot of the writ, directing the sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered and interest thereon, at the rate of *4l. per cent. per annum* from the time when the judgment was entered up, or if it was entered up before the first day of October, 1838, [then from that day; and that, in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty, and the damages and costs recovered, and the interest thereon, calculated as aforesaid, it shall be stated, in the body of the writ, that the sheriff is to levy interest at the rate of *4l. per cent. per annum*, from the — day of —, and on the back or at the foot of the writ there shall be a memorandum as above directed; and that in the case of an assessment of further damages, under a writ of *scire facias* pursuant to stat. 8 & 9 Will. 3., it shall be stated, in the body of the writ of execution, that the sheriff is to levy interest on the damages assessed and costs taxed in that behalf at the rate of *4l. per cent. per annum*, from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day: BUT IT IS FURTHER ORDERED, that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

[The forms of the writs here follow, *vide* 11 A. & E. 603—606.]

T. T. 3 VICT.
1840.

Payment of
costs for a
judge's order
when made a
rule of court.

XX. TRINITY TERM, 3 VICT. 1840.

It is resolved by all the judges, that, when a judge's order is made a rule of court, it shall be a part of the rule of court, that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed, that the order has been served on the party or his attorney, and disobeyed.

H. T. 4 VICT.
1841.

Proceedings in
ejectment.

XXI. HILARY TERM, 4 VICT. 1841.

It is ordered, that a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day of the term in which the tenant is required by the notice to appear, in town causes, and before the end of the fourth day after the term in which the tenant is required by the notice to appear in country causes, and may proceed to compel the plaintiff to reply thereto, or may sign judgment of *non pros.*, notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration; and that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a judge for leave to draw up a rule for judgment, as of the time at which such rule for judgment would have been obtained.

T. T. 4 VICT.
1841.

XXII. TRINITY TERM, 4 VICT. 1841.

It is ordered, that where judgment is signed by virtue of a judge's certificate given pursuant to the act 1 Will. 4. c. 7. s. 2., such judgment may be signed without any rule for judgment.

STATUTES OF SET-OFF(1), 2873—2881.

STAT. 2 GEO. 2. C. 22. S. 13. AND 8 GEO. 2. C. 24. SS. 4 & 5.

STAT. 9 GEO. 4. C. 14. S. 4. — *Cross-demands can only be set off which are in the nature of a debt — When amount of work is matter not of set-off but of reduction — Debt under 40s. — THE DEMANDS MUST BE MUTUAL AND DUE IN THE SAME RIGHT — Husband and wife — Joint debt — Debt due in autre droit. — Partners — Agents — Underwriters and brokers — Bankrupts — Executors — Factors — Debt must have existed, when the action was commenced — Amount of bill of exchange for which defendant was not liable before commencement of action — Actions in which a set-off is allowed — DEMAND INTENDED TO BE SET OFF MUST BE LIQUIDATED. — Creditor borrowing money from his debtor — A. remitting bill to B. for the use of C. — Debt on bond — Bond not conditioned for the payment of money — PENALTIES — Penalty by articles of agreement — Cross-actions and claims — Mutual claims for costs — Costs of a cause against a sum due on another account — Interlocutory costs and final costs — Awarded costs — JUDGMENTS — Defendant in execution — When damages are unliquidated and there is not a mutuality — Guarantee debt cannot be set off — Judgment of Chief Justice Tindal in *Morley v. Ingila* — Work and labour upon an agreement for cash — Unpaid stakes — Costs in Chancery — Costs of a cause, and costs imposed by way of penalty — Costs ordered by the court to be repaid — Costs of a cause in which a rule for a new trial is pending — Costs in ejectment — Verdict recovered — Statutes of set-off do not extend to replevin — PLEADINGS — Defendant can waive his right of set-off — A set-off must be pleaded, and is not a statutable general issue — Judgment of Lord Abinger in *Graham v. Partridge* — Statute of Limitations must be specially replied — When a set-off is pleaded to the whole cause of action, the issue on it is a single one — Plea of set-off of a particular amount, not supported by proof of a lesser amount; but plea may be taken distributively — Set-off may be pleaded as to part by way of deduction and non assumpsit as to the rest — What is a necessary allegation in a plea — Judgment of Mr. Baron Parke in *Dendy v. Powell* — What is not a plea of judgment recovered under Reg. Gen. H. T. 4 Will. 4. s. 8. — Replication to a plea of set-off not altered by the new rules — De injuriâ cannot be replied to a plea of set-off — When plaintiff only bound to prove the balance for which he claims — Verdict how taken in case of set-off — PARTICULARS OF SET-OFF — Waiver of irregularity — Where plea a nullity — Delivery of particulars no waiver — Particulars wrongly headed — Variance by which the plaintiff could not be misled — Where evidence of satisfaction will not be received — Where a judge has no power to order particulars of set-off.*

STAT. 2 GEO. 2. C. 22. S. 13. AND 8 GEO. 2. C. 24. SS. 4. & 5.

STATUTES OF
SET-OFF.

At common law, if the plaintiff was indebted to the defendant, the latter could not set off such debt, if the plaintiff brought an action for the recovery of his debt, and consequently was driven to a cross-action; — to obviate this inconvenience, and to prevent circuity of action, or a bill in equity, it was enacted by stat. 2 Geo. 2. c. 22. s. 13., "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence,

Stat. 2 Geo. 2.
c. 22. s. 13.

(1) *Vide ante*, 460, 461. tit. ATTORNEY; 678—688. tit. BANKRUPTCY; 940. tit. BILLS OF EXCHANGE AND PROMISSORY NOTES; 1187, 1188. tit. DEBT.

STAT. 2 GEO. 2. c. 22. s. 13. AND 8 GEO. 2. c. 24. ss. 4 & 5. notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue."

Stat. 8 Geo. 2. c. 24. ss. 4 & 5.

This clause was made perpetual by stat. 8 Geo. 2. c. 24. s. 4., and it having been doubted, whether mutual debts of a different nature could be set against each other, it was by stat. 8 Geo. 2. c. 24. s. 5. declared, "that mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner mentioned in stat. 2 Geo. 2. c. 22. s. 5., notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off, shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

Stat. 9 Geo. 4. c. 14. s. 4.

By stat. 9 Geo. 4. c. 14. s. 4. a "written memorandum is necessary to take a case out of the Statute of Limitations in case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

Stat. 2 Geo. 2. c. 22.

Cross-demands can only be set off, which are in the nature of a debt.

When amount of work is matter not of set-off but of deduction.

Debt under 40s.

Stat. 2 Geo. 2. c. 22. only enables a defendant to set off cross-demands which are in the nature of a debt, in the legal acceptance of the term: thus, in an action by a servant against his master for wages, the latter cannot, in the absence of an agreement, set off the value of goods lost by the negligence of the former. *Le Loir v. Bristow*, 4 Camp. 134.

Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter, not of set-off but of deduction. *Turner v. Diaper*, 2 M. & G. 241.

A set-off which reduces the plaintiff's demand to a sum less than 40s. does not affect the jurisdiction of the superior courts. *Pitts v. Carpenter*, 1 Wils. 19. Str. 1191. *Gros v. Fisher*, 3 Wils. 48.

If the debt for which the action is brought be reduced by a set-off below the amount recoverable, and for which the plaintiff ought to sue in a court of requests, the defendant will not therefore be entitled to costs; for as a defendant may waive his right of set-off, and resort to his cross-action, the plaintiff could not know, until the plea was pleaded, whether he would avail himself of it or not. *M'Collam v. Carr*, 1 B. & P. 223. *Gobel v. Birt*, 2 Chitt. 394. *Jenkinson v. Morton*, 1 M. & W. 300. 3 Dowl. P. C. 74. *Jervis's New Rules*, 407.

It has been previously observed (*antè*, 940. tit. BANKRUPTCY), that, to constitute a valid set-off, the demands must be mutual, and due in the same right.

A debt due to a man in right of his wife cannot be set off in an action against him on his own bond. *Paynter v. Walker*, Bull. N. P. 179 (a).

Nor can a debt, due from a wife *dum sola*, be set off in an action brought by the husband alone. *Wood v. Aheri*, 2 Esp. N. P. C. 594. Unless he has promised to pay the debt after marriage, and thereby made it his own. *Ibid*.

A debt due from a wife *dum sola* cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property (*Burrough v. Moss*, 5 M. & R. 296. 10 B. & C. 558.): as where he sues upon it in his own name, or indorses it over to a third person; and it is immaterial, that the wife joined in the indorsement. *Ibid*.

Neither to a declaration in covenant by husband and wife as administratrix, can a set-off of money due to the intestate be supported. *Warn v. Bickford*, 7 Price, 550.

If A. have a joint demand against B. and C., who are also creditors of A.; and B. by letter make himself separately liable to A. on account of the demand originally joint, he cannot, either at law or in equity, set off the joint debt due from A. to himself and C. *Ex parte Ross*, Buck, 125.

A joint debt cannot be set off against a separate debt at law; but it may in equity under particular circumstances; as where there is a clear series of transactions in which joint credit has been given. *Fulham v. Noble*, 3 Meriv. 618.

There can be no set-off at law, where either of the debts is a debt in *auter droit* (*Gale v. Luttrell*, 1 Y. & J. 180.); neither will a set-off be allowed in equity in respect of legal demands, although there cannot be a set-off at law, if the demands be in *auter droit*. *Ibid*. *Harvey v. Wood*, 5 Madd. 459.

In an action by a trustee to recover a debt for the benefit of the *cestui que trust*, the de-

THE DEMANDS MUST BE MUTUAL, AND DUE IN THE SAME RIGHT.

HUSBAND AND WIFE.

JOINT DEBT.

DEBT DUE IN AUTER DROIT.

- fendant cannot set off a debt due to him from the *cestui que trust*. *Tucker v. Tucker*, 1 N. & M. 477. 4 B. & Ad. 745.
- A debt due to a defendant, as a surviving partner, may be set off against a demand on him in his own right. *Slipper v. Stidstone*, 5 T. R. 493. 1 Esp. N. P. C. 47. *French v. Andrade*, 6 T. R. 582., et vide *Smith v. Barrow*, 2 T. R. 476. *Stainforth v. Fel-lows*, 1 Marsh. 184. A debt due from one who was the only apparent trader may be set off in an action brought by himself and partners. *Stracey v. Deey*, 7 T. R. 361. n. 2 Esp. N. P. C. 469. n. And where one was a partner in a firm, and also carried on a separate trade himself, and the firm being indebted to him, remitted to him a note given to them by a third person:—It was holden, that in an action on the note by him as indorsee against the maker, the latter might set off a demand, which he had against the firm. *Puller v. Roe*, Peake's N. P. C. 197.
- It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners in trust for the rest, may be set off in an account current between them. *Crosse v. Smith*, 1 M. & S. 545.
- Where in an action for use and occupation of stables it appeared, that the plaintiff and defendant were formerly engaged in running a stage coach, that weekly accounts were delivered by the former to the latter, by which it appeared, that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the work done:—It was decided, that they were not evidence of set-off; for that to become a matter of set-off, the balance in such partnership account must be final. *Fromont v. Coupland*, 2 Bing. 170. 9 Moore, 319. 1 C. & P. 275.
- An agent employed to recover a sum of money, is entitled to retain a just allowance for his labour and service therein; and as such allowance is not in the nature of a cross-demand or mutual debt, he may give it in evidence under the general issue. *Dale v. Sollet*, 4 Burr. 2133.
- Upon an action against the underwriter for a loss, the underwriter cannot set off the premiums, although they have never been paid, unless he can make it appear, that the state of the relative accounts between the assured, broker, and underwriter, is such, as to take the case out of the ordinary rule, which is, that the receipt of the underwriter for the premium is conclusive evidence for the assured, that he has paid the premium to the underwriter. *De Gaminde v. Pigou*, 4 Taunt. 246.
- In *Davies v. Wilkinson* (4 Bing. 573. 1 M. & P. 502.) the defendant, an assurance broker, being sued for premiums received by him on policies subscribed by the plaintiff, was allowed to set off a loss on one of those policies effected in the name of the defendant, at the request of a third person, on goods in which such third person was interested, but on which the defendant had a lien to a greater amount than the set-off claimed.
- Where three underwriters, on a representation of a loss, paid their subscriptions, amounting to 600*l.*, into the hands of the broker, who, by their joint authority, paid over 300*l.*; and the loss turned out to be fraudulent, and one of the underwriters brought an action against the broker to recover back his 200*l.*:—It was holden, that the broker was entitled to set off the 300*l.* paid over against this demand, and that the court could not enter into the account to see what each party was entitled to respectively; and therefore, either that the other underwriters should have joined in the action, or the plaintiff should have resorted to a court of equity. *Silva v. Linder*, 2 Marsh. 437.
- Where the broker had guaranteed the payment of an average loss adjusted by the plaintiff (an underwriter) to the persons insured under a *del credere* commission, it was holden he could set it off. *Wienholt v. Roberts*, 2 Camp. 586.
- A broker cannot set off the amount of losses and returns of insurance which he is authorised to receive from the underwriter, in an action by the latter for his premium. *Wilson v. Creighton*, 1 Marsh. 297.
- And where a broker has effected policies in the name of his principal under a *del credere* commission, he cannot set off losses, which have happened on those policies, although those claimed are total, and he has accounted for them with his principal. *Cumming v. Forester*, 1 M. & S. 494.
- In an action by the executors of an underwriter against a broker, for premiums due on policies subscribed by the testator, the broker cannot set off returns of premium, which returns became due after the testator's death (*Houston v. Robertson*, 2 Marsh. 138. 6 Taunt. 448. 4 Camp. 342. Holt, N. P. C. 68.), even though the policies were effected under a *del credere* commission. *Houston v. Bordenave*, 2 Marsh. 141. 6 Taunt. 451.
- It having been previously stated when bankrupts (*anté*, 940.) and executors (*anté*, 1900.), can exercise the right of set-off, reiteration will be useless.
- To constitute a right of set-off, the debt must have existed not only at the time of the commencement of the action, but at the time when the plea was pleaded. *Evans v. Prosser*, 3 T. R. 186. *Rogerson v. Ladbroke*, 1 Bing. 99. Bull. N. P. 180.
- Where a bill of exchange was drawn by the plaintiff on the defendant, and for which the defendant was only liable before the commencement of the action, it was holden it could not be set off, though paid before the plea. *Leman v. Gordon*, 8 C. & P. 392.

STATS. 2 GEO. 2. c. 22. s. 13. AND 8 GEO. 2. c. 24. ss. 4 & 5.

PARTNERS.

Advances upon a bond given to one of the partners.

The balance in the partnership account must be final.

AGENTS.

UNDERWRITERS, AND BROKERS.

BANKRUPTS, EXECUTORS, AND FACTORS.

Debt must have existed when the action was commenced.

STATS. 2 GEO. 2,
c. 22. s. 13. AND
8 GEO. 2. c. 24.
ss. 4 & 5.

Effect of credit.

Actions in
which a set-off
is allowed.

DEMAND IN-
TENDED TO BE
SET OFF MUST
BE LIQUIDATED.

Creditor bor-
rowing money
from his debtor.

A. remitting
bill to B. for
the use of C.

Debt on bond.

Bond not con-
ditioned for the
payment of
money.

Judgment of
Chief Justice
Willes in
*Hutchinson v.
Sturges*.

PENALTIES.

In any bond or
specialty.

Penalty by
articles of
agreement.

There can be no set-off in an action brought upon a contract for the sale of goods in credit for a bill at a certain time, when the action is brought before the expiration of the time which the bill had to run. *Hutchinson v. Reid*, 3 Camp. 329.

Where a declaration in *assumpsit* stated, that in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit; the defendant undertook to provide money for the payment of the bills as they became due, and to indemnify the plaintiff from loss or damage by reason of the acceptance thereof; and assigned for breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses:—It was held on demurrer, that, as the plaintiff might be entitled on this declaration to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, 5 B. & A. 93.

Where the plaintiff, in his replication to a plea of set-off in *assumpsit* for money lent, denied such set-off, and it appeared, that the loan took place thirteen years since:—It was decided, that although the Statute of Limitations was not a legal bar to the action, yet that the jury might presume, from length of time and other circumstances, that the debt had been satisfied. *Cooper v. Turner*, 2 Stark. 497.

The actions in which a set-off is allowable are—*assumpsit*, debt, and covenant for the non-payment of money, and the demand intended to be set off must be liquidated, and such as might have been made the subject of one or other of these actions.

If a creditor borrow money of his debtor on the security of a note, even under an express promise of repayment, he may, nevertheless, set off the amount of his original debt. *Lechmere v. Hawkins*, 2 Esp. N. P. C. 626., et vide *Preston v. Shotton*, 1 Am. 50. *Taylor v. Okey*, 13 Ves. 180.

If a creditor consent, that his debtor shall set off the debt against a debt due from the creditor to another person, it seems that the agreement, although not in writing, is valid. *Cuxon v. Chadley*, 5 D. & R. 417. 3 B. & C. 596. 1 C. & P. 174.

Where A. remitted a bill of exchange to B., to be paid to a third person on A.'s account, and B. discounted the bill, but did not pay over the proceeds, upon which A. sued him in *assumpsit* for money had and received:—It was held, that in this action a set-off was admissible. *Thorpe v. Thorpe*, 3 B. & Ad. 580.

A set-off may be pleaded to an action of debt on bond, the condition of which, is for the payment of an annuity or growing sum. *Collins v. Collins*, 2 Burr. 820.

To debt on bond conditioned for replacing stock, a set-off cannot be pleaded, under stat. 8 Geo. 2. c. 24. s. 5.; and judgment may be entered up for the plaintiff in such a case, although a verdict was found for the defendant on a plea of set-off, such plea being bad in law. *Gillingham v. Waskett*, M'Clel. 198. 13 Price. 434.

Where a defendant pleaded by way of set-off a bond given to him by the plaintiff, conditioned for payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear:—It was held, that he was not bound to prove, that he had paid the money in order to set it off, but that on production of the bond, the plaintiff was bound to prove payment. *Penny v. Foy*, 8 B. & C. 11.

In debt upon a bail bond, brought by the officer of the palace court (*Hutchinson v. Sturges*, Willes, 261.), to whom the defendant had given the bond conditioned for the appearance of A. B. to answer C. D. in a plea of trespass on the case, the defendant pleaded by way of set-off a greater sum due to him from the plaintiff, by simple contract. On demurrer, the court gave judgment for the plaintiff, Chief Justice Willes observing, that as this was not a bond conditioned for the payment of money, the case was not within stat. 8 Geo. 2. c. 24., and that it was not within stat. 2 Geo. 2. c. 22., because the plaintiff did not sue in his own right, but in the nature of a trustee for C. D.; that it might as well be said, that when a person sued as executor, the defendant might set-off a debt from the plaintiff to the defendant, in his own right, as that the defendant could set off in the present case. He added, however, that if this had been a bond to the sheriff, assigned over to the party according to the statute, the court would have thought otherwise, and that the penalty must have been considered as the debt, this not being a case within the statute.

In cases where either of the debts shall accrue by reason of a penalty in any bond or specialty, the plea must shew how much is actually due on either side. Stat. 8 Geo. 2. c. 24. s. 4.

If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards, as it should remain unfinished, and a bond be prepared in the name of both, which is executed by one only, with condition for the due performance of the work or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dwyche*, 2 T. R. 92.

By articles of agreement for altering and repairing a warehouse for a fixed price, it was stipulated, that in the event of the work not being completed in three months, the

builder should forfeit and pay to the person with whom he contracted to do the work 5*l.* weekly; and every week such penalty to be deducted from the amount, which might remain due on the completion of the work:—It was holden, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the extra work; and that he had a double remedy, either to deduct it or to recover it. *Duckworth v. Alison*, 1 M. & W. 412.

The whole penalty incurred by the non-performance of articles of agreement cannot be pleaded by way of set-off. *Nedriffe v. Hogan*, 2 Burr. 1024. Nor can the defendant plead by way of set-off a bond debt of the plaintiff assigned to the defendant by another, to whom and for whose use it was originally given. *Wake v. Tinkler*, 16 East, 36.

In a cross-action, the defendant may, on motion, set off the debt against a judgment for a greater sum, and the court of C. P. will stay proceedings thereon. *Peacock v. Jeffery*, 1 Taunt. 426. And a verdict against a plaintiff in a prior action may be set off against a present demand. *Baskerville v. Brown*, 2 Burr. 1229. 1 W. Black. 293.

The 93d rule of H. T. 2 Will. 4. does not prohibit the setting off mutual claims for costs between the parties in the same suit: thus, in an action against three defendants, a verdict was found against one and in favour of the other two; and it was decided, that the costs of the successful defendants might be deducted from the amount of damages and costs payable to the plaintiff by the other defendant, without regard to the lien of the plaintiff's attorney. *George v. Elston*, 1 Scott, 518. 3 Dowl. P. C. 419. 1 Bing. N. C. 513.

The costs of one judgment may be set off against the debt and costs of another. *Thrustout d. Barnes v. Crafter*, 2 W. Black. 826.

But costs due from the plaintiff to A. cannot be set off against the costs due from B. to the plaintiff. *Holroyd v. Breare*, 4 B. & A. 43. 700.

The costs of a cause were allowed to be set off against a sum due from the defendant to the plaintiff on another account, but subject to the lien of the plaintiff's attorney, where the cause and all matters in difference were referred, and the arbitrator ordered a verdict to be entered for the defendant, but found, that the defendant was indebted to the plaintiff on other accounts. *Caddell v. Smart*, 4 Dowl. P. C. 760.

Interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged, is not strictly a condition precedent to ulterior proceedings. *Doe v. Carter*. 8 Bing. 330. 1 Dowl. P. C. 269.

If, upon the reference of an action in the court of C. P., the arbitrator award the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off without motion. *Figes v. Adams*, 4 Taunt. 632. And if payment of the smaller sum be enforced by attachment, the court will set the attachment aside. *Ibid.* And the like set-off in case of cross judgments for debt or damages and costs. *Ibid.*

A judgment can be pleaded by way of set-off, though a writ of error be pending thereon. *Reynolds v. Beerling*, 3 T. R. 188., vide *Curling v. Innes*, 2 Hen. Black. 372. Tidd, 716.

And where in an action on a promissory note for 30*l.*, the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for 1*l.*, to which there was a notice to set off the note of hand, the court held, that, notwithstanding the verdict, the note might be set off. *Baskerville v. Brown*, Bull. N. P. 180. 2 Burr. 1229. *Evans v. Prouser*, 3 T. R. 186.

A judgment in K. B. may be set off against a judgment in C. P., so as to narrow the execution to the balance due. *Barker v. Braham*, 2 W. Black. 869. 3 Wils. 396.

B. cannot, in an action brought against him by A., set off a judgment recovered by him against A., for which A. is charged in execution. *Taylor v. Waters*, 2 Chitt. 303. 5 M. & S. 103.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jagues v. Withy*, 1 T. R. 557.

If damages be unliquidated, and there be not a mutuality, there cannot be a set-off: thus, damages not yet recovered cannot be set off. *Freeman v. Hyett*, 1 W. Black. 394. So, likewise, where the plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name, and averred the interest in one count to be in himself, and another in himself and others; to which the defendants pleaded, that a less sum was due on the policy than for a total loss, and set off moneys due to them on the plaintiff's bond, which was made to them before they had notice that any other than the plaintiff was interested in the policy:—It was held, that these pleas were ill. *Grant v. Royal Exchange Assurance Comp.* 5 M. & S. 439. *Howlet v. Strickland*, Cowp. 56.

To an action of covenant for rent by a landlord, the defendant cannot set off any uncertain damages, that he may be entitled to recover against the landlord on any of the other covenants in the lease. *Weigalt v. Waters*, 6 T. R. 488. And in an action of covenant for not indemnifying a person against taxes, no plea of set off can be sustained. *Cooper v. Robinson*, 2 Chitt. 161.

STATS. 2 GEO. 2. c. 22. s. 13. AND 8 GEO. 2. c. 24. ss. 4 & 5.

Cross-actions and claims.

Mutual claims for costs.

Costs of a cause against a sum due on another account.

Interlocutory costs and final costs.

Awarded costs.

JUDGMENTS.

WHEN DAMAGES ARE UNLIQUIDATED AND THERE IS NOT A MUTUALITY.

STATS. 2 GEO. 2.
c. 22. s. 13. AND
8 GEO. 2. c. 24.
ss. 4 & 5.

A guarantee
debt cannot be
set off.

Judgment of
Chief Justice
Tindal in
Morley v.
Ingis.

Work and
labour upon
an agreement
for cash.

Unpaid stakes.

Costs in Chan-
cery.

Costs of a
cause and costs
imposed by
way of penalty.

Costs ordered
by the court to
be repaid.

Costs of a cause
in which a rule
for a new trial
is pending.

Costs in eject-
ment.

Verdict reco-
vered.

Statutes of set-
off do not
extend to re-
plevin.

PLEADINGS.

Defendant can
waive his right
of set-off.

A set-off must
be pleaded, and
is not a statu-
table general
issue.

A guarantee debt cannot be set off: thus, in *Morley v. Ingis* (4 Bing. N. C. 71.) Chief Justice Tindal said, "It seems to me, that the rule by which we are to determine, whether or not a demand can become the subject of a set-off, is by inquiring whether it sounds in damages; whether the demand is capable of being liquidated, or ascertained with precision at the time of pleading. The present set-off does not fall within that criterion. The intestate gave a guarantee for 1600*l.*, advanced by the defendants at the intestate's request to his son, and with the assent of the son placed to the intestate's credit, and also for 3000*l.* advanced to and paid for the son by the defendants, at the like request of the intestate; and the words of the instrument as set forth in the plea are, that the intestate guaranteed and agreed with the defendants to be answerable to them for the repayment of the said sum of 1600*l.*, and also of any further sums which might then or thereafter be owing to them from the intestate's son. There being no day fixed for payment, the law implies that the sum was payable on demand. Then, the plea goes on, 'whereby the plaintiff was, at the commencement of this suit, indebted to the defendants in the said sums of 1600*l.* and 3000*l.*;' that is not the legal deduction from the agreement. It is clear, that the liability of the intestate is not for an ascertained sum, nor for a sum, which was capable of being ascertained without a jury." Vide etiam *Crawford v. Stirling*, 4 Esp. N. P. C. 207.

In *Clarke v. Fell* (1 N. & M. 244.) it appeared that B., a creditor of A., employed A. to repair a carriage, undertaking to pay ready money for the repairs: — whereas it was holden, that B. could not, upon offering to set off an adequate portion of the debt, require the redelivery of the carriage without payment of the repairs.

The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race, against the stake of another race won by the plaintiff's horse. *Charlton v. Hill*, 5 C. & P. 147.

Costs in Chancery cannot be set off against costs on a rule of K. B. *Wenham v. Frost*, 2 Dowl. P. C. 444.

In *Dicas v. Waine* (1 Scott, 584.) the court refused to allow the costs of a case in another court, in which the plaintiff had been nonsuited, to be set off against costs imposed by way of penalty on the attorney for the defendant in this cause, and for which costs an attachment had issued.

The court will not order costs due from one party to another, to be set off against a sum obtained from the former by the latter to obtain his liberation from an illegal arrest, but ordered by the court to be repaid. *Pitt v. Coombs*, 1 H. & W. 13.

Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favour, and in the other the plaintiff obtained a verdict with damages, the court refused to stay proceedings in the first action, until a motion for a new trial in the other was disposed of, in order, that the damages and costs in the action might be set off against the costs of the other. *Johnson v. Latham*, 2 Dowl. P. C. 646.

A rule for staying proceedings in a second ejectment until the costs of the first have been paid, will not be enlarged in order to set off the costs claimed against any to which the lessors of the plaintiff may become entitled on the trial of the second ejectment. *Doe d. Maslin v. Packer*, 4 Tyrw. 144. S. C. nom. *Doe d. Martin v. Packer*, 2 C. & M. 457.

The amount of a verdict recovered cannot be set off against the amount of a judgment. (*Garrick v. Jones*, 2 Dowl. P. C. 157.); and the court of C. P. will not upon motion, enable a prisoner to set off in a summary way a debt for which he has obtained no judgment against the plaintiff's execution. *Philpott v. Caldwell*, 6 Taunt. 176.

The statutes of set-off do not extend to the action of replevin. *Laycock v. Telford*, 2 Chitt. 531. *Tidd*, 716. *Absalom v. Knight*, Bull. N. P. 181. (b.) Therefore, a plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Ibid.* But a tenant may plead payment of ground-rent in bar of an avowry for rent. *Safford v. Fletcher*, 4 T. R. 511.

There is no compulsion upon a defendant to make a set-off, and, if he please, he may bring a cross-action, provided he and his attorney choose to incur the odium of an obstinate and litigious character, and the censure of the court which will follow, unless good reason can be shewn for not pleading such set-off. *Brown v. Pigeon*, 2 Camp. 595. *Green v. Law*, 2 Smith, 668.

But if the defendant be not prepared at the time the plaintiff sues him upon his cross-demand, it is most advisable not to plead, or give notice of set-off, for in case he should go into evidence upon the trial in support of his cross-demand, and fail in the attempt, he cannot afterwards proceed in a cross-action for the amount; and a party cannot bring an action for money which he has succeeded in setting off in a former action against him, although, if the set-off were more than sufficient to cover the plaintiff's demand in the former action, the defendant therein may maintain an action for the surplus. *Hennell v. Fairlamb*, 3 Esp. N. P. C. 104. 1 Chitt. Pl. 571.

A set-off must be pleaded, but it is not a statutable general issue: thus, in *Graben v. Partridge* (1 M. & W. 395.) it was holden, that a defendant was not entitled to give evidence of set-off under a notice of set-off delivered with the plea of *nonpayment indebtedness* since Reg. Gen. H. T. 4 Will. 4., and that the judges were not restrained by the proviso

in stat. 3 & 4 Will. 4. c. 42. s. 1. from making the rule of H. T. 4 Will. 4. requiring that in all cases a set-off shall be pleaded; Lord Abinger observing, "The statute of set-off does not propose to alter the common law mode of pleading, but merely provides, that a party may use this as a defence. If, in an action of *assumpsit* or debt it might have been given in evidence under the plea of the general issue, in other actions it must have been pleaded specially. The statute goes on to provide, that, at the time of pleading the general issue, notice shall be given of the particular debt intended to be insisted on, otherwise such matter shall not be allowed to be given in evidence. This provision has been properly observed to have been a restriction, and not a privilege; I am of opinion, therefore, that the plea of set-off does not fall within the intention of the legislature, in the proviso contained in stat. 3 & 4 Will. 4. c. 42. s. 1., and that the judges did not exceed the powers given to them by that statute in making the rule in question."

The Statute of Limitations must be specially replied to a plea of set-off, and is an admission of the debt. *Chappel v. Darston*, 1 C. & J. 1. *Gale v. Capern*, 1 A. & E. 102.

In *Moore v. Bultin* (7 A. & E. 595.) it was holden, that a plea of set-off to several counts is not divisible, and that the plaintiff was entitled to a verdict generally, unless the defendant proved a set-off equalling the whole of the plaintiff's aggregate demand, without regard to the particular amount under each count, or to any other issue on the record, applying only to a particular count.

But a plea of set-off of a particular amount, is not supported by proof of a set-off of a less amount; and the plea may be taken distributively, and found as to the part not proved for the plaintiff, and as to the part proved for the defendant; and if, upon the finding on a plea of *nunquam indebitatus*, it appear on the record, that the plaintiff is not entitled to recover a larger sum than that which is covered by the proof given under the defendant's pleas, the defendant will be entitled to judgment on the whole record. *Cousins v. Paddon*, 2 C. M. & R. 547. 4 Dowl. P. C. 488. 5 Tyrw. 535. *Green v. Marsh*, 5 Dowl. P. C. 669. Kennedy on Pleading, 23. Lutwyche on Pleading, 103, 104. Ramsay on Pleading, 39. Tidd's N. P. 425.

To a declaration in debt by the assignees of a bankrupt for money received by the defendant for the use of the plaintiff's assignees, a plea that the bankrupt before his bankruptcy was indebted to the defendant in a greater sum upon an account stated between them, and that the defendant was willing to allow the plaintiffs to set off against such debt, the debt claimed in the declaration—was holden ill on demurrer. *Groom v. Mealey*, 2 Bing. N. C. 138.

In *Moe v. Tomlinson* (4 A. & E. 273.) Mr. Justice Coleridge said, "I do not see why, since the new rules, a set-off may not be pleaded as to part, by way of deduction, and *non assumpsit* as to the rest."

Where a plea of set-off stated, that at the time of the commencement of the action the plaintiff was indebted to the defendant in sums of money exceeding the debt claimed by the plaintiff, but omitted to add "and still is" indebted:—It was holden on demurrer, that the plea was bad, Mr. Baron Parke observing, "The rule is *verba fortius accipiuntur contra proferentem*;" the defendant does not plead, that this is an existing debt; then we cannot infer that it is so, but have a right to infer, that it has been satisfied." *Dendy v. Powell*, 3 M. & W. 442.

In *Gibson v. Bell* (1 Bing. N. C. 743.) the court seemed to be of opinion, that two pleas of set-off might be pleaded respectively to two counts; at all events they thought, that if there were any objection, it was a misjoinder, and that the plaintiff having demurred to the first plea of set-off, and traversed the second, the objection was waved. It was urged by the plaintiff's counsel, that if a set-off were allowed to be pleaded to each count separately, the defendant might set off the same debt against each, and so answer a larger demand by a smaller: the court, however, intimated, that in such a case, if the defendant had given evidence of the items of his set-off against the first count, he would not be allowed to give evidence of the same items a second time, as an answer to the demand in the other count. Kennedy on Pleading, 124.

A plea, that the now plaintiff set off the identical debt sued for against a claim made by the now defendant in an action brought by him against the now plaintiff, when the jury found, and the court gave judgment for the now defendant, is not a plea of judgment recovered within Reg. Gen. H. T. 4 Will. 4. s. 8. *Brokenshire v. Morgan*, 1 Dowl. P. C. N. S. 378. *anti*, 2848.

In *Brown v. Daubenay* (4 Dowl. P. C. 585.) it was holden, that if the plaintiff reply *nunquam indebitatus* to a plea of set-off, and that the defendant prove his plea, the plaintiff will not be allowed under such replication to shew, that the sum proved, or even any part of it, has been paid; it being once proved, that the plaintiff was indebted, the issue must be found for the defendant: and that if the plaintiff reply *nil debet*, he may give evidence of payment, Mr. Justice Patteson observing, "I must treat this case as if the new rules of pleading were not in existence, for they do not touch replications. Nothing is said throughout them concerning replications. The plaintiff has a right to reply *nil debet*, as before the new rules." Vide etiam *Cousins v. Paddon*, 2 C. M. & R. 547. *Stevens v. Ufford*, 7 C. & P. 97. Tidd's N. P. 425.

STATS. 2 GEO. 2. c. 22. s. 13. AND 8 GEO. 2. c. 24. ss. 4 & 5.

Judgment of Lord Abinger in *Graham v. Partridge*.

Statute of Limitations must be specially replied.

When a set-off is pleaded to the whole cause of action, the issue on it is a single one.

Plea of set-off of a particular amount, not supported by proof of a lesser amount, but plea may be taken distributively.

Set-off may be pleaded as to part by way of deduction, and *non assumpsit* as to the rest.

What is a necessary allegation in a plea.

Judgment of Mr. Baron Parke in *Dendy v. Powell*.

What is not a plea of judgment recovered under Reg. Gen. H. T. 4 Will. 4. s. 8.

Replication to a plea of set-off not altered by the new rules.

STATS. 2 GEO. 2.
c. 22. s. 13. AND
8 GEO. 2. c. 24.
ss. 4 & 5.

De injuriâ
cannot be re-
plied to a plea
of set-off.

When plaintiff
only bound to
prove the
balance for
which he
claims.

Verdict how
taken in case of
set-off.

Entry of
verdict.

PARTICULARS
OF SET-OFF.

Waver of
irregularity.

Delivery of
particulars no
waver.

Particulars
wrongly headed.

Variance by
which the
plaintiff could
not be misled.

Where evidence
of satisfaction
will not be
received.

To an action of debt for goods sold and delivered, it was pleaded, that the goods were sold by M., being a factor of the plaintiff's, and entrusted by him with the goods as M.'s own goods, by the plaintiff's consent; and that the defendant did not know, and had not the means of knowing, that the goods were not M.'s; and a set-off against the plaintiff of a debt due from M. to the defendant, which was holden to be a good plea on demurrer to the replication. The replication was, that the defendant, of his own wrong, and without the cause alleged, neglected to pay the debt:—which was decided to be good by the court of Queen's Bench on special demurrer, but it was held to be bad by the court of Exchequer Chamber—1. because *de injuriâ* cannot be replied to a plea of set-off, which operates by way of excuse; 2. because the plea here was, substantially, grounded upon an authority from the plaintiff. *Purchell v. Salter*, 1 A. & E. N. S. 197.

Where there are cross-demands, and the defendant pleads a set-off, the plaintiff is not bound to prove the whole of his demand in the first instance, but may prove only the balance which he claims; and after the defendant has proved his set-off, the plaintiff may prove other parts of his account to meet it. *Williams v. Davies*, 1 C. & M. 464.

Where the defendant has pleaded a set-off, but does not appear at the trial to give evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, deducting the amount of the set-off really due, with a special indorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off. *Laing v. Chatham*, 1 Camp. 252. Archb. by Chitt. 475.

To a declaration in *assumpsit*, containing counts for goods sold, money lent, money paid, and on an account stated, the defendant pleaded *non assumpsit*, the Statute of Limitations, payment, and a set-off upon a judgment recovered in the Q. B. for 58*l.* 15*s.*, and of 200*l.* for goods sold, &c.: the plaintiff replied, as to so much of the fourth plea as related to the said judgment, that inasmuch, as he could not deny, that he was indebted to the defendant in the said sum of 58*l.* 15*s.* in the said judgment, he freely admitted the same, and therefore he would not further prosecute his suit against the defendant in respect of so much of the said premises in the declaration mentioned, as were satisfied by the said judgment being so set off. Issue being joined upon the other pleas, and upon general set-off alleged in the fourth plea, the plaintiff at the trial proved a claim for 28*l.* 16*s.* 11*d.*, a portion of his whole demand being barred by the Statute of Limitations; the defendant proved no payment or set-off beyond the amount of the judgment in the fourth plea mentioned:—It was held, that the defendant was entitled to a verdict upon the first and second issues, and that the plaintiff was entitled to a verdict upon the third and fourth issues. *Amor v. Cuthbert*, 1 Dowl. P. C. N. S. 160.

The court will order a defendant to declare particulars of his set-off in the same cases in which they would make him deliver particulars of his demand, if he had brought an action to recover the amount. Archb. C. Att. Prac. 493.

The plaintiff may obtain a particular of the set-off, in the same cases, as a defendant would be entitled to it, if the matter so set off were declared upon; and if the defendant in such a case do not deliver a bill of particulars within the time limited in the judge's order for that purpose, he will not be allowed to give evidence of his set-off at the trial. *Swain v. Roberts*, 1 M. & Rob. 452.

The defendant cannot make, at the trial of the cause, any objection to the particulars, which, if made earlier, the plaintiff or the court might have rectified. *Lowelock v. Cheveley*, Holt's N. P. C. 552.

Where an order was obtained for the delivery of particulars of set-off within a fortnight, and they were not delivered for five weeks, but after the delivery an order was made by consent for the amendment of the declaration:—this was holden to be waver of the irregularity in the delivery of the particulars, *Wallis v. Anderson*, M. & M. 291. Todd's N. P. 304.

But the demand of particulars of a notice of set-off, delivered after a plea, which was a nullity, was holden to be no waver of the plaintiff's right to sign judgment. *Ford v. Bernard*, 6 Bing. 534. 4 M. & P. 302. It is no objection to the use of particulars of set-off, that they are headed in a different court from that in which the action is brought, if they have not been delivered pursuant to a judge's order. *Lewis v. Hilton*, 5 Dowl. P. C. 267.

In his particulars of set-off, the defendant claimed "cash, being the amount of the plaintiff's dishonoured acceptance and charges, 21*l.* 6*s.*," dated August, 1840. He gave evidence of a bill of exchange for 19*l.*, on which an action had been commenced, dated June 23, 1840, and payable two months after date, indorsed to him by the plaintiff:—It was held, that there was no variance by which the plaintiff could have been misled. *Parsons v. Wilson*, 1 Dowl. P. C. N. S. 181.

Where in an action by the assignee of an insolvent debtor, for goods sold and delivered by the insolvent, the defendant relied on a set-off; and in the notice delivered by him, he set out a composition deed of assignment by a former creditor of the defendant to the insolvent, in which there was a covenant by the latter, guaranteeing to the defendant the payment of a dividend agreed to be paid on that occasion; and the notice also

stated, as other grounds of set-off, money had and received, and an account stated; but in the particular of the set-off, the defendant stated the subject-matter to be a sum of 34*l.*, "the amount of the two several dividends of five shillings in the pound upon a debt of 68*l.*, due from Simon Pain to the defendant, which said dividends are directed to be paid by the said T. L. Pain, as in the said notice of set-off particularly mentioned:"

STATS. 2 GEO. 2
c. 22. s. 13. AND
8 GEO. 2. c. 24.
ss. 4 & 5.

—It was held, that the particulars of such set-off confined the defendant to proof of the demand under the covenant in the deed of assignment, as the sole ground of his defence; and precluded him from giving evidence of satisfaction of the demand of Pain, either by money had and received, or an account stated, according to the terms of the notice of set-off, or by any other means. *Andrews v. Bond*, 8 Price, 213.

By a judge's order, the defendant was required, within a limited time, to deliver to the plaintiff particulars of set-off, and in default thereof the defendant was to be precluded from giving evidence in support of his set-off at the trial. The defendant neglected to comply with the terms of the order, and the cause was afterwards referred by an order of *Nisi Prius*; and after the arbitrators had proceeded with the reference, a judge during the assizes made an order for the delivery of the defendant's set-off:—It was held, that he had no authority so to do, under stat. 1 Geo. 4. c. 55. s. 5., as, after the order of reference, the cause was out of court. *Ashworth v. Heathcote*, 4 M. & P. 396. 6 Bing. 596.

When a
judge has no
power to order
particulars of
set-off.

STATUTES OF INTERPLEADER, pp. 2882—2892.

STATS. 1 & 2 WILL. 4. c. 58. ss. 1—5. AND 1 & 2 VICT. c. 45. s. 2.

BY THIRD PARTIES—The court has no jurisdiction except in cases of assumption, debt, detinue, and trover—The applicant must have been sued—Stakeholders threatened with proceedings—Claims in equity—Where an injunction has been issued—When defendant has a legal claim—Subject-matter must be one in which the defendant has no interest—A party who by his own act is placed in a situation to be sued—Defendant indemnified by a third party—Holder of title deeds—Two parties claiming to be entitled to a reward—Where a lien attaches upon goods—When adverse claimant has a right to have the whole sum he claims paid into court—Where the court has no power to compel the sheriff to re-enter and take possession of goods.—THE RULE—STAT. 1 & 2 WILL. 4. c. 58. ss. 7 & 8.—Where the application may be made—When rules must be obtained in two courts—Application should be made promptly after notice of claim—Substance of the affidavit and rule—When particulars of claim must be given upon affidavit—When an issue will be directed—Where rule nisi will not be amended—Where a count in trover will be struck out, and plaintiff confined to the special damage—Where special agreement may be given in evidence—EFFECT OF CLAIMANT'S NEGLECTING TO APPEAR—Where plaintiff fails to appear—STAY OF PROCEEDINGS—When money paid into court it cannot be taken out before judgment signed—COSTS—Instituting affidavit—Costs generally ordered to abide the event of the issue—When costs will be ordered to be paid out of the fund in dispute—Where neither party appears to shew cause—Costs of appearing to the sheriff's rule, can be adjudicated upon after trial—Where applicant had no grounds for supposing that he should be sued by an alleged applicant—Claimant refusing to proceed to trial—When sheriff will be ordered to pay the costs.—Costs of final motion not previously demanded—Taxation of costs—Giving notice of the amount of costs—Judgment how signed.—BY SHERIFFS—STAT. 1 & 2 WILL. 4. c. 58. s. 6.—TIME WITHIN WHICH THE APPLICATION MUST BE MADE—What is laches—One court cannot interfere with the process of another court—Goods or money must be in the hands of the sheriff—Claim to property must be made—Conflicting claims to property—Where the claim is only of a lien to a part of the property—Sheriff not bound to accept indemnity from execution creditor—Where court will not stay proceedings to protect the sheriff—When doubts exist, whether one writ ought to have precedence of another—When sheriff pays proceeds of the execution to execution creditor, & delivers up part of the goods to the claimant—Sheriff guilty of neglect—Sheriff seizing goods in execution, which were under a distress for rent—When an attachment has been issued against the sheriff—When the sheriff is interested—THE RULE—Application must be on affidavit—The court to which the application must be made—Where cause can be shewn at chambers—Sheriff need not wait until proceedings are taken against him, nor apply to the respective parties for an indemnity—No one has a right to be heard against the rule, unless called upon by the rule—Where a new claim is raised after a rule nisi—When sheriff not entitled to call a party before the court—Where execution creditor is bound to appear, and where the court cannot bar the claim of an execution creditor—Sheriff will be ordered to withdraw from possession, if execution creditor do not appear—When third party must appear and state by affidavit the nature of his claim—Where claims of a third party are barred—Claimants may appear without taking office copies of the affidavit—Rules must be entered according to their dates—WHEN AN ISSUE WILL BE DIRECTED—Stay of proceedings against sheriff—Plaintiff must prove, that all the property seized belonged to him—Proceedings the same, as in other feigned issues—Costs of the issue—Paying money out of court to the execution creditor—COSTS—When right of claimant does not appear valid—Where claimant abandons his claim after an issue directed—When sheriff entitled to receive costs of possession and sale—Where sheriff's rule does not pray costs, and the claimant does not appear—When sheriff will not be compelled to pay the costs of an assignee's appearance—When sheriff not in general entitled to his costs, when extra expenses for obeying the rule will be allowed—When all parties appear to be blameless—Parties improperly brought before the court—Sheriff taking goods in execution while there was rent due to the landlord—When sheriff has not given notice to the execution creditor of an adverse claim—When execution creditor does not appear—When adverse claimant does not appear—When the sheriff's rule is discharged, he is allowed after that a reasonable time to make his return.

STATS. 1 & 2 WILL. 4. c. 58. AND 1 & 2 VICT. c. 45. s. 2.

STATS. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims. [20th October, 1831.]

Stat. 1 & 2 Will. 4. c. 58. ss. 1, 2, 3, 4 & 5., after reciting that "it often happens, that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay," ENACTS, "that upon application made by or on behalf of any defendant, sued in any of his majesty's courts of law at Westminster, or in the court of Common Pleas of the county palatine of Lancaster, or the court of Pleas of the county palatine of Durham, in any action of *assumpsit*, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the court, or any judge thereof, may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters, as may appear to be just and reasonable.

BY THIRD
PARTIES.

Upon application by a defendant in an action of *assumpsit*, &c. stating the right in the subject-matter is in a third party, the court may order such third party to appear and maintain or relinquish his claim, and in the meantime stay proceedings in such action.

"That the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

Sect. 2.
Judgment and
decision to be
final.

"That if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

Sect. 3.
If such third
party shall not
appear, &c., the
court may bar
his claim
against the
original
defendant.

"That no order shall be made in pursuance of this act by a single judge of the court of Pleas of the said county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster; and that every order to be made in pursuance of this act by a single judge not sitting in open court, shall be liable to be rescinded or altered by the court in like manner as other orders made by a single judge.

Sect. 4.
Proviso as to
orders made by
a single judge.

"That if upon application to a judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court; and thereupon

Sect. 5.
If a judge
think the

STATS. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

matter more fit
for the decision
of the court, he
may refer it.

STAT. 1 & 2 VICT.
c. 45. s. 2.

Any judge may
exercise such
powers for the
relief of sheriffs,
&c. as may by
virtue of stat.
1 & 2 Will. 4.
c. 58. s. 6.
be exercised by
the several
courts.

The court has
no jurisdiction
except in cases
of *assumpsit*,
debt, detinue,
and trover.

The applicant
must have been
sued.

Stakeholders
threatened with
proceedings.

Claims in
equity.

Where an in-
junction has
been issued.

When defend-
ant has a legal
claim.

Subject-matter
must be one in
which the de-
fendant has no
interest.

A party who by
his own act, is
placed in a
situation to be
sued.

Defendant in-

the court shall and may hear and dispose of the same in the same manner, as if the proceeding had originally commenced by rule of court, instead of the order of a judge."

Stat. 1 & 2 Vict. c. 45. s. 2. after reciting, that "by another act passed in the second year of the reign of his late majesty King William the Fourth, intitled 'An act to enable the courts of law to give relief against adverse claims made upon persons having no interest in the subject of such claims,' provision is made for the relief of sheriffs and other officers concerned in the execution of process issued out of any of his majesty's courts of law at Westminster, or the court of Common Pleas of the county palatine of Lancaster, or the court of Pleas of the county palatine of Durham, against goods and chattels, by reason of claims made to such goods and chattels, but such relief can only be given by rule of court; and that it was expedient that a single judge should possess the power of giving relief in that respect," ENACTS, "that it shall be lawful for any judge of the said courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the said court of Common Pleas of the county palatine of Lancaster, or court of Pleas of the county palatine of Durham (being also a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last-mentioned act be exercised by the said several courts respectively, and to make such order therein, as shall appear to be just, and the costs of such proceeding, shall be in the discretion of such judge."

The statute gives jurisdiction to the court in *assumpsit*, debt, detinue, and trover only; and therefore, where the declaration against the applicant contained a count in *case*, as well as a count in trover, the court held, that they had no jurisdiction, as they must decide upon the whole matter, and having no jurisdiction over the count in *case*, they could not interfere. *Laurence v. Mathews*, 5 Dowl. P. C. 149. It has likewise been held, that trover for title deeds is not within the statute. Archb. C. Att. Prac. 402.

To entitle a party to relief under the statute, he must have been sued, and the suit must have gone on to declaration (*Parker v. Linnett*, 2 Dowl. P. C. 562.) for the recovery of some specific chattel or its value, or for a debt, or demand in the nature of a debt as distinguished from an action for damages. *Walter v. Nicholson*, 6 *Ibid* 517.

In *James v. Pritchard* (7 M. & W. 216.) it appeared, that the defendant having bought a rick of hay from the plaintiff (who was the executor *de son tort* of M. S.), before payment of the price, received a notice from a third party, stating, that he was the administrator of M. S., and demanding payment of the sum for which it had been sold: the defendant being subsequently sued by the plaintiff for the price of the hay, it was holden, that he was not entitled to relief under the Interpleader Act, 1 & 2 Will. 4. c. 58. s. 1.

The court cannot give relief under the Interpleader Act to stakeholders, who are only threatened with proceedings; an action must be brought, and the plaintiff must declare, before the court will interfere. *Parker v. Linnett*, 2 Dowl. P. C. 562. *Shay v. Redman*, 1 Jur. 775.

Stat. 1 & 2 Will. 4. c. 58. does not apply to claims in equity. *Sturges v. Croud*, 1 Dowl. P. C. 505.

But if the court of Chancery have issued an injunction to stay a cause, the court will not grant a rule for interpleading. *Aragne v. Lloyd*, 1 Bing. N. C. 790.

The Interpleader Act does not apply to a case, where the defendant has a legal claim (*Braddick v. Smith*, 9 Bing. 84. 2 M. & Sc. 131.); and it seems, that a wharfinger, who claims a lien on goods for wharfage, &c., is not within the act. *Ibid*.

The subject-matter must be one, in which the defendant has no interest. *Farr v. Ward*, 2 M. & W. 844.

Thus, where the payee of a promissory note, which was made for the benefit of a third party, brought an action thereon against the maker, and the *cestui que trust* gave him notice not to pay it to any but himself, the court would not interfere. *Newton v. Moody*, 7 Dowl. P. C. 582.

A party, who by his own act is placed in a situation to be sued, cannot call on the court to substitute another defendant under the Interpleader Act, 1 & 2 Will. 4. c. 58. *Belcher v. Smith*, 9 Bing. 82. Nor will it be allowed, where, from the circumstances, it may be reasonably suspected, that there is collusion between the defendant and the third party whom he seeks to substitute. *Ibid*.

Where a defendant has been indemnified by a third party for not delivering up property

in his possession, he has no right to relief under the Interpleader Act, and the court will discharge a rule obtained for that purpose, with costs. *Tucker v. Morris*, 1 C. & M. 73. 1 Dowl. P. C. 639.

Neither will the court interfere to restrain a sheriff from selling goods seized by him under a *fi. fa.*, on an offer of indemnity by a third person, claiming the goods. *Harri-son v. Forster*, 4 Dowl. P. C. 558.

The holder of title deeds cannot apply, under the Interpleader Act, for protection against opposing claims. *Smith v. Wheeler*, 1 Gale, 15. 163.

Where two parties claim to be entitled to a reward, the defendant, when sued by one of them to recover it, is not entitled to the relief given by the Interpleader Act. *Grant v. Fry*, 4 Dowl. P. C. 135.

A lien attaching upon the goods in dispute, does not prevent the party who holds them, from applying to the court for relief under the Interpleader Act. *Cotter v. England (Bank of)*, 3 M. & Sc. 180. 2 Dowl. P. C. 728.

If part of a sum claimed by the parties have been paid to one of them, before an adverse claim be made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder applying for relief under the Interpleader Act. *Allen v. Gilby*, 3 Dowl. P. C. 143.

Where the sheriff by a rule under this act was authorised to withdraw from the possession of the goods seized, until the validity of a claim by the assignees of the defendant should be decided, with liberty then to re-enter, and in three years afterwards the assignees failing to establish their claim, an application was made for a rule requiring the sheriff to enter and sell accordingly; the court said, that although the sheriff might if he would, re-enter under the first rule, yet as he was then out of office, they could not compel him to do so. *Willon v. Chambers*, *ibid.* 12.

By stat. 1 & 2 Will. 4. c. 58. s. 7. "all rules, orders, matters, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *feri facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *feri facias*; and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ, shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court."

Stat. 1 & 2. Will. 4. c. 58. s. 8. after reciting that "by a certain act made and passed in the last session of parliament, intituled 'An act to improve the proceedings in prohibition, and on writs of *mandamus*,' it was among other things enacted, that it should be lawful for the court to which application may be made for any such writ of *mandamus*, as is therein in that behalf mentioned, to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or in any default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as were or might be given or mentioned by or in any act passed or to be passed during that present session of parliament, for giving relief against adverse claims upon persons having no interest in the subject of such claims; and that no such act was passed during the then present session of parliament," ENACTS "that upon any such application as is in the said act and hereinbefore mentioned, it shall be lawful for the court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present act."

STATS. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

demnified by a
third party.

Holder of title
deeds.

Two parties
claiming to be
entitled to a
reward.

Where a lien
attaches upon
goods.

When adverse
claimant has a
right to have
the whole sum
he claims paid
into court.

Where the court
has no power
to compel the
sheriff to re-
enter and take
possession of
goods.

THE RULE.

Stat. 1 & 2
Will. 4. c. 58.
ss. 7, 8.

Rules, orders,
&c., made in
pursuance of
this act, may be
entered of
record, and
made evidence.

Costs.

Writs.

Sheriff's fees.

Upon any ap-
plication under
stat. 1 Will. 4.
c. 21. and this
act, the court to
exercise such
powers and
make such rules
as are given by
or mentioned in
this act.

The application may be made to the court, or to a judge at chambers; if made to the Where the ap-

STATS. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

plication may
be made.

When rules
must be ob-
tained in two
courts.

Application
should be made
promptly after
notice of claim.

Substance of the
affidavit and
rule.

When particu-
lars of claim
must be given
upon affidavit.
Claimant, if he
appear, must
make an
affidavit of his
claim.

When an issue
will be directed.

Where rule *nisi*
will not be
amended.

When a count
in trover will be
struck out, and
plaintiff con-
fined to the
special damage.

Where special
agreement may
be given in
evidence.

EFFECT OF
CLAIMANTS
NEGLECTING TO
APPEAR.

Where plaintiff
fails to appear.

STAT OF PRO-
CEEDINGS.

When money
paid into court
cannot be taken
out before judg-
ment signed.

court, it must be made to that court in which the action against the applicant is pend-
ing.

Where an auctioneer has one action brought against him in Common Pleas, and another in
the Queen's Bench, by different claimants to the same property, he must, to relieve
himself under the Interpleader Act, obtain rules in both courts. *Allen v. Gibby*, 3 Dowl.
P. C. 143.

The application should be made promptly after notice of the claim, and may be made to a
judge by summons, but in term time it is usually made to the court.

In either case an affidavit is necessary (in the first instance, if it be made in court; if at
chambers, on the hearing), which must be entitled in the court and cause, setting forth
the proceedings which have been taken; the claim; and averring, that the defendant
does not claim any interest in the subject-matter thereof, and does not in any manner
collude with the third party.

The rule calls upon the claimant to appear and state the nature and particulars of his
claim, and to maintain or relinquish the same. In the Exchequer, if it be intended, that
the rule *nisi* should be drawn up as a stay of proceedings, a previous notice of the
motion must be given to the opposite parties. But in the court of Queen's Bench and
Common Pleas, such notice is not necessary. If the application be made so late in
term, that cause cannot be shewn in court during that term, the court may allow the
rule to be drawn up to shew cause before a judge at chambers. *Smith v. Wheeler*, 5
Dowl. P. C. 431. Archb. C. Att. Prac. 403.

A claimant called upon by a rule under the Interpleader Act to come in and state his claim,
must give the particulars upon his affidavit, to enable the court to decide whether
he is to be made a party to an issue. *Ponell v. Lock*, 3 A. & E. 315. 1 H. & W. 281.

But it seems not necessary for the plaintiff so to do. *Angus v. Wootton*, 3 M. & W. 310.
If the claimant appear, and persist in his claim, the court will either order, that he be made
defendant in the action already pending, instead of the applicant, or will direct an issue
between the plaintiff and the claimant to try the right, and will give orders for the safe
custody of the matter in dispute in the mean time. *Allen v. Gibby*, 3 Dowl. P. C. 143.

When a claimant, ordered to be plaintiff in such an issue, refused to proceed in it, and it
was proposed to substitute the name of another claimant, Mr. Justice Coleridge held,
that it could not be done without making such other claimant a party to the rule.
Lydal v. Biddle, 5 ibid. 444.

On an application to a judge at chambers, under an Interpleader Act, an order was made,
by consent of all parties, to refer the cause, on certain terms, to a barrister instead
of an issue being directed. The court refused to grant a rule *nisi* for varying the order
by introducing a fresh term into the reference, in consequence of information which one
of the parties (an administratrix) had obtained since the hearing at chambers. *Drake*
v. Brown, 2 C. M. & R. 370.

Goods consigned to A., and warehoused at the London docks, were claimed by B. The
dock company required an indemnity from A., the original consignee, before they
delivered them to him. A. refused, and brought an action of trover, with counts for
special damage, for the detention. On motion by the company for relief under the Inter-
pleader Act, B. upon due notice not appearing, the court held, that the claim of B. against
the company was barred, but that A. ought not, by reason of the act, to be precluded
from recovering for his special damage, if any. The rule was made, that, on the de-
fendant's undertaking to deliver up the goods, then, if A. should accept the same, the
action should be discontinued on payment of costs by the defendants; but if A. should
go on with the action, the count in trover should be struck out, and A. proceed for the
special damage only. *Lucas v. London Dock Company*, 4 B. & Ad. 378.

In an action brought by A. against B., the court, upon a motion under the Interpleader
Act made by B., directed, that an action for money had and received should be brought
by C. against A., to try the right of certain money: — It was holden, first, that in an
action brought in pursuance of such order, a special agreement might be given in
evidence, which in ordinary cases would be admissible only under a special count.
Pooley v. Goodwin, 5 N. & M. 466. 4 H. & W. 567.

Claimants neglecting to appear under the Interpleader Act, are precluded by the terms of
the rule from enforcing their claims. *Ford v. Dillon*, 2 N. & M. 662.

There is no direction as to what shall be done, if the plaintiff fail to appear; but it would
seem, that the action would be stayed and the defendant be entitled to his costs out of
the fund. *Doble v. Cummins*, 7 A. & E. 580.

If the plaintiff in the issue, however, neglect to proceed to the trial of it, the other party
may apply to have the money or other property in dispute; but the rule in such a case
is a rule *nisi* only. *Stanley v. Perry*, 1 H. & W. 669. 4 Dowl. P. C. 599.

A rule under the first section of the Interpleader Act, cannot be drawn up for a stay of
proceedings, unless notice has been given. *Smith v. Wheeler*, 3 Dowl. P. C. 431.
But such a rule may be drawn up to shew cause at chambers. *Ibid.*

Where money has been paid into court by a stakeholder to abide the event of a feigned
issue under stat. 1 & 2 Will. 4. c. 58., the party succeeding, cannot take out the money
before judgment signed. *Cooper v. Lead Smelting Company*, 1 ibid. 728. 9 Eng.
634. 2 M. & Sc. 810.

- If an issue be directed under the Interpleader Act, and afterwards the claim be abandoned, affidavit in support of an application for costs must be intitled in the names of the parties in the original cause. *Elliott v. Sparrow*, 1 H. & W. 370.
- As to the costs between the plaintiff and the claimant, the court usually order them to abide the event of the action or issue. Archb. C. Att. Prac. 404.
- The costs of the applicant under the Interpleader Act, where he has acted *bonâ fide*, will in the first instance be directed to be paid out of the fund or the produce of the thing in dispute, to be repaid by the party ultimately unsuccessful. *Duear v. Mackintosh*, 3 M. & Sc. 174. 2 Dowl. P. C. 780. *Cotter v. England (Bank of)*, ibid. 728. 3 M. & Sc. 180. *Parker v. Linnett*, 2 Dowl. P. C. 562.
- Where a claim is made by one on behalf of another to goods seized by the sheriff in execution, and upon a rule being obtained under the Interpleader Act, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff, but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to shew cause. *Philby v. Ikey*, 2 Dowl. P. C. 222.
- When, upon a rule under the first section of the Interpleader Act, the claimant did not appear, Mr. Justice Williams held, that he could not order the costs of the application to be paid by the claimant, or out of the fund in dispute. *Lambert v. Cooper*, 5 ibid. 547.
- Where a sheriff is relieved under the act, and an issue is directed to try the rights of adverse claimants, the court may adjudicate after the trial on the costs of appearing to the sheriff's rule and of the issue. *Seaward v. Williams*, 1 ibid. 528.
- Where it appeared, that the applicant had no ground for believing, that he should be sued by the alleged claimant, the latter having desired him to pay the money in dispute to the plaintiff, the court discharged the rule with costs. *Harrison v. Payne*, 2 Hodges, 107.
- Where an issue is directed to be tried between an execution creditor and a claimant, brought before the court by the sheriff under the Interpleader Act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned, and of applying to take the money, paid in by the sheriff, out of court. *Wills v. Hopkins*, 3 Dowl. P. C. 346.
- Where, in consequence of a claim made to goods seized by a sheriff in execution, the court ordered the claimant to proceed to trial upon paying a sum of money into court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim:—It was held, that he was liable to pay those costs as well as the costs of that rule, though no previous application had been made to him. *Scales v. Sargeson*, ibid. 707.
- The court will, on proper grounds shewn, order the sheriff, or the execution creditor, to pay to a third party appearing, and successfully prosecuting his claim, his costs of such appearance. *Ford v. Dilly*, 5 B. & Ad. 885.
- It was holden in one case, that the costs of the final motion could not be allowed, where they had not previously been demanded (*Bowen v. Bramidge*, 2 Dowl. P. C. 213.); but as the fund, &c. cannot be got at, but by means of an application, a previous demand is now deemed unnecessary. *Meredith v. Rogers*, 7 ibid. 596. *Barnes v. England (Bank of)*, ibid. 319.
- The costs are taxed in the ordinary way. The whole of the proceedings should then be entered on a judgment roll in the order of their dates. Lush, Pr. 691.
- The most effectual way of giving notice of the amount of costs allowed on taxation will be, by service of a copy of the rule of court, with the master's *allocatur* for costs therein, upon the party required to pay the same, his attorney or agent, with an indorsement, stating that, unless the amount allowed for costs be paid within fifteen days, execution will be issued for the recovery thereof. The notice does not require personal notice. *Vide Chapman's Practice (Second Addenda)*, 162—166.
- Until the judgment in the action or issue be obtained, neither of the parties is in general secure against future claims by the others for the same matters. Archb. by Chitt. 1046. *Cooper v. Lead Smelting Company*, 1 Dowl. P. C. 728.
- Judgment is not signed on the verdict in the ordinary way (*Dickinson v. Eyre*, 7 ibid. 721. contra *Cooper v. Lead Smelting Company*, 9 Bing. 634.); but the successful party should apply to the court or a judge, upon an affidavit of the facts, to have the money, &c. paid over to him, and that the opposite party may be ordered to pay the costs of the appearance, trial, and application. *Matthews v. Sims*, 5 Dowl. P. C. 234.

Stat. 1 & 2 Will. 4. c. 58. s. 6. after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection

STAT. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

COSTS.
Intituling affidavits.

Costs generally ordered to abide the event of the issue.

When costs will be ordered to be paid out of the fund in dispute.

Where neither party appears to shew cause.

Costs of appearing to the sheriff's rule can be adjudicated upon after trial.

Where applicant had no ground for supposing, that he should be sued by an alleged applicant.

Claimant refusing to proceed to trial.

When sheriff will be ordered to pay the costs.

Costs of final motion not previously demanded.

Taxation of costs.

Giving notice of the amount of costs.

Judgment how signed.

By Sheriffs.
1 & 2 Will. 4.
c. 58. s. 6.
For relief of sheriffs and other officers in execution of

STAT. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

process against
goods and
chattels.

in such cases to such sheriffs and other officers," ENACTS "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court."

TIME WITHIN
WHICH THE
APPLICATION
MUST BE MADE.
Late application
under special
circumstances
will be allowed

A sheriff will not be entitled to relief under stat. 1 & 2 Will. 4. c. 58. s. 6. unless he comes "immediately" on receiving notice of an adverse claim. *Devereux v. John*, 1 Dowl. P. C. 548.

But a late application will, under special circumstances, be allowed. *Dixon v. East*, 2 ibid. 621. Thus, where there was great delay on the part of the sheriff in applying to the court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claims, the court refused to make the latter pay costs. Ibid.

Where a whole term has elapsed after a notice of claim under a fiat of bankruptcy, the assignees not being chosen until after the term (*Barker v. Phipson*, 3 ibid. 590. 1 H. & W. 191.), the application was considered in time.

And where the sheriff had seized goods under a *fi. fa.*, and notice was given to him on the 18th January, that a fiat was about to be issued out against the defendant; and on the 28th a claim was made to the goods by the assignees:—It was held, that an application by the sheriff on the 29th, for relief under the Interpleader Act, was sufficiently prompt. *Skipper v. Lane*, 4 M. & Sc. 283. 2 Dowl. P. C. 784.

Where there is delay or any circumstance to be accounted for, the sheriff must make a special affidavit stating the facts; and no supplemental affidavit will be allowed. Ibid. *Cook v. Allen*, 2 Dowl. P. C. 11. 1 C. & M. 542.

The following cases will illustrate what is considered laches in the sheriff:—

Where goods were taken by a sheriff, and a claim being made to them, he was prevented from applying to the court, in consequence of a rule obtained by the defendant, which rule was not disposed of till the 23d January, when it was discharged; and the sheriff applied to the court on the 31st January:—It was held, that the sheriff was too late in applying on the 31st January, though the sheriff was in Suffolk, and the affidavit was sworn there on the 30th. *Cook v. Allen*, 2 Dowl. P. C. 11. 1 C. & M. 542.

The sheriff seized goods under a *fi. fa.* on the 25th November, they were claimed by a third person on the 28th, and the sheriff applied to the court under the Interpleader Act in the Easter Term following:—the court held, that he was too late, and that he should pay the costs of the other parties; he should have applied within such time in the next following term, that the matter might then have been disposed of. *Bark v. Overton*, 5 Dowl. P. C. 599.

If a sheriff receive notice on the 23d of January, of a claim to goods seized by him under a *fi. fa.*, he will not be entitled to relief under the Interpleader Act, unless he comes to the court in Hilary Term. *Ridgway v. Fisher*, 3 ibid. 567.

If a sheriff has paid over the produce of an execution to a judgment creditor, after notice of a claim, he is too late to move for relief. *Chalon v. Anderson*, 3 Tyrw. 237. S. C. nom. *Anderson v. Calloway*, 1 C. & M. 182. 1 ibid. 636.

One court cannot relieve the sheriff under the Interpleader Act, with respect to process issued out of another court. *Bragg v. Hopkins*, 2 Dowl. P. C. 151.

The sheriff cannot apply to the court under the Interpleader Act, unless the goods or money in dispute be actually in his hands. *Scott v. Lewis*, 2 C. M. & R. 239. 4 Dowl. P. C. 259.

Thus, where the sheriff went to the premises of a defendant, for the purpose of levying under a *fi. fa.*, but finding that the goods were claimed by a third party, he withdrew without making any seizure; and then applied for a rule under the Interpleader Act: the court held, that as the sheriff had not the possession of the goods, and was therefore unable to deliver them to either party, he was not entitled to relief under the Interpleader Act. *Holton v. Guntrip*, 6 Dowl. P. C. 130.

The court will not interfere, under the Interpleader Act, for the sheriff, *quia timet*, unless a claim to property be actually made (*Isaac v. Spilbury*, 10 Bing. 3. 3 M. & Sc. 341. 2 Dowl. P. C. 211.), and appears to have been made before moving for the rule. *Bartley v. Hook*, 4 Tyrw. 229.

Where there are conflicting claimants to property seized under a writ of *fi. fa.*, the

Affidavit of
facts.

WHAT IS
LACHES.

One court
cannot interfere
with the process
of another
court.

Goods or
money must be
in the hands of
the sheriff.

Claim to pro-
perty must be
made.

Conflicting

defendant having become bankrupt, the court will interfere and protect the sheriff under the Interpleader Act. *Parker v. Booth*, 1 M. & Sc. 156. S. P. *Northcote v. Beauchamp*, *ibid.* 158.

And if the goods remain in the hands of the sheriff, the prothonotary will be directed to inquire into the best mode of disposing of them, and also to ascertain, which party was legally entitled to the proceeds. *Ibid.*

An order was made under stat. 1 & 2 Will. 4. c. 58., where goods had been taken by the sheriff under a *fi. fa.* and sold by him, another *fi. fa.* having issued in the meantime against the same goods; and where a party claimed title to the property against both the plaintiffs, the defendant and the sheriff, and complained that the goods had been sold im- providently, and in spite of notice from the owner. *Slowman v. Back*, 3 B. & Ad. 103.

The court will relieve the sheriff in the case of conflicting claims on property seized by him, though that claim be only of a lien, and not of the whole property. *Ford v. Baynton*, 1 Dowl. P. C. 357.

If an execution creditor abandon his process, seized under a *fi. fa.*, in favour of a claimant, the sheriff has still a right to shew in an action against him, that the goods were the property of the defendant. *Baynton v. Harvey*, 3 *ibid.* 344.

Where a sheriff has seized goods under a *fi. fa.*, and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under stat. 1 & 2 Will. 4. c. 58. s. 6. *Levy v. Champneys*, 2 Dowl. P. C. 454.

The sheriff having taken in execution goods which the defendant, who was one of the administrators of an intestate person, had become possessed of under a sale from his co-administrator, was served with a notice from another party, that he and others were also entitled to shares in the goods, as next of kin to the intestate; and that, upon a bill filed by them in the court of Chancery, the defendant had been restrained by injunction from selling, mortgaging, or disposing of the goods, and that they should hold the sheriff answerable for all loss and damage occasioned by the seizure: — It was held, that this was not such a claim as entitled the sheriff to apply for relief under the Interpleader Act. *Roach v. Wright*, 8 M. & W. 155. 1 Dowl. P. C. N. S. 56. *Quære*, Whether the court will grant such relief in any case, where the claim is of a merely equitable nature?

In an action against the sheriff, by the assignees of a bankrupt, for seizing and selling the bankrupt's goods, the court will not interfere in a summary way to stay proceedings, on the sheriff's paying into court the sum for which they were sold, or restoring them in specie, if there be a dispute about the value of the goods, or if it appear that, even on restoring the goods, the parties would not be put into as good a situation as they were in before, especially if the sheriff might have applied to the court under the Interpleader Act. *Gibson v. Humphrey*, 2 Dowl. P. C. 68.

Where a sheriff seizes under one *fi. fa.*, and the question is, whether that writ ought to have precedence of another, the court will not grant the sheriff relief under the act. *Day v. Waldock*, 1 *ibid.* 523.

Where the sheriff has levied under a *fi. fa.*, and while in possession, he receives notice, that other writs of execution have been issued against the defendant's goods, and that the first execution creditor is not entitled to the whole proceeds of the levy, the sheriff is not entitled to relief. *Salmon v. James*, *ibid.* 369.

If the sheriff, having seized goods in execution, which are claimed by another party, deliver up part of the goods to the claimant, he thereby precludes himself from relief under the act. *Braine v. Hunt*, 2 Dowl. P. C. 391. 2 C. & M. 418.

Where a sheriff applied for relief under the Interpleader Act, and it appeared, that he had been guilty of neglect, the court refused to relieve him from any liability occasioned thereby. *Brackenbury v. Laurie*, 3 Dowl. P. C. 180.

Where a sheriff applied for a rule under the Interpleader Act, on the ground, that the goods seized by him were claimed by a third party under a bill of sale; but it appearing, that the bill of sale bore date after the time of the levy, the court discharged the sheriff's rule with costs, saying, that, before he applied for it, he should at least have examined the date of the bill of sale. In re *Sheriff of Oxfordshire*, 6 *ibid.* 136.

Where the sheriff seized goods in execution, which were under distress for rent due to the landlord, the court refused to grant him relief under the Interpleader Act, though he had applied for indemnity to the execution creditor, which had been refused. *Haythorn v. Bush*, 2 C. & M. 689. 2 Dowl. P. C. 641.

Where the sheriff applied for relief under the Interpleader Act, but it appeared, that an attachment had been already obtained against him for not returning the writ, the court would only make the rule absolute on the terms of his paying for having the attachment moved. *Alemore v. Adeane*, 3 Dowl. P. C. 496.

Where the sheriff is placed in circumstances, which give him an interest on either side, the court will not relieve him under the Interpleader Act. *Dudden v. Long*, 1 Scott, 281. 1 Bing. N. C. 299. 3 Dowl. P. C. 139. Thus, the court refused to interfere in favour of the sheriff, under the Interpleader Act, where the under-sheriff's partner, appeared to be concerned for some of the parties. *Ibid.*

STATS. 1 & 2 WILL. 4. c. 58. AND 1 & 2 VICT. c. 45. s. 2.

claims to property.

Where the claim is only of a lien to a part of the property.

Sheriff can shew that the goods were the property of the defendant.

Sheriff not bound to accept indemnity from execution creditor.

Where court will not stay proceedings to protect the sheriff.

When doubts exist, whether one writ ought to have precedence of another.

When sheriff pays proceeds of the execution to execution creditors, or delivers up part of the goods to the claimant.

Sheriff guilty of neglect.

Sheriff seizing goods in execution, which were under a distress for rent.

Where an attachment has been issued against the sheriff.

When the sheriff is interested.

STATS. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

THE RULE.

Application
must be on
affidavit.

The court to
which the ap-
plication must
be made.

Where cause
can be shewn
at chambers.

Sheriff need not
wait, until pro-
ceedings are
taken against
him. No one
has a right to be
heard against
the rules, unless
called upon by
the rule.

When a new
claim is raised
after a rule nisi.

Where sheriff
not entitled to
call a party
before the court.

When execu-
tion creditor
not bound to
appear, and
where his
claim cannot
be barred.

When sheriff
will be ordered
to withdraw
from posses-
sion.

When third
party must ap-
pear, and state
by affidavit the
nature of his
claim.

Where claims of
a third party
are barred.

Claimants may
appear without
taking office
copies of the
affidavit.

Rules must be
entered accord-
ing to their
date.

And if the under-sheriff be the execution creditor or partner in business of the execution creditor, the sheriff is not entitled to relief under the Interpleader Act. *Osler v. Bower*, 4 Dowl. P. C. 605.

The application must be founded on an affidavit of the facts, stating the seizure of the goods by the sheriff under the execution, and notice of the claim by the party who made it (*Northcote v. Beauchamp*, 1 M. & Sc. 158.); and if there have been delay, it should be accounted for in the first instance, for he will not be allowed to file a supplemental affidavit. *Cook v. Allen*, 2 Dowl. P. C. 11.

It has been holden in the Queen's Bench, that the sheriff need not deny collusion (*Donniger v. Hinzman*, *ibid.* 424. *Dobbins v. Green*, *ibid.* 509. *Beard v. Woodall*, 2 C. M. & R. 601. 4 Dowl. P. C. 351.); but a contrary opinion appears to have prevailed in the Exchequer. *Cook v. Allen*, 2 Dowl. P. C. 11. *Dixon v. East*, *ibid.* 621.

The application must be made to the court out of which the writ of execution issued. Stat. 1 & 2 Will. 4. c. 58. s. 6. It must be made in court, and not to a judge at chambers. Archb. by Chitt. 1049.

Although the rule must be moved for in court, the court of Common Pleas will allow cause to be shewn against it at chambers, if necessary (*Beames v. Cross*, 4 Dowl. P. C. 122. *Haines v. Daney*, 1 Hodges, 189.); but the court of Exchequer and the court of Queen's Bench will not, unless by consent of parties. Archb. C. Att. Proc. 47. Under stat. 1 & 2 Will. 4. c. 58. s. 6. (the Interpleader Act), the sheriff need not wait for proceedings to be taken against him, before he applies to the court for relief. *Green v. Brown*, 2 Dowl. P. C. 337.

It is not necessary for the sheriff to apply to the different parties for an indemnity, before he applies to the court under the Interpleader Act. *Crossly v. Ebers*, 1 H. & W. 216.

Where the sheriff applies to the court for protection under the Interpleader Act, no one has a right to be heard against the rule, unless he be called upon by the rule, though he be in fact a claimant; and if he be called upon in one character, he cannot appear in another. *Clarke v. Lord*, 2 *ibid.* 55.

Where a new claim is raised, after a rule nisi under the Interpleader Act has been obtained, the sheriff may make the new claimant a party to the rule. *Airk v. Clark*, 4 *ibid.* 363.

The sheriff is not entitled to call a party before the court under the Interpleader Act, 1 & 2 Will. 4. c. 58., on the ground of claim set up in respect of an interest as a partner, in goods seized under a writ of execution. *Holmes v. Mentze*, 5 N. & M. 333. 4 Dowl. P. C. 300. So, although the claim states, that the balance of accounts is so much in favour of the claimant, as to give him the sole beneficial interest in the property seized. *Ibid.* But where the execution creditor refuses either to admit or to deny the alleged partnership, the court will enlarge the time for the sheriff's return on the writ until he be indemnified. *Ibid.*

An execution creditor, served with a sheriff's rule under Interpleader Act, is not bound to appear, when there are no goods liable to his execution. Where, therefore, such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance. *Glasier v. Cooke*, 5 N. & M. 680.

Where an execution creditor does not appear on being served with the sheriff's rule, the court cannot bar his claim. *Donniger v. Hinzman*, 2 Dowl. P. C. 424. *Dobbins v. Green*, *ibid.* 509.

If the execution creditor do not appear upon a rule to relieve the sheriff under the Interpleader Act, the court will order the sheriff to withdraw from possession, but will not direct the execution creditor to pay the sheriff the costs of keeping possession. *Field v. Cope*, 2 C. & J. 480. 1 Dowl. P. C. 567. 2 Tyrw. 458.

Where a sheriff obtains a rule under the Interpleader Act, calling upon an execution creditor and a third party, who claims goods seized by the sheriff under a *f. fa.*, to appear and state the nature of their claims, such third party must appear and state by affidavit the nature of his claim. *Poweler v. Lock*, 4 N. & M. 853.

On application to the court by a sheriff, under section 6 of the Interpleader Act, a third party served with the rule, and not appearing, is barred by section 3. from further prosecuting any claim brought in question by the rule, as well as where such application is made by a defendant under section 1. *Ford v. Dilly*, 5 B. & Ad. 885.

Where the sheriff obtains a rule for relief under the Interpleader Act, the claimants may appear without taking office copies of the affidavits on which the rule was obtained. *Mason v. Redshaw*, 2 Dowl. P. C. 595.

The court has no power to order rules made under the Interpleader Act (1 & 2 Will. 4. c. 58.), to be entered in any other manner than that, which is pointed out by the 7th sect., viz. according to their true date. *Lambirth v. Durrington*, 2 Scott, 283. 4 Dowl. P. C. 126.

Where the defendant, in an issue tried under the Interpleader Act, died after verdict for the plaintiff, but before judgment was signed, the court will not order the rules of court to be entered *nunc pro tunc*. *Ibid.*

If the claimant appear to support his claim, which he must do by affidavit (*Powell v. Lock*, 3 A. & E. 315.), and the execution creditor appear also, which he may do without affidavit (*Angus v. Wootton*, 3 M. & W. 310.), then, unless they consent to the matter being disposed of summarily, an issue must be directed, in which it is usual to make the claimant the plaintiff, and the execution creditor the defendant. Lush, Pr. 693.

Where an application is made to the court by the sheriff under the Interpleader Act, the court cannot try the rights of the different claimants upon affidavit, but must direct an issue. *Allen v. Gibbon*, 2 Dowl. P. C. 293. *Bramidge v. Adshead*, *ibid.* 59.

Where the court direct a feigned issue or action, they will order the proceedings against the sheriff to be stayed, until the trial of the feigned issue or action, and in the mean time, give such directions respecting the sale of the goods, and application of the proceeds, or value thereof, as shall appear to be just. Tidd's N. P. 580.

Where the declaration in an issue under the Interpleader Act states, that "divers goods and chattels" were seized under a *fi. fa.*, and avers, that "the said goods and chattels" were the property of the plaintiff, unless the plaintiff proves, that the whole of the goods belong to him, the defendant will be entitled to a verdict; but *semble*, that if any part of the goods belonged to the plaintiff, the judge would ask the jury to find specially. *Morewood v. Wilkes*, 6 C. & P. 144.

If an issue be directed, the proceedings thereon are the same as in other feigned issues in ordinary cases.

The costs of the issue follow the event (*Bowen v. Bramidge*, 2 Dowl. P. C. 213. *Seaward v. Williams*, 1 *ibid.* 528.), even although the issue have been ordered by a judge at chambers by consent (*Matthews v. Sims*, 5 *ibid.* 234.); but the successful party must apply for it by rule, and the rule is only a rule *nisi*.

Where money, the proceeds of an execution, has been paid into court by the sheriff under the Interpleader Act, and the claimant abandons his claim, the rule for paying the money out of court to the execution creditor, together with his costs, is *nisi* in the first instance. *Stanley v. Perry*, 4 *ibid.* 599.

If a claim to goods seized by a sheriff be made by the defendant on behalf of another, which does not appear to be well founded, the court will make him pay the costs of the sheriff's application under the Interpleader Act. *Lewis v. Eicky*, 2 *ibid.* 321. 2 C. & M. 321. 4 Tyrw. 157. *Cor v. Fenn*, 7 Dowl. P. C. 50.

Where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue and of the application of those costs. *Scales v. Sargeson*, 4 Dowl. P. C. 231.

Although the sheriff is not actually allowed costs, on a motion under the Interpleader Act, yet where he has retained possession of the goods seized at the request of the execution creditor, and has sold them with consent of all the parties, and the execution creditor afterwards abandons his claim, the sheriff is entitled to receive from him his costs of such possession and sale. *Dabbs v. Humphries*, 1 Scott, 325. 1 Bing. N. C. 412. 3 Dowl. P. C. 377. *Scales v. Sargeson*, 4 *ibid.* 231.

Where the sheriff's rule, under the Interpleader Act, does not pray costs, and that the claimant does not appear, the court will not, on disposing of the rule, at once order the claimant to pay costs, but will make an order conditional on his not appearing within a certain period. *Shuttleworth v. Clark*, 4 *ibid.* 561.

Where the rule called upon assignees of a bankrupt, who had made a claim under the fiat of bankruptcy, but which was afterwards superseded, the court refused to make the sheriff pay the costs of the assignees' appearance. *Clarke v. Lord*, 2 *ibid.* 55.

The court will not in general allow the sheriff his costs, the act being passed for his relief, and his claim to poundage depending on the legality of the seizure; consequently, the court will in general order him to pay the proceeds of the goods seized into court, without allowing him to deduct such poundage (*Bowdler v. Smith*, 1 Dowl. P. C. 417. *Dram v. Sheldon*, 3 *ibid.* 640. Archb. by Chitt. 1052. *West v. Rotherham*, 2 Bing. N. C. 527. *Beswick v. Thomas*, 5 Dowl. P. C. 458.); but the court will allow him the extra expenses he may have been put to, by obeying the rule of court directing an issue. *Armitage v. Foster*, 1 H. & W. 208.

Where the sheriff applies to the court for relief, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will have to pay his own costs. *Morland (Bart.) v. Chitty*, 1 Dowl. P. C. 520. *Bland v. Delano*, 6 *ibid.* 293.

Before the sheriff applies to the court under the Interpleader Act, he is bound to inquire into the nature of the claims set up; and, therefore, if he bring parties before the court in consequence of a claim which is clearly bad in point of law, the court will compel him to pay the costs. *Bishop v. Hinzman*, 2 *ibid.* 166.

Where the sheriff had taken goods in execution, while there was rent due to the landlord, which he claimed from the sheriff, and the latter brought the landlord, with other claimants, into court under the Interpleader Act: the court ordered, the sheriff to pay the rent, upon the landlord's giving security, and also to pay his costs, and to pay the expense of the security. *Clarke v. Lord*, *ibid.* 227.

Where the sheriff has not given notice to the execution creditor of an adverse claim being made, and of his intention to apply to the court under the Interpleader Act, before instructions have been given to counsel to move for an attachment for not returning

STATS. 1 & 2 WILL. 4. c. 58. AND 1 & 2 VICT. c. 45. s. 2.

WHEN AN ISSUE WILL BE DIRECTED.

Stay of proceedings against sheriff.

Plaintiff must prove that all the property seized belonged to him.

Proceedings the same as in other feigned issues.

Costs of the issue.

Paying money out of court to the execution creditor.

COSTS.

When right of claimant does not appear valid; or where he abandons his claim after an issue directed.

When sheriff entitled to receive costs of possession and sale.

Where sheriff's rule does not pray costs, and the claimant does not appear.

When sheriff will not be compelled to pay costs.

When sheriff not in general entitled to his costs.

Other extra expenses for obeying the rule will be allowed.

When all parties appear to be blameless.

Parties improperly brought before the court.

Sheriff taking goods while rent due.

When sheriff

STAT. 1 & 2
WILL. 4. c. 58.
AND 1 & 2 VICT.
c. 45. s. 2.

has not given
notice to the
execution
creditor of an
adverse claim.
When execu-
tion creditor
does not appear.
When adverse
claimant does
not appear.

When the
sheriff's rule is
discharged, he
is allowed, after
that, a reason-
able time to
make his
return.

the writ, the court will grant the attachment, or require the sheriff to pay the costs of the motion. *Braine v. Hunt*, 2 C. & M. 418. 2 Dowl. P. C. 391. 4 Tyrw. 243.

Where a *fi. facias* has been issued, and goods seized under it, and, an adverse claim being set up, the sheriff has applied for relief under the Interpleader Act, and the execution creditor does not appear to support his *fi. fa.*, the court will order the costs of the adverse claimant's appearing to support his claim to be paid by the execution creditor, but not those of the sheriff; yet, if the execution creditor afterwards appear and open the rule, the court will grant the sheriff the costs of his second appearance. *Bryant v. Ikey*, 1 Dowl. P. C. 428. *Tomlinson v. Dona*, 1 H. & W. 123.

Where an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief under the act, and the adverse party does not appear to support his claim, the court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule, but will not allow the sheriff his costs. *Bowdler v. Smith*, 1 Dowl. P. C. 417. *Perkins v. Burton*, 2 ibid. 108. *Orum v. Sheldon*, 3 ibid. 640. *Jones v. Lewis*, 8 M & W. 264.

The sheriff or officer can, notwithstanding the Interpleader Act, apply to the court to enlarge the time for making their return. Archb. by Chitt. 1047.

If the sheriff apply to the court under stat. 1 & 2 Will. 4. c. 58., and his rule be afterwards discharged, he is allowed a reasonable time after that, for the purpose of making his return, and therefore an attachment against him for not returning the writ, obtained on the very day that his rule under the Interpleader Act was discharged, was held irregular. *Rex v. Hertfordshire (Sheriff of)*, 5 Dowl. P. C. 144.

STATUTES OF LIMITATION(1), pp. 2893—2935.

1. STAT. 3 EDW. 1. c. 4. s. 1., p. 2895.
"WHAT SHALL BE ADJUDGED WRECK OF THE SEA, AND WHAT NOT."
2. STAT. 13 EDW. 1. c. 5. (WESTM. 2.) s. 2., p. 2895.
"REMEDIES TO REDRESS USURPATIONS OF ADVOWSONS OF CHURCHES."
3. STAT. 24 HEN. 8. c. 12. ss. 6 & 7., pp. 2895, 2896.
"FOR THE RESTRAINT OF APPEALS."
4. STAT. 23 ELIZ. c. 1. s. 8., p. 2896.
"AN ACT TO RETAIN THE QUEEN'S MAJESTY'S SUBJECTS IN THEIR DUE OBEDIENCE."
5. STAT. 31 ELIZ. c. 5. ss. 5 & 6., p. 2896.
"AN ACT CONCERNING INFORMERS."
6. STAT. 43 ELIZ. c. 5. s. 2., p. 2897.
"AN ACT TO PREVENT PERJURY, AND SUBORNATION OF PERJURY, AND UNNECESSARY EXPENSES IN SUITS OF LAW."
7. STAT. 21 JAC. 1. c. 14. ss. 1 & 2., p. 2897.
"AN ACT TO ADMIT THE SUBJECT TO PLEAD THE GENERAL ISSUE IN INFORMATIONS OF INTRUSIONS BROUGHT ON THE BEHALF OF THE KING'S MAJESTY, AND RETAIN HIS POSSESSION TILL TRIAL."
8. STAT. 21 JAC. 1. c. 16. ss. 3, 4. & 7., pp. 2897—2900.
"AN ACT FOR LIMITATION OF ACTIONS, AND FOR AVOIDING OF SUITS IN LAW."
9. STAT. 21 JAC. 1. c. 23. ss. 2. 6 & 7., pp. 2900, 2901.
"AN ACT FOR AVOIDING OF VEXATIOUS DELAYS CAUSED BY REMOVING ACTIONS AND SUITS OUT OF INFERIOR COURTS."
10. STAT. 4 & 5 WILL. & M. c. 18. s. 2., p. 2901.
"AN ACT TO PREVENT MALICIOUS INFORMATIONS IN THE COURT OF KING'S BENCH, AND FOR THE MORE EASY REVERSAL OF OUTLAWRIES IN THE SAME COURT."
11. STAT. 7 WILL. 3. c. 3. ss. 5 & 6., pp. 2901, 2902.
"AN ACT FOR REGULATING OF TRIALS IN CASES OF TREASON AND MISPRISON OF TREASON."
12. STAT. 7 & 8 WILL. 3. c. 6. s. 6., p. 2902.
"AN ACT FOR THE MORE EASY RECOVERY OF SMALL TITHES."
13. STAT. 8 & 9 WILL. 3. c. 26. s. 9., p. 2902.
"AN ACT FOR THE BETTER PREVENTING THE COUNTERFEITING THE CURRENT COIN OF THIS KINGDOM."
14. STAT. 10 & 11 WILL. 3. c. 14. ss. 1 & 2., p. 2902.
"AN ACT FOR LIMITING CERTAIN TIMES, WITHIN WHICH WRITS OF ERROR SHALL BE BROUGHT FOR THE REVERSING FINES, COMMON RECOVERIES, AND ANCIENT JUDGMENTS."

(1) *Vide ante*, 5. tit. ACCOUNT—10. tit. ADULTERY—179. tit. ARBITRATION AND AWARDS—211. tit. ASSAULT AND BATTERY—987. tit. CARRIERS—1025. tit. CASE—1170. tit. COVENANT—1262. tit. DEBT.—1312. tit. DETINUE—1379. tit. EJECTMENT—1899. tit. EXECUTORS—2031. tit. IMPRISONMENT—2059. tit. INFANT—2218. tit. INSURANCE—2256. tit. LIBEL—2273. tit. MALICIOUS ARREST—2288. tit. MALICIOUS PROSECUTION—2372. tit. NUISANCE—2432, 2433. tit. QUO WARRANTO—2519. tit. REFLEVIN—2580. tit. SLANDER—2615. tit. TITHES—2650. tit. TRESPASS—2714. tit. TROVER—2737. tit. USE AND OCCUPATION—2752. tit. WATER AND WATERCOURSES—2761. tit. WAY.

15. STAT. 3 & 4 ANNE, c. 9. s. 2., p. 2902.
 "AN ACT FOR GIVING LIKE REMEDY UPON PROMISSORY NOTES AS IS NOW USED UPON BILLS OF EXCHANGE, AND FOR THE BETTER PAYMENT OF INLAND BILLS OF EXCHANGE."
16. STAT. 4 ANNE, c. 16. ss. 17—19., p. 2903.
 "AN ACT FOR THE AMENDMENT OF THE LAW, AND THE BETTER ADVANCEMENT OF JUSTICE."
17. STAT. 7 ANNE, c. 25. s. 2., p. 2903.
 "AN ACT FOR MAKING PERPETUAL AN ACT FOR THE BETTER PREVENTING THE COUNTERFEITING THE CURRENT COIN OF THIS KINGDOM."
18. STAT. 8 ANNE, c. 14. ss. 6 & 7., pp. 2903, 2904.
 "AN ACT FOR THE BETTER SECURITY OF RENTS, AND TO PREVENT FRAUDS COMMITTED BY TENANTS."
19. STAT. 9 ANNE, c. 14. s. 2., p. 2904.
 "AN ACT FOR THE BETTER PREVENTING EXCESSIVE AND DECEITFUL GAMING."
20. STAT. 11 GEO. 2. c. 19. s. 1., p. 2904.
 "AN ACT FOR THE MORE EFFECTUAL SECURING THE PAYMENT OF RENTS, AND PREVENTING FRAUDS BY TENANTS."
21. STAT. 24 GEO. 2. c. 44. s. 8., pp. 2904, 2905.
 "AN ACT FOR THE RENDERING JUSTICES OF THE PEACE MORE SAFE IN THE EXECUTION OF THEIR OFFICE; AND FOR INDEMNIFYING CONSTABLES AND OTHERS ACTING IN OBEDIENCE TO THEIR WARRANTS."
22. STAT. 9 GEO. 3. c. 16. ss. 1—7. 10., pp. 2905—2908.
 "AN ACT TO AMEND AND RENDER MORE EFFECTUAL AN ACT MADE IN THE TWENTY-FIRST YEAR OF THE REIGN OF KING JAMES THE FIRST, INTITULED 'AN ACT FOR THE GENERAL QUIET OF THE SUBJECTS AGAINST ALL PATTENURES OF CONCEALMENT WHATSOEVER.'"
23. STAT. 32 GEO. 3. c. 58. ss. 1 & 2., pp. 2908, 2909.
 "AN ACT FOR THE AMENDMENT OF THE LAW IN PROCEEDINGS UPON INFORMATION IN NATURE OF QUO WARRANTO."
24. STAT. 53 GEO. 3. c. 127. s. 5., p. 2909.
 "AN ACT FOR THE BETTER REGULATION OF ECCLESIASTICAL COURTS IN ENGLAND, AND FOR THE MORE EASY RECOVERY OF CHURCH RATES AND TITHES."
25. STAT. 53 GEO. 3. c. 141. ss. 2. & 10., pp. 2909, 2910.
 "AN ACT TO REPEAL AN ACT OF THE SEVENTEENTH YEAR OF THE REIGN OF HIS PRESENT MAJESTY, INTITULED 'AN ACT FOR REGISTERING THE GRANTS OF LIFE ANNUITIES, AND FOR THE BETTER PROTECTION OF INFANTS AGAINST SUCH GRANTS, AND TO SUBSTITUTE OTHER PROVISIONS IN LIEU THEREOF.'"
26. STAT. 9 GEO. 4. c. 14. ss. 1—4. 8., pp. 2910—2913.
 "AN ACT FOR RENDERING A WRITTEN MEMORANDUM NECESSARY TO THE VALIDITY OF CERTAIN PROMISES AND ENGAGEMENTS."
27. STAT. 2 WILL. 4. c. 39. s. 10., p. 2913.
 "AN ACT FOR THE UNIFORMITY OF PROCESS IN PERSONAL ACTIONS IN HIS MAJESTY'S COURTS OF LAW AT WESTMINSTER."
28. STAT. 2 & 3 WILL. 4. c. 71. ss. 1—8., pp. 2913—2916.
 "AN ACT FOR SHORTENING THE TIME OF PRESCRIPTION IN CERTAIN CASES."
29. STAT. 2 & 3 WILL. 4. c. 100. ss. 1, 2. 4—8., pp. 2916—2918.
 "AN ACT FOR SHORTENING THE TIME REQUIRED IN CLAIMS OF MODUS DECIMARUM OR EXEMPTION FROM OR DISCHARGE OF TITHES."

30. STAT. 3 & 4 WILL. 4. c. 27. ss. 1—42., pp. 2918—2932.

"AN ACT FOR THE LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY, AND FOR SIMPLIFYING THE REMEDIES FOR TRYING THE RIGHT THERE TO."

31. STAT. 3 & 4 WILL. 4. c. 42. ss. 2—7. 37, 38., pp. 2932—2935.

"AN ACT FOR THE FURTHER AMENDMENT OF THE LAW, AND THE BETTER ADVANCEMENT OF JUSTICE."

32. STAT. 7 WILL. 4. AND 1 VICT. c. 28., p. 2935.

"AN ACT TO AMEND AN ACT OF THE THIRD AND FOURTH YEARS OF HIS LATE MAJESTY, FOR THE LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY, AND FOR SIMPLIFYING THE REMEDIES FOR TRYING THE RIGHTS THERE TO."

1. STAT. 3 EDW. 1. c. 4. s. 1.

STAT. 3 EDW. 1.
c. 4.

"What shall be adjudged Wreck of the Sea, and what not."

"Concerning wrecks of the sea, it is agreed, that where a man, a dog, or a cat Sect. 1.
escape quick out of the ship, that such ship nor barge, nor any thing within them, shall be adjudged wreck, but the goods shall be saved and kept by view of the sheriff, coroner, or the king's bailiff, and delivered into the hands of such as are of the crown, where the goods were found, so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay, and if not they shall remain to the king."

2. STAT. 13 EDW. 1. c. 5. (WESTM. 2.) s. 2.

STAT. 13 EDW. 1.
c. 5. (WESTM. 2.)

"Remedies to redress Usurpations of Advowsons of Churches."

"From henceforth one form of pleading shall be observed among justices in writs Sect. 2.
of *darrein presentment* and *quare impedit*, in this respect, if the defendant The defendant
allegeth plenarty of the church of his own presentation, the plea shall not fail by pleadeth plenarty of his own
reason of the plenarty; so that the writ be purchased (1) within six months (2), presentation.
though he cannot recover his presentation within the six months." (3)

3. STAT. 24 HEN. 8. c. 12. ss. 6 & 7.

STAT. 24 HEN.
8. c. 12. ss. 6.
& 7.

"For the Restraint of Appeals." (4)

"And in likewise if it be commenced before the bishop diocesan, or his com- Sect. 6.
missary, from the bishop diocesan, or his commissary, within fifteen days next Before whom
ensuing the judgment or sentence thereof there given, to the archbishop of the and in what
province of Canterbury, if it be within his province; and if it be within the courts appeals
province of York, then to the archbishop of York; and so likewise to all other arch- shall be sued
bishops in other the king's dominions, as the case by order of justice shall require." within this
realm.

"And if the matter or contention for any of the causes aforesaid be or shall be Sect. 7.
commenced, by any of the king's subjects or retainers, before the archdeacon of Appeals ought
any archbishop, or his commissary, then the party grieved shall or may take his to be within
fifteen days.

(1) *I. e.* issued.

(2) *Peterborough (Bishop of) v. Catesby*,
Cro. Jac. 166.

(3) If the demandant be nonsuited after ap-
pearance, it is peremptory, and a bar against
very other writ; so if on title made, the writ
e discontinued; but it is not so, if the writ
e abated for a misnomer in the writ, for it

may be the fault of the clerk in writing it. *Sir*
Hugh Portman's case, 7 Co. 27. (b.) Co.
Entr. 481. pl. 4. *Berkeley v. Hansard*,
2 Salk. 559.

(4) *Philips v. Bury*, 4 Mod. 106. *Cove-*
ney's case, 2 Dyer, 209. (a.) *Savil v. Kirby*,
10 Mod. 385.

STAT. 24 HEN. 8.
c. 12. s. 7.

appeal within fifteen days next after judgment, or sentence there given, to the court of the Arches, or audience, of the same archbishop or archbishops."

STAT. 23 ELIZ.
c. 1. s. 8.

4. STAT. 23 ELIZ. c. 1. s. 8.

"An Act to retain the Queen's Majesty's Subjects in their due Obedience."

Sect. 8.
What justices
may inquire
of offences
against stats.
1 Eliz. c. 1.,
5 Eliz. c. 1.,
13 Eliz. c. 2.

"All and every offences against this act, or against the acts of the first, fifth, or thirteenth years of her majesty's reign, touching acknowledging of her majesty's supream government in causes ecclesiastical, or other matters touching the service of God, or coming to church, or establishment of true religion in this realm, shall and may be inquirable, as well before justices of peace, as other justices named in the same statutes, within one year and a day after every such offence committed." (1)

STAT. 31 ELIZ.
c. 5. ss. 5 & 6.

5. STAT. 31 ELIZ. c. 5. ss. 5 & 6.

"An Act concerning Informers."

Sect. 5.
Within what
times suits
upon penal
statutes shall be
pursued.

"All actions, suits, bills, indictments, or informations, which after twenty days next after the end of this session of parliament shall be had, brought, sued, or exhibited (2) for any forfeiture upon any statute penal (3) made or to be made, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only, shall be had, brought, sued, or exhibited within two years next after the offence committed or to be committed against such act penal, and not after two years; and that all actions, suits, bills, or informations, which after the said twenty days shall be had, brought, sued, or commenced for any forfeiture, upon any penal statute, made or to be made, except the Statute of Tillage, the benefit and suit whereof is or shall be by the said statute limited to the queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued, or commenced by any person that may lawfully pursue for the same as aforesaid, within one year next after the offence committed, or to be committed against the said statute (4); and in default of such pursuit, that then the same shall be had, sued, exhibited, or brought (5) for the queen's majesty, her heirs or successors, at any time within two years after that year ended; and if any action, suit, bill, indictment, or information for any offence against any penal statute made or to be made, except the Statute of Tillage, shall be brought after the time in that behalf before limited, that then the same shall be void and of none effect."

Sect. 6.
Actions, in-
formations, &c.
limited by
some statutes
to be sued
within a shorter
time.

"Provided always, that where any action, information, indictment, or other suit is or shall be limited by any statute penal, to be had, sued, commenced, or brought within shorter time than is afore rehearsed; that in every such case the action, information, indictment, or other suit, shall be brought within the time limited by such estatute." (6)

(1) *Lionell Farrington's case*, Cro. Car. 10.
1 East, P. C. 18.

(2) The acts of parliament do not define what shall be the "commencement of the action;" it is therefore for the courts of law to determine, what act of the party commences the suit, and after the limited time forbids the act to be done. *Johnson v. Smith*, 2 Burr. 959. The moment the time limited expires, the prohibition attaches, for the legislature says, he shall not sue "after that time;" and the act done by the party in commencing his action within the limited time, is in the nature of a condition precedent to entitle him to maintain his action. Mansel on Limitation, 102.

(3) If accumulative damages be given by a

statute to the party grieved, it is not a penal statute. *Woodgate v. Knatchbull*, 2 T. R. 154.

(4) The plaintiff must shew, that he has commenced the action in due time, or he will fail in his suit; for in penal actions the duty, or right of action, attaches to the plaintiff by merely bringing the action. 2 Sand. 68. (a.) n. 6.

(5) The issuing of process, and not the actual filing of the information, is the commencement of a suit by the attorney general. *Att. Gen. v. Hall*, 11 Price, 760.

(6) By stat. 21 Jac. 1. c. 4. s. 4, the Statute of Limitations as to penal actions can be given in evidence under *nil debet*. *Spencer (Earl) v. Swannell*, 3 M. & W. 154. 6 Dowl. P. C. 326.

6. STAT. 43 ELIZ. c. 5. s. 2.

STAT. 43 ELIZ.
c. 5. s. 2.

"An Act to prevent Perjury, and Subornation of Perjury, and unnecessary Expenses in Suits of Law."

"No writ or writs of *habeas corpus*, or any other writ or writs sued forth, or to be sued forth, by any person or persons whatsoever, out of any of her majesty's courts of record at Westminster, to remove any action, suit, plaint, or cause, depending or to be depending, in any court or courts, within any city or town corporate, or elsewhere, which have or shall have jurisdiction, power, or authority to hold plea in any action, plaint, or suit, shall be received or allowed by the judge or judges, or officer or officers of the court or courts wherein or to whom any such writ or writs shall be delivered (but that he and they shall and may proceed in the said cause and causes ready to be tried, as though no such writ or writs were sued forth or delivered to him or them), except that the said writ or writs be delivered to the judge or judges, officer or officers of the said court, before that the jury which is to try the cause in question between the party or parties plaintiffs, and the party or parties that sued forth the said writ or writs, or for whose benefit the said writ or writs is or shall be sued forth, have appeared, and one of the said jury sworn to try the said cause."

Sect. 2.

At what time a writ to remove a suit depending in an inferior court shall be delivered to the judge or officer of the same court.

7. STAT. 21 JAC. 1. c. 14. ss. 1 & 2.

STAT. 21 JAC. 1.
c. 14. ss. 1 & 2.

"An Act to admit the Subject to plead the General Issue in Informations of Intrusions brought on the behalf of the King's Majesty, and retain his Possession till Trial."

"Whosoever the king, his heirs or successors, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, hath been or shall be out of possession by the space of twenty years, or hath not, or shall not have taken the profits of any lands, tenements, or hereditaments (1) within the space of twenty years, before any information of intrusion brought or to be brought to recover the same, that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the king."

Sect. 1.

In informations of intrusion, the subject is allowed to plead the general issue, and to retain possession till trial.

"Where an information of intrusion may fitly and aptly be brought on the king's behalf, that no *scire facias* (2) shall be brought, whereunto the subject shall be forced to a special pleading, and be deprived of the grace intended by this act."

Sect. 2.

8. STAT. 21 JAC. 1. c. 16. ss. 3, 4. & 7.

STAT. 21 JAC. 1.
c. 16. ss. 3, 4.
& 7.

"An Act for Limitation of Actions, and for avoiding of Suits in Law."

All actions of trespass *quare clausum fregit* (3); all actions of trespass, detinue, action sur trover (4), and replevin for taking away of goods and cattle (5); all actions of account and upon the case (6), other than such accounts as concern the trade of merchandise (7), between merchant and merchant, their factors or ser-

Sect. 3.

The limitation of certain personal actions.

(1) The effect of this statute is to throw the onus of proving the title, in the first instance, on the crown. *Att. Gen. v. Parsons*, 2 M. & W. 23.

(2) This must be upon a record. *Att. Gen. v. Stowell*, 4 ibid. 77. 6 Dowl. P. C. 673. 8 C. & P. 376.

(3) *Antd.*, 1376—1497. tit. EJECTMENT—*Antd.*, 2628—2657. tit. TRESPASS.

(4) *Antd.*, 2660—2716. tit. TROVER.

(5) *Antd.*, 2482—2523. tit. REPLEVIN.

(6) "Promises" and "case" against the

sheriff for an escape are comprehended. *Bonafous v. Walker*, 2 T. R. 129.

(7) The exception as to merchants' accounts in the Statute of Limitations (stat. 21 Jac. 1. c. 16. s. 3.) applies only to an action of account, or seemingly, to an action on the case for not accounting; but not to an action of *indebitatus assumpsit*. *Ingles v. Haigh*, 8 M. & W. 769.

Accounts not in writing are not accounts excepted by the Statute of Limitations. *Mills v. Fowkes*, 5 Bing. N. C. 455.

STAT. 21 JAC. I.
c. 16 s. 3.

vants (1); all actions of debt grounded (2) upon any lending or contract without speciality (3); all actions of debt for arrearages of rent (4), and all actions of assault (5), menace, battery, wounding, and imprisonment (6), or any of them, which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued (7) within the time and limitation hereafter expressed, and

Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take the debts due longer than six years out of the Statute of Limitations; but the creditor may at any time apply such payment to the debts due longer than six years. *Mills v. Fowkes*, 5 Bing. N. C. 455.

(1) Bull. N. P. 149. *Barber v. Barber*, 18 Ves. 286.

(2) *Steward v. Bridger*, 2 Vern. 516. *Leigh v. Thornton*, 1 B. & A. 625.

(3) By a promissory note E. H., W. D., and I. H. jointly and severally promised to pay to I. E. 300*l.*, with interest. W. D. having afterwards paid I. E. 280*l.* on account of the note, I. E. made the following indorsement upon it:—"Received of W. D. the sum of 280*l.* on account of the within note, the 300*l.* having been originally advanced to E. H." In an action brought by W. D., who had paid the whole amount due, against G. H., to recover contribution from him as a "co-surety;"—It was held, that the indorsement was admissible in evidence, to prove not only the payment of 280*l.*, but also, that the money was originally advanced to E. H., as principal. *Davies v. Humphreys*, 6 M. & W. 153. The amount of principal and interest was paid by the plaintiff more than six years before the commencement of the suit with the exception of 30*l.*, which was paid by him within that period; and the Statute of Limitations having been pleaded, it was holden, that the plaintiff was entitled to recover only to the extent of 30*l.* which had been paid within the six years, and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion. And that in an action on the same note against E. H. the principal, that the Statute of Limitations was a bar to all except the 30*l.*, as the plaintiff had a right of action against the principal, the moment he paid any thing for so much money paid to his use. *Ibid.*

In 1816, G. shipped goods on board a vessel chartered by him for Calcutta, and B. and Co. made advances to enable him to do so, under an arrangement, that the goods should be transmitted to the agents at Calcutta of B. and Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. and Co. in London, who were to reimburse themselves their charges, and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in 850*l.*, the defendants and G. applied to B. and Co. to pay off this debt by a further allowance to G. on his consignment, and the defendants

gave B. and Co. the following guarantee:—"Messrs. B. and Co.—You having expressed some doubts of the propriety of paying G.'s draft on you for 850*l.* in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. and Co. thereupon accepted and paid a bill for 850*l.* drawn by G. on them, in favour of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner (G. having become bankrupt), gave notice to the East India Company (in whose docks she lay) not to deliver any part of the cargo without his authority; they, thereupon sold the cargo, and paid the owner's demand for freight, and, in consequence of conflicting claims from G.'s assignees and from B. and Co., filed an interpleader bill, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the above parties, under legal advice, up to the year 1837, when the result was, that B. and Co. were obliged to pay C.'s costs. In 1838, B. and Co. demanded of the defendants the 850*l.* due by the guarantee, with interest, and their share of the expenses incurred in the law proceedings; and on their refusal to pay, brought an action against them on the guarantee:—"It was holden, first, that the Statute of Limitations began to run against the plaintiffs, not from the termination of the legal proceedings in 1837, but from the return and sale of the cargo in 1818, when all the facts were ascertained upon which the defendant's legal liability depended, and therefore, that it was a bar to the action: secondly, that the defendants could not be made liable under the guarantee for the expenses incurred by the plaintiffs in the law proceedings. *Colvin v. Buckle*, 8 M. & W. 680.

Where a debtor draws a bill of exchange to be applied in part payment of the debt, and the bill is paid, when due, by the debtor to the creditor, it operates as part payment to defeat the Statute of Limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. *Irving v. Veitch*, 3 *Ibid.* 90.

(4) An affidavit to hold bail for rent, part of which accrued more than six years ago, need not negative the Statute of Limitations. *Briscoe v. Etwood*, 1 Jebb & Symes (Irish), 499. *Hodsdon v. Harridge*, 1 Sd. 415. S. C. nom. *Hodgson v. Harris*, 1 Lea 273.

(5) *Vide antè*, 208—228. tit. ASSAULT AND BATTERY.

(6) *Vide antè*, 2017—2046. tit. INJURY.

(7) The court will amend a writ of *mon-*

not after (1), that is to say, the said actions upon the case (2) (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum frigit*, within three years next after the end of this present session of parliament, or within six years next after the cause (3) of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years (4) next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken (5), and not after."

STAT. 21 JAC. 1.
c. 16. s. 3.

mons, although more than four months have elapsed since it was issued, by altering the cause of action from debt to *assumpsit*, on an affidavit, that if a fresh action were commenced, the Statute of Limitations would be a bar; but the court cannot amend the copy of the writ served, as they have no power over it. *Eccles v. Cole*, 8 M. & W. 537.

The defendant was indebted to the plaintiffs in a balance of 2245*l.*, for which they held his over-due promissory note. In 1827 the plaintiff and defendant agreed, that the defendant should pay the balance as follows:—245*l.* in cash, and the remainder by annual payments of 300*l.* a-year out of his salary as consul abroad, and by the proceeds of certain wines consigned by him to India, and that the plaintiff should hold his promissory note as security for payment of the account. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September 1830:—It was holden, that the plaintiffs were entitled at any time within six years from September 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. *Irving v. Veitch*, 3 *ibid.* 90.

(1) The statute extends to mesne acts. *Gray v. Mendez*, Str. 536. *Doe d. Durore v. Jones*, 4 T. R. 305, 306. *n.*

(2) Trover is included (*Swain v. Stephens*, Cro. Car. 245. 333.), and slander for words actionable only for the special damage. *Burby v. Perry*, 2 Ld. Raym. 1588. *Browne v. Gibbons*, 1 Salk. 306.

(3) It means a right to prosecute an action with effect. *Jolliffe (Sir W.) v. Pitt*, 2 Vern. 594. *Murray v. East India Company*, 5 B. & A. 304. On a note made payable with interest on demand, the Statute of Limitations begins to run from the date of the note. *Norton v. Ellam*, 1 M. & W. 461. On a contract to indemnify a plaintiff against costs, which he is afterwards called upon to pay, the cause of action arises when he pays, not when the costs are incurred, or the attorney's bill delivered to such plaintiff. Therefore the Statute of Limitations runs from the time of payment. *Collinge v. Heywood*, 9 A. & E. 633. Where parties have pleaded in abatement for non order of a defendant, the court of Queen's Bench will not set aside the plea, or allow the writ to be amended, on the ground, that the

plaintiff is barred by the Statute of Limitations from bringing a fresh action. And, on motion for such amendment, the court refused to enter upon the consideration of facts stated on affidavit to shew an equitable claim to the indulgence. *Roberts v. Bate*, 6 A. & E. 778. Where the defendant's testator, who was master of a ship belonging to the plaintiff, agreed, in 1817, to guarantee him against any loss arising from an adventure from Dublin to Jamaica, out and home; and there was a loss upon the adventure, and in 1820 the plaintiff furnished to the defendant an account of the loss:—It was held, that the breach of the contract being then ascertained, although a part of the returns for the goods shipped out were not sold until afterwards, the Statute of Limitations ran from that time, and not from the time when the last article was sold:—And, that the plaintiff in his account, having treated the defendant as executrix, by charging her with the testator's funeral expenses, and having returned to her certain deposits which the testator had left with him as securities for the performance of his guarantee, which she accepted, the Statute of Limitations ran from that period when she intermeddled with the assets, and not from the time when, subsequently, she received probate of the will. *Brophy v. Holmes*, 1 Hudson & Brooke (Irish), 512. It also appeared, that the plaintiff had converted a part of the securities deposited with him into money, and given credit for them in his account, and that the defendant had within six years sued him for, and recovered the amount: it was held, under the circumstances, that the action in the present case was not thereby taken out of the Statute of Limitations. *Ibid.* A conditional acknowledgment and promise to pay, will not take a case out of the Statute of Limitations, unless it be shewn, that the condition has been fulfilled. *Hodgens v. Graham, Alcock & Napier* (Irish), 49.

(4) Unless there be a special demurrer, this will be included in an informal plea as to six years. *Macfadzen v. Olivant*, 6 East, 389.

(5) These provisions cannot be pleaded to process at the suit of the crown, if the statute have not run upon the debt before it was seized by the prerogative process. *Williams v. Jones*, 13 East, 450. *Lambert v. Taylor*, 4 B. & C. 133. 6 D R. 188.

STAT. 21 JAC. 1.
c. 16. ss. 4. 7.

Sect. 4.
Their limitation after judgment or outlawry reversed.

Sect. 7.
Infants, femmes covert, &c., excepted.

"If in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error (1), or a verdict pass for the plaintiff, and upon matter alledged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill (2); or if any of the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry (3), that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action (4) or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after." (5)

"If any person or persons that is or shall be entituled to any such (6) action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come (7), within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned (8), or beyond the seas (9), that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment (10) should have done."

STAT. 21 JAC. 1.
c. 23. ss. 2. 6 & 7.

9. STAT. 21 JAC. 1. c. 23. ss. 2. 6 & 7.

"An Act for avoiding of vexatious Delays caused by removing Actions and Suits out of inferior Courts."

Sect. 2.
No writ to remove a suit commenced in an inferior court shall be obeyed, unless it be delivered unto the steward, &c. of the same court before issue or demurrer joined.

"No writ or writs of *habeas corpus*, *certiorari*, or any other writ or writs, process or processes whatsoever, other than writs of error or attain, to be used forth after the end of this present session of parliament, by any person or persons whatsoever, out of or from any of his majesty's courts at Westminster or the court of Great Sessions in Wales, or out of any other court or courts having or pretending to have power to award such writs or processes, or stay or remove any action, bill, plaint, suit, or cause brought, commenced, or depending, or hereafter to be brought, commenced, or depending, in any court or courts of record within any city, liberty, town corporate, or elsewhere, which have or shall have jurisdiction, power, or authority to hold plea in that action, bill, plaint, suit, or cause — the same cause of action, bill, plaint, or suit arising or growing within the said city, liberty, town corporate, or jurisdiction, shall after the end of this present session of parliament be received or allowed by the steward or steward, judge or judges, or officer or officers of the court or courts wherein or to whom any such writ or writs shall be directed and delivered (11); but that he and they shall and may proceed in the said cause or causes as though no such writ

(1) *Bleasdale v. Darby*, 9 Price, 606.

(2) *Newball v. Adams*, 8 Taunt. 535.

(3) *Fynch (Sir T.) v. Lambe*, Cro. Car. 294. Sir W. Jones, 312. *Whitwick v. Hovenden*, 3 Lev. 245.

(4) 2 Saund. 63. (g, h.)

(5) If the action abate from the death of either of the parties, a new action may be commenced within a year. *Wilcocks v. Hugins*, Str. 907.

(6) Actions "on the case" (*Chandler v. Vilett*, 2 Saund. 120.), and "on promises" (*Crosier v. Tomlinson*, 2 Mod. 71.), are comprehended herein.

(7) *Fenton v. Emblers*, 1 W. Black 354.

(8) *Yapp v. Harrington*, 3 Bing C. 907. 6 Dowl. P. C. 55.

(9) The statute, attaches, if there be a plaintiff in England capable of suing. *Rhodes v. Smethurst*, 4 M. & W. 42.

(10) *Perry v. Jackson*, 4 T. R. 517. It is not compulsory on the party to avail himself of this proviso, but he may commence his action immediately (*Chandler v. Fisk*, 2 Saund. 121. *Stowell v. Zouche*, Fowl. 365. *Cotton's case*, 1 Leon. 215. 2 Inst. 518. *Freake v. Cranefeldt*, 3 M. & C. 499.), which cannot be availed of by a third party. *Moss v. Pyne*, 11 Moore, 6.

(11) A *certiorari* for the removal of a case cannot be received by an inferior court after the period limited by this section. *Larrest v. Bill*, 6 Dowl. P. C. 111. S. C. nom. *Leverack v. Bean*, 3 M. & W. 62.

or writs were sued forth or delivered to him or them, except that the said writ or writs be delivered to the steward or stewards, judge or judges, officer or officers of the said court, before issue (1) or demurrer joined in the said cause or causes so depending or to be depending in any such court of record in any city, liberty, town corporate, or elsewhere, having power to hold such plea, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant or defendants to such action or suit commenced."

STAT. 21 JAC. 1.
C. 23. ss. 2, 6 & 7.

"That this act shall extend only to such courts of record in cities, liberties, towns corporate, and elsewhere, and for so long time only, as there is or shall be an utter barrister of three years' standing at the bar of one of the four inns of court, that is or shall be steward, under-steward, or deputy steward, town clerk, or judge, or recorder of the same inferior court, or that is or shall be from time to time assistant to such judge or judges of such inferior courts, as shall not be utter barristers of such standing as is aforesaid, and there present, in which such actions, bills, complaints, suits, or causes is or shall be brought, commenced, or depending, and not of counsel in any action, suit, or cause then depending in the same inferior court; any thing in this present act, or any law or other statute, usage, custom, or restraint to the contrary in any wise notwithstanding."

Sect. 6.
This act shall only extend to courts in liberties, &c. and when the steward is an utter barrister. (2)

"Provided that this act, or any thing therein contained, shall not extend to any action, bill, complaint, suit, or cause, wherein any such foreign or other plea shall be pleaded, as could not be tried or determined within the jurisdiction of such inferior courts." (3)

Sect. 7.
This act shall not extend to any foreign plea.

10. STAT. 4 & 5 WILL. & M. C. 18. s. 2.

"An Act to prevent malicious Informations in the Court of King's Bench, and for the more easy Reversal of Outlawries in the same Court."

STAT. 4 & 5
WILL. & M.
C. 18. s. 2.

"In case any person or persons against whom any information or informations for the causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to issue, and that the prosecutor or prosecutors of such information or informations shall not, at his and their own proper costs and charges, within one whole year next after issue joined therein, procure the same to be tried; or if upon such trial a verdict pass for the defendant or defendants, or in case the said informer or informers procure a *noli prosequi* to be entered, then in any of the said cases the said court of King's Bench is hereby authorised to award to the said defendant and defendants his, her, or their costs, unless the judge before whom such information shall be tried, shall at the trial of such information, in open court certify upon record, that there was a reasonable cause for exhibiting such information; and in case the said informer or informers shall not within three months next after the said costs taxed, and demand made thereof, pay to the said defendant or defendants the said costs, then the said defendant and defendants shall have the benefit of the said recognisance to compel them thereunto."

Sect. 2.
Memorandum to be filed.
Defendant shall have costs, if cause not tried within one year after issue joined, &c.

11. STAT. 7 WILL. 3. C. 3. ss. 5 & 6.

STAT. 7 WILL. 3.
C. 3. ss. 5 & 6.

"An Act for regulating of Trials in Cases of Treason and Misprision of Treason."

"No person or persons whatsoever shall be indicted, tried, or prosecuted for any such treason as aforesaid, or for misprision of such treason, that shall be com-

Sect. 5.
No person to be indicted for

(1) *Bruce v. Wait*, 3 M. & W. 21.

(2) *Clapham's case*, Cro. Car. 79.

(3) It is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right

of probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted. *Rhodes v. Smethurst*, 6 M. & W. 351. 4 *ibid.* 42.

STAT. 7 WILL. 3.
c. 3. ss. 5 & 6.

treason, unless
within three
years after
offence.

Sect. 6.
Exception.

mitted or done within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, after the said 25th day of March in the year of our Lord 1696, unless the same indictment be found by a grand jury within three years next after the treason or offence done or committed."

"Always provided and excepted, that if any person or persons whatsoever shall be guilty of designing, endeavouring, or attempting any assassination on the body of the king, by poison or otherwise, such person or persons may be prosecuted at any time, notwithstanding the aforesaid limitation."

STAT. 7 & 8
WILL. 3. c. 6.
s. 6.

12. STAT. 7 & 8 WILL. 3. c. 6. s. 6.

"An Act for the more easy Recovery of Small Tithes."

Sect. 6.
No complaint
to be heard
unless made
within two
years.

"No complaint for or concerning any small tithes, offerings, oblations, obventions, or compositions hereafter due, shall be heard and determined by any justice of the peace, by virtue of this act, unless the complaint shall be made within the space of two years next after the times that the same tithes, oblations, obventions, and compositions did become due or payable."

STAT. 8 & 9
WILL. 3. c. 26.
s. 9.

13. STAT. 8 & 9 WILL. 3. c. 26. s. 9.

"An Act for the better preventing the counterfeiting the current Coin of this Kingdom."

Sect. 9.
Prosecution to
be in three
months.

"No prosecution shall be made for any offence against this act, unless such prosecution be commenced within three months after such offence committed."

STAT. 10 & 11
WILL. 3. c. 14.
ss. 1 & 2.

14. STAT. 10 & 11 WILL. 3. c. 14. ss. 1 & 2.

"An Act for limiting certain Times, within which Writs of Error shall be brought for the reversing Fines, common Recoveries, and ancient Judgments."

Sect. 1.
No fine or
recovery, &c.
shall be re-
versed, unless
writ of error be
brought in
twenty years
after fine levied,
&c.

"No fine or common recovery, nor any judgment in any real or personal action, shall from and after the 1st day of May, 1699, be reversed or avoided, for any error or defect therein, unless the writ of error or suit for the reversing such fine, recovery, or judgment, be commenced, or brought and prosecuted with effect, within twenty years after such fine levied, or such recovery suffered, or judgment signed or entered of record."

Sect. 2.
Proviso.

"If any person who is or shall be intitled to any such writ of error as aforesaid shall, at the time of such title accrued, be within the age of twenty-one years, or covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person, his or her heirs, executors, or administrators (notwithstanding the said twenty years expired), shall and may bring his, her, or their writ of error for the reversing any such fine, recovery, or judgment, as he, she, or they might have done in case this act had not been made, so as the same be done within five years after his or her full age, discovery, coming of sound mind, enlargement out of prison, or returning from beyond the seas, or death, but not afterwards, or otherwise."

STAT. 3 & 4
ANNE, c. 9. s. 2.

15. STAT. 3 & 4 ANNE, c. 9. s. 2.

"An Act for giving like Remedy upon Promissory Notes (1) as is now used upon Bills of Exchange, and for the better Payment of Inland Bills of Exchange."

Sect. 2.
How action
shall be
brought.
21 Jac. 1. c. 16.

All and every such actions shall be commenced, sued, and brought within such time (2) as is appointed for commencing or suing actions upon the case, by the

(1) *Buller v. Crips*, 6 Mod. 30. 1 Saund. 210. (a.) n. a.

(2) If the note be payable on demand, the

statute runs from the making; if payable at sight, then from the time of presentment. *Holmes v. Aerrison*, 2 Taunt. 323.

statute made in the twenty-first year of the reign of King James the First, intituled "An act for limitation of actions and for avoiding of suits in law." (1)

STAT. 3 & 4 ANNE, c. 9. s. 2.

16. STAT. 4 ANNE, c. 16. ss. 17—19.

STAT. 4 ANNE, c. 16. ss. 17—19.

"An Act for the Amendment of the Law, and the better Advancement of Justice."

"All suits and actions in the court of admiralty for seamen's wages, which shall become due after the said first day of Trinity Term, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after." (2)

SECT. 17. SEAMEN'S WAGES.

"If any person or persons, who is or shall be entitled to any such suit or action for seamen's wages, be or shall be, at the time of any such cause of suit or action accrued, fallen, or come, within the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within six years next after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas."

SECT. 18. PROviso in case of nonage, feme covert, or non compos mentis, &c.

"If any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages (3), or against whom there shall be any cause of action of trespass, detinue, actions sur trover, or replevin for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come beyond the seas (4), that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons, after their return (5) from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act, and by the said other act made in the one and twentieth year of the reign of King James the First." (6)

SECT. 19. ACTION AGAINST PERSONS GONE BEYOND THE SEAS MAY BE BROUGHT AFTER THEIR RETURN.

17. STAT. 7 ANNE, c. 25. s. 2.

STAT. 7 ANNE, c. 25. s. 2.

"An Act for making perpetual an Act for the better preventing the counterfeiting the current Coin of this Kingdom," &c.

"The prosecution of such person or persons as offend against the said act, by making or mending, or beginning or proceeding to make or mend any coining tool or instrument therein prohibited, or by marking of money round the edges with letters or grainings, may be commenced at any time within six months after such offence committed."

SECT. 2. THE PROSECUTION OF OFFENCES AGAINST 8 WILL. 3. c. 26. MAY BE COMMENCED IN SIX MONTHS AFTER THE OFFENCE.

18. STAT. 8 ANNE, c. 14. ss. 6 & 7.

"An Act for the better Security of Rents, and to prevent Frauds committed by Tenants."

STAT. 8 ANNE, c. 14. ss. 6 & 7.

"And whereas tenants *pur auter vie*, and lessees for years or at will, frequently hold over the tenements to them demised, after the determination of such leases; and whereas after the determination of such, or any other leases, no distress can

SECT. 6. RENT IN ARREAR UPON A LEASE FOR

(1) *Antd*, 2897. stat. 21 Jac. 1. c. 16.

(2) In pleading to a libel it should be positively alleged, that no suit had been brought within six years after the cause of action accrued. *Ewers v. Jones*, 9 Salk. 228.

2 Ld. Raym. 934. 1 Com. 137.

(3) *Antd*, 2535—2542. tit. SHIPPING.

(4) This stat. is not expressly referred to in stat. 3 & 4 Will. 4. c. 27. s. 7.; the act there mentioned is that of stat. 21 Jac. 1.

c. 16.; but as this statute refers to the former, and merely extends its provisions, it would seem to be equally within the meaning of the above cited clause of explanation. *Mansel on Limitation*, 114.

(5) Merely touching at a seaport in England during a voyage would not be a "return." *Gregory v. Hurfill*, 8 Moore, 189. 1 Bing. 324.

(6) c. 16. s. 3.

STAT. 8 ANNE,
c. 14. ss. 6 & 7.

life, &c. expired
may be dis-
trained for after
the determina-
tion of the
lease.

Sect. 7.
Distress to
be within
six months
after the end of
the lease, and
during the
landlord's title
and tenant's
possession.

STAT. 9 ANNE,
c. 14. s. 2.

Sect. 2.
The loser of
10*l.* at cards,
&c. may sue for
the money
within three
months.

STAT. 11 GEO.
2. c. 19. s. 1.

Sect. 1.
Landlords may
distrain and sell
goods fraudu-
lently carried
off the premises
within thirty
days.

STAT. 24 GEO.
2. c. 44. s. 8.

Sect. 8.
Limitations of
actions.

by law be made for any arrears of rent, that grew due on such respective leases before the determination thereof, it is hereby further enacted, by the authority aforesaid, that from and after the said 1st day of May, 1710, it shall and may be lawful, for any person or persons, having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined."

"That such distress be made within the space of six calendar months after the determination of such lease (1), and during the continuance of such landlord's title or interest, and during the possession (2) of the tenant from whom such arrear became due."

19. STAT. 9 ANNE, c. 14. s. 2.

"An Act for the better preventing excessive and deceitful Gaming."

"Any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice, tables (8) or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole, the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt founded on this act, to be prosecuted in any of her majesty's courts of record."

20. STAT. 11 GEO. 2. c. 19. s. 1.

"An Act for the more effectual securing the Payment of Rents, and preventing Frauds by Tenants."

"In case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord or lessor, landlords or lessors, within that part of Great Britain called England, dominion of Wales, or the town of Berwick-upon-Tweed, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent."

21. STAT. 24 GEO. 2. c. 44. s. 8.

"An Act for the rendering Justices of the Peace more safe in the Execution of their Office; and for indemnifying Constables and others acting in Obedience to their Warrants."

"Provided also, and be it enacted, by the authority aforesaid, that no action shall be brought against any justice of the peace for any thing done in the execution of

(1) If by the custom of the country the tenant be entitled to leave his away going crop in the barns, &c. of the farm for a certain period, after the expiration of the lease, the "determination" does not arise until the expiration of the time for taking away the crops. *Beavan v. Delahay*, 1 Hen. Black, 5. *Knight v. Benett*, 3 Bing. 364. ante, 1057—1172. tit. COVENANT.

(2) Though it be of only a portion of the premises. *Nuttall v. Sturanton*, 4 R. & C. 51. 6 D. & R. 155.

(3) As hazard, and whether played in private or at a public gaming table. *Atkinson v. Robinson*, 3 M. & W. 434. ante, 2744. tit. WAGER.

his office, or against any constable, headborough, or other officer or person acting as aforesaid, unless commenced within six calendar months after the act committed." (1)

STAT. 24 GEO. 2.
c. 44. s. 8.

22. STAT. 9 GEO. 3. c. 16. ss. 1—7. 10.

"An Act to amend and render more effectual an Act made in the Twenty-first Year of the Reign of King James the First, intituled, 'An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever.'" (2)

STAT. 9 GEO. 3.
c. 16. ss. 1—7.
10.

"The king's majesty, his heirs, or successors, shall not, at any time hereafter, sue, impeach, question, or implead, any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, other than liberties or franchises (3), or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand, of, in, or to the same, or any of them, by reason of any right or title which hath not first accrued and grown, or which shall not hereafter first accrue and grow, within the space of sixty years next before the filing, issuing, or commencing, of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof; unless his majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his majesty, his heirs or successors, anything hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, or the rents, issues, or profits of any honour, manor, or other hereditament, whereof the premises in question shall be part or parcel, within the said space of sixty years, or that the same have or shall have been duly in charge to his majesty, or some of his progenitors, predecessors or ancestors, heirs or successors, or have or shall have stood *insuper* of record within the said space of sixty years: And that all and every person or persons, bodies politic and corporate, their heirs and successors, and all claiming by, from, or under them, or any of them, for and according to their and every of their several estates and interests, which they have, or claim to have, or shall or may have or claim to have, in the same respectively, shall, at all times hereafter, quietly and freely have, hold, and enjoy, against his majesty, his heirs and successors, claiming by any title, which hath not first accrued or grown, or which shall not hereafter first accrue or grow, within the said space of sixty years, all and singular manors, lands, tenements, rents, tithes, and hereditaments whatsoever (except liberties and franchises), which he or they, or his or their, or any of their ancestors or predecessors, or those from, by, or under whom they do or shall claim, have or shall have held or enjoyed, or taken the rents, revenues, issues, or profits thereof, by the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be

Sect. 1.
The crown disabled to sue or implead any person for any manors, lands, hereditaments, &c., where the right hath not or shall not first accrue and grow within sixty years next before the commencing such suit, &c.

And the subject secured in the free and quiet enjoyment thereof, as well against the crown, &c.

(1) In an action of trespass against a magistrate, to shew that it had been commenced within six months after the trespass:—It was held, that it was sufficient to prove, that a writ of *ca. resp.* had been sued out in time, though it was not served, nor was it filed with a return thereon, until after issue had been joined in the action; for that according to the practice of the Exchequer, subsequent writs of *ca. resp.*, issued for the same cause of action, were to be deemed renewals of the original writ, although not actually filed when the subsequent writs were issued. *Folwell v. Walsh*, 1 Jones & Carey, (Irish), 241.

(2) The Statute of Limitations (21 Jac. 1. c. 16.) may be pleaded to a *scire facias* issued by the crown against the drawer of a

bill of exchange which was barred in the hands of the crown debtor, upon the ground, that the crown is only entitled to its debtor's right, and cannot create or reserve a right if none existed, or if it have become barred; and as the crown debtor could not have recovered, if the statute had been pleaded, so neither can the crown, standing in the same situation as its debtor. *Rex v. Morrell*, 6 Price, 24. *Manuel on Limitation*, 117.

(3) These provisions do not include a reversion in the crown, where the prior estate has been granted by it, and by its gift and provision for services, and which therefore cannot be barred by the subject. 34 Hen. 8. c. 20. s. 2. *Perkins d. Vowe v. Sewell*, 1 W. Black. 654.

STAT. 9 GEO. 2.
c. 16. ss. 1 & 2.

filed, issued, or commenced, for recovering the same, or in respect thereof, ~~when~~ his majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, by, from, or under whom his majesty, his heirs, or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, in the said manors, lands, tenements, rents, tithes, or hereditaments, by force of any right or title, have been or shall have been answered, by virtue of any such right or title, the rents, revenues, issues, or other profits thereof, within the said space of sixty years, or that the same have or shall have been duly in charge, or stood ~~insuper~~ of record as aforesaid, within the said space of sixty years: And furthermore, that all and every person or persons, bodies politic and corporate, their heirs and successors, and all claiming or to claim by, from, or under them, or any of them, for and according to their and every of their several estates and interests which they have a claim, or shall or may have or claim respectively, shall, for ever hereafter, quietly and freely have, hold, and enjoy all such manors, lands, tenements, rents, tithes, and hereditaments (except liberties and franchises) as they now have, claim, or enjoy, or hereafter shall or may have, claim, or enjoy, whereof his majesty, his progenitors, predecessors or ancestors, or whereof his majesty, his heirs or successors, or he or they by, from, or under whom his majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, or some of them, by force of some right or title to the same, have not or shall not have been answered, by virtue of such right or title, the rents, revenues, issues, or profits thereof, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof, nor the same have been or shall have been duly in charge, or stood ~~insuper~~ of record as aforesaid, within the said space of sixty years, against all and every person and persons, their heirs and assigns, having, claiming, or pretending to have, or who shall or may have, claim, or pretend to have any estate, right, title, interest, claim, or demand whatsoever, of, in, or to the same, by force or colour of any letters patent or grants, upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, or by, from, or under any patentees or grantees, or any letters patents or grants, upon suggestion of concealment or wrongful detaining, or not being in charge, or defective titles, of or for which said manors, lands, tenements, rents, tithes, and hereditaments, or any of them, no verdict, judgment, decree, judicial order upon hearing, or sentence of any court, now standing in force, hath been had or given, or any such verdict, judgment, decree, judicial order upon hearing, or sentence of court, shall hereafter be had or given in any action, bill, plaint, or information, in any of his majesty's courts at Westminster, for or in the name of the king's majesty, or any of his ancestors, progenitors, predecessors, heirs or successors, or of any of the said patentees or grantees, or for their or any of their heirs or assigns, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof as aforesaid."

As against all persons claiming any estate or interest therein, by colour of any letters patent, or grants upon suggestion of concealment, wrongful detaining, &c., for which judgment hath not or shall not be given for the crown within sixty years before the commencing such suit.

Sect. 2.

In what cases the rents and profits of manors, &c., shall be deemed to be duly in charge.

"Where the rents, revenues, issues, or profits of any manors, lands, tenements, tithes, or hereditaments, are or shall be in charge by, to, or with any auditor (1) or auditors, or other proper officer or officers of the revenue, such rents, revenues, issues, and profits, shall be held, deemed, and taken to be duly in charge within the meaning and intent of this act, any usage or custom to the contrary notwithstanding."

(1) Returns by auditors in their accounts of the crown revenue, are sufficient proof of the subject-matter having been kept in charge so as to protect the claim of the crown, from this act, even though they have returned "*nihil*," and no claim has been put in suit for sixty years. *Att. Gen. v. Eardley (Lord)*, 8 Price, 89. And the same rule applies,

where the returns are made to the auditor for auditing the public accounts; for such returns constitute a "putting in charge," even though nothing has been received of such revenue, nor any suit or proceeding for its recovery within sixty years. *Att. Gen. v. Maxwell*, 8 *ibid.* 76. n.

" Provided always, that this act, or any thing therein contained, shall not extend to bar, impeach, or hinder his majesty, his heirs or successors, of, for, or from any manors, tenements, rents, tithes, or hereditaments, whereof any reversion or remainder now is in his majesty, for or concerning the said reversion or remainder; nor of, for, or from any reversion or remainder, or possibility of reversion or remainder, in any of his majesty's progenitors, or predecessors, or ancestors, which by the expiration, end, or other determination of any limited estate of fee simple, or of any fee tail, or other particular estate, hath or ought to have first fallen or become in possession, or which shall or may, or ought hereafter first to fall or come in possession within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof; nor of, for, or from any right or title first accrued or grown to his majesty, or any of his progenitors, predecessors, or ancestors, or which shall first accrue or grow to his majesty, or any of his heirs or successors, of, in, or to any manors, lands, tenements, rents, tithes, or hereditaments, at any time or times within the space of sixty years next before the filing (1), issuing, or commencing, of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof, and not before."

" Provided also, and be it enacted by the authority of the present parliament, that this act, or any thing therein contained, shall not extend to any manors, lands, tenements, rents, tithes, or hereditaments, mentioned to be granted or conveyed by any of his majesty's progenitors, predecessors, or ancestors, or by any other under whom his majesty claimeth, to any person or persons, of any limited estate in fee simple, or of any estate in tail, or other particular estate, which several estates (if the same had been good and effectual in law) have or ought to have first fallen or become in possession, or will or ought first to fall or come in possession, within the space of sixty years next before the filing, issuing, or commencing, of any such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof as aforesaid; nor to any manors, lands, tenements, rents, tithes, or hereditaments, mentioned to be granted or conveyed by any of his majesty's progenitors, predecessors, or ancestors, or by any other under whom his majesty claimeth, to any person or persons in fee tail, or other particular estate, whereof the reversion or inheritance (if such estate tail, or other particular estate, had been good and effectual in law) should have been and continued in his majesty, or any of his progenitors, predecessors, or ancestors, or should or ought hereafter to be and continue in his majesty, his heirs or successors, at any time within the space of sixty years next before the filing, issuing, or commencing of any such action, bill, plaint, information, commission, or other suit or proceeding as shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof, as aforesaid."

" Provided also, and be it enacted by the authority of this present parliament, that all and singular the said manors, lands, tenements, and hereditaments, shall at all times hereafter be holden of his majesty, his heirs, and successors, and of other person and persons, bodies politic and corporate, their heirs and successors respectively, by the same tenures, services, fee farms, chief rents, heriots, and other duties, to all intents and purposes, as the same should or ought of right to have been holden, if the estates, rights, and interests, established and made sure by this present act, had been, before the making of this act, firm, good, and effectual in law."

" Provided also, and be it enacted, that where any fee farm rent, or other rent or rents, have been or shall be answered and actually paid to the king's majesty, or to

STAT. 9 GEO. 3.
c. 16. ss. 3—5.
& 7.

Sect. 3.
Cases wherein
reversions or
remainders in
the crown of
any manor, &c.,
are not liable
to be impeached
by this act.

Sect. 4.
Limitation of
the act with
respect to grants
from the crown
of any limited
estate, &c.

Sect. 5.
The said ma-
nors, &c., to be
holden of the
crown upon the
usual tenures,
services, and
duties.

Sect. 7.
Provisions for

(1) The suing out process is the commencement of the information for this purpose. And the memorandum on the record is not decisive evidence of the time when the information commenced. *Att. Gen. v. Brown, Forrest*, 110.

STAT. 9 GEO. 3.
c. 16. ss. 7. & 10.

the securing
to the crown
such fee farm or
other rents, &c.,
as have been
paid within a
limited time.

any of his predecessors, heirs, or successors, within the space of sixty years next before an action, bill, plaint, information, commission, or other suit or proceeding, shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof, out of any manors, lands, tenements, or hereditaments, of which manors, lands, tenements, or hereditaments, the estates, rights, or interests, being defective, are established and made sure by this present act, that the king's majesty, his heirs and successors, shall from henceforth for ever have, hold, and enjoy the said rents, and arrearages thereof, in such manner and form, and as fully and amply, as the same are or were enjoyed at any time within the said space of sixty years."

Sect. 10.

Provision de-
claring what
shall or shall
not be deemed
a putting in
charge, stand-
ing *insuper*, or
taking or
answering by
or to the crown,
&c.

" Provided always, and be it enacted by the authority of this present parliament, that no putting in charge (1), nor standing *insuper*, nor taking or answering the farm rents, revenues, or profits of any of the said manors, lands, tenements, or hereditaments, by force, colour, or pretext of any letters patent or grants of concealments, or defective titles, or of manors, lands, tenements, or hereditaments, out of charge, or by force, colour, or pretext of any inquisitions, presentments by or by reason of any commission or other authority to find out concealments, defective titles, or lands, tenements, or hereditaments out of charge, shall be deemed, construed, or taken to be a putting in charge, standing *insuper*, or taking or answering the farm rents, revenues, or profits, by or to his majesty, or any of his progenitors or predecessors, heirs or successors; unless thereupon such manors, lands, tenements, or hereditaments, have been or shall be, upon some information or suit, on the behalf of his majesty, or some of his progenitors or predecessors, heirs or successors, upon a lawful verdict given or to be given, or demurrer in law adjudged, or upon a hearing, ordered or decreed for his majesty, or some of his progenitors or predecessors, heirs, or successors, or of some of them, within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced, for recovering the same, or in respect thereof, as aforesaid."

STAT. 32 GEO.
3. c. 58. ss. 1
& 2.

23. STAT. 32 GEO. 3. c. 58. ss. 1 & 2.

" *An Act for the Amendment of the Law in Proceedings upon Information in nature of Quo Warranto.*"

Sect. 1.

Preamble.

From the 1st
day of Trinity
Term, 1793,
defendants to
informations in
the nature of
quo warranto,
for the exercise
of any office,
may plead the
holding of it
six years or
more, &c.

Whereas it would greatly tend to secure the freedom of election, and the quiet, tranquillity, and good order of cities, boroughs, and towns corporate, if a certain reasonable limitation of time should be by law established, beyond which no member or officer of any city, borough, or town corporate should be disturbed in the enjoyment or exercise of his office or franchise which he should have held and enjoyed for such time, be it enacted, that from and after the 1st day of Trinity Term in the year 1793, it shall and may be lawful for the defendant or defendants to any information in the nature of a *quo warranto*, for the exercise of any office or franchise in any city, borough, or town corporate, whether exhibited with leave of the court, or by his majesty's attorney general, or other officer of the crown on behalf of his majesty, by virtue of any royal prerogative or otherwise, and each and every of them severally and respectively to plead, that he or they had first actually taken upon themselves, or held or executed the office or franchise which is the subject of such information, six years or more before the exhibiting (2) of such information, such six years to be reckoned and computed from the day on which such defendant so pleading, was actually admitted and sworn into such office or franchise; which plea shall and may be pleaded either singly, or together, with and besides such plea as he

(1) *Att. Gen. v. Eardley (Lord)*, 8 Price, 73. 3 E. & Y. 986. 3 Inst. 189.

next before the time when the rule for the information was made absolute. *See* (2) This has been held to mean six years *Stokes*, 2 M. & S. 71.

or they might have lawfully pleaded before the passing of this act, or such several pleas as the court on motion shall allow."

"Provided always and be it enacted, that in every such case the prosecutor of such information may reply to such plea, any forfeiture, surrender, or avoidance by the defendant of such office or franchise happening within six years before the exhibition of such information, whereon the defendant may take issue."

STAT. 32 GEO. 3.
c. 58. ss. 1 & 2.

Sect. 2.
Forfeiture of office within six years before information, may be replied to such plea.

STAT. 53 GEO. 3.
c. 127. s. 5.

24. STAT. 53 GEO. 3. c. 127. s. 5.

"An Act for the better Regulation of Ecclesiastical Courts in England, and for the more easy Recovery of Church Rates and Tithes."

"No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought or such suit commenced within six years from the time when such tithes became due." (1)

Sect. 5.
Limitation of actions respecting tithes.

25. STAT. 53 GEO. 3. c. 141. ss. 2. & 10.

STAT. 53 GEO. 3.
c. 141. ss. 2 & 10.

"An Act to repeal an Act of the Seventeenth Year of the Reign of his present Majesty, intituled 'An Act for registering the Grants of Life Annuities, and for the better Protection of Infants against such Grants, and to substitute other Provisions in lieu thereof.'" [14 July, 1813.]

"Within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act, be granted, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the high court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require (*the form of the schedule then follows*), otherwise every such deed, bond, instrument, or other assurance, shall be null and void to all intents and purposes."

Sect. 2.
Annuities, &c., enrolled in Chancery.

"This act shall not extend to Scotland or Ireland, nor to any annuity or rent charge given by will or by marriage settlement, or for the advancement of a child, nor to any annuity or rent charge secured upon freehold or copyhold or customary lands in Great Britain or Ireland, or in any of his majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent charge granted without regard to pecuniary consideration or

Sect. 10.
Proviso for Scotland or Ireland, and annuities granted by will, &c.

(1) In equity, an account of tithes will only be decreed for six years. *Collins v. Archer*, 1 Russ. & M. 284. *Chichester v. Sheldon*, T. & R. 245. *Garrard v. Schollar*, 3 Gwill. 1045. In Chancery it is carried down to the master's report, but formerly on the equity side of the Exchequer it referred only to the filing of the bill. 2 *Eagle on Tithes*, 372. *Carleton v. Brightwell*, 2 P. Wms. 462. *York (Archbishop of) v. Stapleton (Sir M.)*, 2 Atk. 136. *Bell v. Read*, 3 *ibid.* 590.

STAT. 53 GEO. 3. money's worth; nor to any annuity or rent charge granted by any body corporate
c. 141. s. 10. or under any authority or trust created by act of parliament."

STAT. 9 GEO. 4.
c. 14. ss. 1—4.
8.

26. STAT. 9 GEO. 4. c. 14. ss. 1—4. 8.

"An Act for rendering a Written Memorandum necessary to the Validity of certain Promises and Engagements."

Sect. 1.
English act,
21 Jac. 1. c. 16.

"Whereas by an act passed in England in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions (1) of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants (2), all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit and not after; and whereas a similar enactment is contained in an act passed in Ireland in the tenth year of the reign of King Charles the First; and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments (3) and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof, be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment (4) or promise (5) by words only, shall be deemed sufficient evidence (6) of a new or continuing contract (7), whereby to take any case out of

In actions of
debt or upon
the case, no ac-

(1) In cases arising under these statutes, and which are unconnected with stat. 3 & 4 Will. 4. c. 27., which regards interests in land, the remedy by action or of set-off is alone affected, and the right remains (vide *Hunt v. Burn*, 2 Salk. 422.); but if the right be released, then the remedy falls also.

(2) "It is not that defendant may not plead the statute in all cases, where the account is closed and concluded between the parties, and the dealing and transaction over. It was not the meaning to hinder that; but it was to prevent dividing the account between merchants, where it was a running account, when, perhaps, part might have begun long before and the account never settled; and, perhaps, there might have been dealings and transactions within the time of the statute." Per Lord Hardwicke in *Welford v. Liddell*, 2 Ves. sen. 400. Cases within the exception do not appear to want a new or continuing contract, and therefore are not governed by stat. 9 Geo. 4. c. 14. s. 1. *Wilkinson on Limitation*, 35.

(3) The construction of a doubtful document given in evidence to defeat the Statute of Limitations is for the court, and not for the jury. If it be explained by extrinsic facts, they are for the opinion of the jury. *Morrell v. Frith (Clerk)*, 3 M. & W. 402. 8 C. & P. 246. *Brown v. Brown*, 2 Jur. 255. *Snook v. Mears*, 5 Price, 636.

(4) *Jones v. Ryder*, 4 M. & W. 32.

(5) A verbal acknowledgment by the debtor, within six years, of the part payment of a debt, is not sufficient to take the case

out of the Statute of Limitations. *Moght v. O'Neil*, 7 M. & W. 531.

(6) The debtor must be charged in direct terms with the debt. *Whippy v. Hilary*, 3 B. & Ad. 399. *Kennett v. Milbank*, 8 Bing. 38., et vide *Martin v. Knott*, 1 N. & M. 421. A conditional (*Tanner v. Smart*, 6 B. & C. 603.) or qualified promise must be declared on as such (*Haydon v. Williams*, 7 Bing. 163.); a promise to pay may be inferred from a general acknowledgment. *Routledge v. Ramsay*, 2 N. & P. 319.

(7) In *Burley v. Scott* (2 M. & R. 96.) Lord Tenterden observed, "It is now settled that a mere acknowledgment of the subsistence of the debt, unless coupled with or amounting to evidence of a promise to pay, is not sufficient to take the case out of the Statute of Limitations." Vide etiam *Greenfell v. Girdlestone*, 2 Y. & C. 662. But where A. had owed money to B. for hay for more than six years, and within six years said to B., "You use spirits; why not have them of me as long as I owe you money for hay? If it were ever so little, it would be a way to lessen the debt;" and B. said he would have a gallon at 12s.; and A. went home, and sent a gallon of gin to B.:—It was holden, in an action by B. for the price of the hay, to be sufficient to take the case out of stat. 9 Geo. 4. c. 14. *Hooper v. Stephens*, 7 C. & P. 260.

"I wish I could comply with your request, for I am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must

the operation of the said enactments or either of them, or to deprive any party of the benefit thereof (1), unless such acknowledgment or promise (2) shall be made or contained by or in some writing (3), to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them (4):

STAT. 9 GEO. 4.
c.14. s.1.

knowledge
shall be deemed
sufficient unless
it be in writing,
or by part
payment.
Joint con-
tractors.

turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it: my hope is, that out of the present harvest you will be paid:— was held to be a sufficient acknowledgment to renew a debt barred by stat. 9 Geo. 4. c. 14. *Bird v. Gammon*, 3 Bing. N. C. 883. *St. John v. Brutton*, 2 Jur. 413.

(1) The Insolvent Act (52 Geo. 3. c. 165. s. 54.), by which a right is reserved to creditors to obtain payment out of the future effects of the insolvent, does not prevent the operation of the Statute of Limitations. *Browning v. Paris*, 5 M. & W. 117.

(2) Where parties have pleaded in abatement for the non joinder of a defendant, the court of Queen's Bench will not set aside the plea, or allow the writ to be amended, on the ground, that the plaintiff is barred by the Statute of Limitations from bringing a fresh action; and, on motion for such amendment, the court refused to enter upon the consideration of facts stated on affidavit to shew an equitable claim to the indulgence. *Roberts v. Bate*, 6 A. & E. 778.

(3) A promise in writing to pay "the balance" due is enough, under stat. 9 Geo. 4. c. 14., to take a case out of the Statute of Limitations, although the writing does not express the amount of the balance. But if the whole evidence be proof of the writing, and of the original cause of action, the plaintiff can only recover nominal damages. *Dickinson v. Hatfield*, 1 M. & Rob. 141. The following letter from the defendant to the plaintiff's attorney was held not to be a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations:—"Since the receipt of your letter (and, indeed, for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith (Clerk)*, 3 M. & W. 402. 8 C. & P. 246. In assumption on a bill of exchange, a letter was produced, to take the case out of the Statute of Limitations, from the defendant to the plaintiff, stating, that the plaintiff should be informed immediately it was settled, how the defendant's affairs should be arranged, and adding, "Your account is quite correct, and O! that I were now going to inclose the amount." No amount of debt was stated, and no proof was given, from the letter or otherwise, to what account the letter referred, nor whether the letter applied to the bill. It being left to the jury, whether this was an unconditional ac-

knowledge of the debt, and they having found that it was:— It was held, that there was no ground for a nonsuit, for that the acknowledgment was unconditional, and that the jury, if it was a question for them, had decided it rightly. *Dodson v. Mackey*, 8 A. & E. 225. n. *Quare*, Whether the plaintiff was entitled to more than nominal damages; and whether the effect of the acknowledgment was a question for the court or jury? *Ibid*.

The acknowledgment in writing, to take a case out of the Statute of Limitations, must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due:— But, there is some doubt, whether a letter written by the defendant be or be not a sufficient acknowledgment for this purpose; and till that point is settled, the learned judge will, to save the parties expense, express his own opinion with respect to the document, and also leave it to the jury. *Bucket v. Church*, 9 C. & P. 209. *Mounstephen v. Brooke*, 3 B. & A. 141.

(4) In *Douglas v. Forrest* (4 Bing. 686. 1 M. & P. 663.), an action was brought against an executor on a Scotch judgment, recovered against his testator. The defendant, after pleading the general issue, pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit: to this there was a replication, that the deceased, at the time the action accrued, was beyond seas, and remained there till he died, and that the plaintiff sued out his writ against the defendant within six years after he first took upon himself the burthen and execution of the will:— It was holden, that this replication was a good answer to the plea, the court being of opinion, that although the injury of which the plaintiff complained had existed more than six years, yet he had no "cause of action," until there was some person within the realm against whom the action could be brought; and that, as the deceased never was in England after the cause of action accrued against him, there was no person in England against whom the plaintiff could proceed, until the defendant took upon him the execution of the will. But it is no answer to a plea of the Statute of Limitations, that after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after the

STAT. 9 GEO. 4.
c. 14. ss. 1-3.

Proviso for the
case of joint
contractors.

Sect. 2.
Pleas in abate-
ment.

Sect. 3.
Indorsements
of payment.

provided always, that nothing herein contained shall alter or take away, or lessen the effect of any payment (1) of any principal or interest (2) made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

"If any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement, to the effect, that any other person or persons ought to be jointly sued, and issue be joined on such plea; and it shall appear at the trial, that the action could not, by reason of the said recited acts or of this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea, shall be found against the party pleading the same."

"No indorsement or memorandum of any payment written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, as to take the case out of the operation of either of the said statutes." (3)

probate granted; for, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued in England, from that time the date of six years begins to run; and when the statute once begins to run, it must continue to run. *Rhodes v. Smethurst*, 4 M. & W. 42., affirmed in the Exchequer Chamber, 6 *ibid.* 351. *Freaker v. Craneheld*, 3 M. & C. 499. *Williams on Executors*, 1531.

(1) Payment by one of two or more joint debtors is a payment by all (*Whitcomb v. Whiting*, Doug. 651.); and if the debtor give as security a note of himself and another, A., a payment on behalf of B., after the statute has begun to run, revives the debt as against A. also. *Exp. Woodman v. Turner*, 3 Mont. & Ayr. 609. A written paper containing a statement of mutual accounts between a creditor and debtor, by whom it was signed, is evidence of payment, and must be pleaded as such, and not by way of set-off. *Sinclair v. Baggaley*, 4 M. & W. 312. 2 Jur. 683. The words "settled, Samuel Hughes," at the foot of a bill of parcels, import a receipt or acquittance (*Rex v. Martin*, 7 C. & P. 549.); and such a payment as is here intended, may be made by a transfer of stock. *Bretton v. Cope*, Peake's N. P. C. 43.

(2) Payment of interest by one of the makers of a joint and several promissory note, takes the case out of the Statutes of Limitation, in the same manner as before stat. 9 Geo. 4. c. 14. *Chippindale v. Thurston*, M. & M. 411. *Wyatt v. Hodson*, 8 Bing. 309., vide *Pease v. Hirst*, 10 B. & C. 122.

In *Burleigh v. Stott* (8 B. & C. 36.), which was an action upon a joint and several promissory note of A. and B., the latter being a mere surety, brought by the payee against

the administrator of B., the defendant pleaded, that the cause of action did not accrue within six years, upon which the plaintiff took issue: the plaintiff proved, that within six years, and during the lifetime of B., A. made a payment on account of the note: B. afterwards died:—It was held, that such payment operated as a new promise by B. to pay, according to the nature of the instrument, and that his administrator was liable on the note. Accordingly it was held in the late case of *Chennell v. Ditchburn* (5 M. & W. 494.), that payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the Statute of Limitations as against the other maker. But where an action is brought against the executor of a deceased contractor, a payment by a surviving joint contractor, made after the death of the testator, will not take the case out of the statute. *Atkins v. Tolgold*, 2 B. & C. 23. *Williams on Executors*, 1530.

(3) The court will allow a judgment more than twenty years old to be revived against the cognisor, although there has been no actual payment of interest or proceeding taken, if it appear, that the cognisor was the person beneficially entitled to the interest within twenty years. And if the cognisor be an insolvent, the judgment may be revived against his assignee, although it has not been redocketed under stat. 9 Geo. 4. c. 35. Such an application will be granted on the affidavit of the *cestui qui trust* cognisor himself (an insolvent), though opposed by his assignee, provided the court are satisfied that his trustee assent. *Dillon v. Kennerly*, 1 Jebb & Symes (Irish), 573.

"That the said recited acts and this act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off (1), on the part of any defendant, either by plea, notice (2), or otherwise."

"No memorandum (3), or other writing made necessary by this act, shall be deemed to be an agreement within the meaning of any statute (4), relating to the duties of stamps."

27. STAT. 2 WILL. 4. c. 39. s. 10.

"An Act for Uniformity of Process in personal Actions in his Majesty's Courts of Law at Westminster."

"No writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named, may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any), issued in continuation of a preceding writ (5), shall be returned *non est inventus* (6), and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff his attorney suing out the same, as the case may be."

28. STAT. 2 & 3 WILL. 4. c. 71. ss. 1—8.

"An Act for shortening the Time of Prescription in certain Cases."

"Whereas the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now, by the law of England, in many cases considered to include and denote the whole period of time, from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated, by shewing the commencement of such enjoyment, which is in many cases, productive of inconvenience and injustice, 'for remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law by custom, prescription, or grant, to any

STAT. 9. GEO. 4. c. 14. ss. 4 & 8.

SECT. 4.
Simple contract debts alleged by way of set-off.

SECT. 8.
Memorandums exempted from stamps.

STAT. 2 WILL. 4. c. 39. s. 10.

DURATION OF WRITS.

SECT. 10.

PROVISO AS TO STATUTE OF LIMITATIONS.

STAT. 2 & 3 WILL. 4. c. 71. ss. 1—8.

SECT. 1.

CLAIMS TO RIGHT OF COMMON, AND OTHER PROFITS, & PRENDRE, NOT TO BE DEFEATED AFTER THIRTY

(1) It must exist at the time of plea pleaded. *Dendy v. Powell*, 3 M. & W. 442. 6 Dowl. P. C. 577. *ante*, 2879. tit. SET-OFF.

(2) There cannot now be a "notice" of set-off.

(3) In *Jones v. Ryder* (4 M. & W. 35.), Mr. Baron Parke observed, the effect of stat. 9 Geo. 4. c. 14. s. 8. is, that "if the instrument be such, as would operate as an agreement, and is made necessary by the act, no stamp need be imposed upon it." "When parties mean to make an instrument solely to prevent the operation of the Statute of

Limitations, they must take care not to import into it terms, which will make it liable to stamp duty as a promissory note."

(4) Stat. 55 Geo. 3. c. 184. Sched. tit. AGREEMENT.

(5) For the purposes of outlawry a writ of *distringas* can issue in continuation of writs previously sued out to save the Statute of Limitations. *Reay v. Youde*, 2 M. & W. 188. S. C. nom *Ray v. Dow*, 5 Dowl. P. C. 310.

(6) This is imperative. *Gregory v. Des Anges (Knt.)*, 3 Scott, 534. 5 Dowl. P. C. 193.

STAT. 2 & 3
WILL. 4. c. 71.
ss. 1 & 2.

years' enjoyment, by shewing the commencement.

After sixty years of enjoyment the right to be absolute, unless had by consent or agreement.

Sect. 2.
In claims of right of way, or other easement, the periods to be twenty years and forty years.

right of common, or other profit (1), or benefit (2), to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes (3), rent (4), and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only (5), that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

"No claim which may be lawfully made at the common law, by custom, prescription, or grant to any way (6), or other easement (7), or to any water-course (8), or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned, shall have been actually enjoyed by any person claiming right thereto without interruption (9), for the full period of twenty years, shall be defeated or destroyed by shewing only, that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated (10) in any other way by which the same is now liable to be defeated, and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear, that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

(1) As a toll. *Hill v. Priour*, 2 Show. 36. *Rowe v. Brenton*, 3 M. & R. 133.

(2) *Ex. gr. easement. Manning v. Waddale*, 1 N. & P. 172. 5 A. & E. 758. *Partidge v. Scott*, 3 M. & W. 220. *Welcome v. Upton*, 5 ibid. 398. *Wickham v. Hawker*, 7 ibid. 63.

(3) *Anté*, 2612—2616. tit. TITHES.

(4) Rent-service, rent-charge, rent-seck (Co. Litt. 141. (b.)); rents of assize (2 Inst. 19.), including chief and quit-rents; and a fee-farm-rent. Co. Litt. 143. (b.) n. 5. *Bradbury v. Wright*, Doug. 627. n. 1.

(5) A license, favour, or other matter, inconsistent with a claim, or assertion of right, may be proven. *Campbell v. Wilson*, 3 East, 294.

(6) *Vide anté*, 2758—2773. tit. WAY; *et etiam*, Co. Litt. 56. (a.) *Ballard v. Dyson*, 1 Taunt. 279. *Osborn v. Wise*, 7 C. & P. 761. *Barraclough v. Johnson*, 3 N. & P. 233. 2 Jur. 839.

(7) Respecting the rights of the occupier of an ancient messuage to water his cattle at a pond, and to take the water for domestic purposes for the mere convenience of his messuage, *vide Manning v. Waddale*, 1 N. & P. 172. 5 A. & E. 758. *Wickham v. Hawker*, 7 M. & W. 63.

The grant to a person, his heirs and as-

signs, of "free liberty, with servants or otherwise, to come into and upon lands, and there to hunt, hawk, fish, and fowl," is a grant of a license of profit, and not of a mere personal license of pleasure; and therefore it authorises the grantee, his heirs and assigns, to hawk, hunt, &c., by his servants in his absence. And such a liberty is, therefore, a profit *à prendre*, within the Prescription Act, 2 & 3 Will. 4. c. 71. s. 2. *Wickham v. Hawker*, 7 M. & W. 63.

(8) The stannars of Devonshire have a right by custom to divert water from streams into their mines. *Bastard v. Smith*, 3 M. & Rob. 129. 1 N. & P. 242. 5 A. & E. 827.

(9) *Vide anté*, 2758—2773. tit. WAY. *Marmouth Canal Company v. Harford*, 1 C. M. & R. 614. *Bright v. Walker*, 4 Tyr. 211. 1 C. M. & R. 211.

(10) An agreed alteration of a line of way, or a temporary non-user under an agreement of the parties will not defeat a claim of a right of way (*Payne v. Shelden*, 1 M. & Rob. 382.); nor is a prescriptive right of way to a public path on the banks of a navigable river destroyed by that part which adjoins the way, the path being converted into a floating harbour. *Re v. Tippett*, 3 B. & A. 193.

"When the access and use of light (1) to or for any dwelling-house, workshop, or other building (2), shall have been actually enjoyed (3) therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear, that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

"Each of the respective periods of years hereinbefore mentioned, shall be deemed and taken to be the period next before (4) some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice (5) thereof, and of the person making or authorising the same to be made." (6)

"In all actions upon the case, and other pleadings wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation (7) shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass (8), and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

"In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years, than for such period or number in this act, as may be applicable to the case and to the nature of the claim." (9)

STAT. 2 & 3
WILL. 4. c. 71.
ss. 3—6.

Sect. 3.
Claim to the use of light enjoyed for twenty years.

Sect. 4.
Before mentioned periods to be deemed those next before suits.

Sect. 5.
In actions on the case, the claimant may allege his right generally.

In pleas to trespass, and certain other pleadings, the periods mentioned in this act may be alleged.

Exceptions, &c., to be replied to specially.

Sect. 6.
Presumption to be allowed in claims herein provided for.

(1) *Antd*, 1002—1026. tit. CASE. 2 Saund. 175. (d.e.) *Darwin v. Upton*, cit. 3 T. R. 159. *Cross v. Lewis*, 2 B. & C. 696. 4 D & R. 234. *Flight v. Thomas*, 11 A. & E. 688. *Gerritt v. Sharp*, 3 ibid. 325. *Blanchard v. Bridges* 4 ibid. 191.

(2) It does not apply to an open space of ground, as a timber yard and saw pit, though requiring light and air. *Roberts v. Macord*, 1 M. & Rob. 230. *antd*, 1002—1026. tit. CASE.

(3) The complete shutting up a window with bricks and mortar for above twenty years, takes away the privilege of light (*Lawrence v. Ober*, 3 Camp. 514.); so where a person entitled to ancient lights pulls down his house and erects a blank wall in the place of one where there were windows, and it cannot be shewn, that it was a mere temporary abandonment of the enjoyment, with an intention to resume it within a reasonable time. *Moore v. Rawson*, 3 B. & C. 332. 5 D. & R. 234. *antd*, 1002—1026. tit. CASE.

(4) A plea of user is bad on special demurrer, if it do not allege it to have been

within the period next before the suit. *Richards v. Fry*, 3 N. & P. 67.

(5) Direct, actual, and positive, when regularly and formally communicated; constructive, when the presumptions are so violent that the court ought not to allow it to be controverted. *Plumb v. Fluit*, 2 Anst. 432.

(6) *Bailey v. Appleyard*, 8 A. & E. 161. 778. (a.) *Flight v. Thomas*, 11 ibid. 688. *Welcome v. Upton*, 5 M. & W. 398.

(7) *Tebbutt v. Selby*, 6 A. & E. 786. *Wakeman (Bart.) v. West*, 8 C. & P. 105.

(8) A plea justifying on account of an alleged right to light under a license, ought to shew in what manner the right arose. *Bridges v. Blanchard*, 3 N. & M. 691.

(9) A license cannot be presumed (*Doe d. Foley v. Wilson*, 11 East, 56.), or a right by prescription or grant however strong the circumstances may tend to support it (*Res v. Wardroper*, 4 Burr. 2025. *Res v. Davies*, ibid. 2121. *Bealey v. Shaw*, 6 East, 214.); and if the plaintiff prescribe for pasture, the onus lies on him to prove

STAT. 2 & 3
WILL. 4. c. 71.
ss. 7 & 8.

Sect. 7.
Proviso for
infants, &c.

Sect. 8.
What time to
be excluded
in computing
the term of forty
years appointed
by this act.

" Provided also, that the time during which any person otherwise capable of resisting any claim (1) to any of the matters before mentioned, shall have been or shall be (2) an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases, where the right or claim is hereby declared to be absolute and indefeasible."

" Provided always and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion (3) expectant on the determination thereof." (4)

STAT. 2 & 3
WILL. 4. c. 100.
ss. 1, 2. 4—8.

29. STAT. 2 & 3 WILL. 4. c. 100. ss. 1, 2. 4—8. (5)

" *An Act for shortening the Time required in Claims of Modus Decimandi, & Exemption from or Discharge of Tithes.*" [9th August, 1832.]

Sect. 1.

What prescrip-
tions and
claims of *modus
decimandi* to be
valid in law.

" Whereas the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from or discharge of tithes (6), be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that all prescriptions and claims of or for any *modus decimandi* (7), or of or to any exemption from or discharge of tithes by composition real or otherwise, shall in cases where the render of tithes in kind shall be hereafter demanded by our said lord the king, his heirs, or successors, or by any duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence shewing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge shewing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money, or other thing differing in amount, quality, or quantity from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money, or other matter in lieu thereof,

affirmatively his actual enjoyment of pasture for thirty years; and no presumption for a less period or proof of enjoyment can be admitted (*Bailey v. Appleyard*, 8 A. & E. 161. *Ibid.* 778. (a.) 3 N. & P. 257.); but a right to a watercourse is not destroyed by the owner's altering its course. *Hall v. Swift*, 6 Scott, 167. 4 Bing. N.C. 381. *anté*, 2748—2757. tit. WATER AND WATERCOURSES.

(1) *Hinchliffe v. Kinnoul (Earl of)*, 5 Bing. N. C. 19.

(2) There is not any saving in favour of persons beyond seas or in prison.

(3) 1 Inst. 183. (b.) *Daniel v. North*, 11 East, 372.

(4) The other rights affected by this act may be acquired by enjoyment during the

respective periods mentioned in the first and third sections, even though the parties acquiescing, may have had particular estates only, unless the right exercised is founded on some writing. *Mansel on Limitations*, 158.

(5) *Vide anté*, 2612—2616. tit. TITHES.

(6) Non payment of tithes will not run, as against a lay impropriator, a presumption of a grant of the tithes to the layowner. *Bayley v. Drever*, 1 A. & E. 449. 3 N. & M. 885.

(7) *Driffeld (Clerk) v. Orrell*, 6 Price, 324. 3 E. & Y. 834. *Levesque de Winchester's case*, 2 Co. 44. *Baudinck v. Buxton*, 1 Keb. 602. *Hall v. Maltby*, 6 Price, 255. 3 E. & Y. 928. *Perry v. Soam*, Cro. Elix. 139.

shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved, that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing: and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of *modus* made, or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of *modus* made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years; and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved, that such payment or render of *modus* was made or enjoyment had by some consent or agreement, expressly made or given for that purpose by deed or writing."

STAT. 2 & 3
WILL. 4. c. 100.
ss. 1, 2. 4-6.

Proviso.

"That every composition for tithes, which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary patron and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provisions of this act, unless such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time for within one year next before the passing of this act."

Sect. 2.
What compositions for tithes shall be considered valid.

"Provided also and be it further enacted, that this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition."

Sect. 4.
To what cases this act shall not extend.

"Provided also, and be it further enacted, that where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned."

Sect. 5.
Time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation.

"Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been

Sect. 6.
As also the time during which any person capable

STAT. 2 & 3
WILL. 4. c. 100.
ss. 6—8.

of resisting any
claim shall be
an infant, &c.

Sect. 7.
What it shall be
sufficient to
allege in ac-
tions com-
menced under
this act.

Sect. 8.
No presump-
tion allowed in
support of
any claim for
any less period
than herein-
before men-
tioned.

STAT. 3 & 4
WILL. 4. c. 27.
ss. 1—42.

Sect. 1.
Meaning of the
words in the
act.

"Land."

"Rent."

diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

"That in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege, that the *modus*, or exemption, or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act, as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law, not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be especially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed."

"In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."

30. STAT. 3 & 4 WILL. 4. c. 27. ss. 1—42.

"An Act for the Limitation of Actions and Suits relating to real Property, and for simplifying the Remedies for trying the Right thereto."—[24th July, 1883.]

"Be it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows (that is to say), the word 'land' shall extend to manors (1), messuages, and all other corporeal hereditaments (2) whatsoever, and also to tithes (other than tithes belonging to a spiritual (3), or eleemosynary (4), corporation sole (5)), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel (6) interest, and whether freehold or copyhold (7), or held according to any other (8) tenure; and the word 'rent' (9) shall extend to all heriots (10), and to all services (11) and suits (12) in which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim (13), shall mean any person by, through, or under, or by the act of whom, the person so claiming became es-

(1) Doe d. Beck v. Heekin, 6 A. & E. 495. Parrott v. Palmer, 3 M. & K. 362.

(2) Co. Litt. 4. 6. (a.) *Le Marques de Winchester's case*, 3 Co. 2. Touchst. by Atherley, 91.

(3) Co. Litt. 150. (a.) 1 Kyd on Corporations, 22.

(4) 1 Bell's Law Dict. tit. COMMUNITY. *Le case de Sutton's Hospital*, 10 Co. 31. 35. *Philips v. Bury*, Skin. 484. 1 Ld. Raym. 6. *Rex v. Cambridge (Vice-chancellor of)*, 3 Burr. 1652. 1656.

(5) Co. Litt. 43. *Le case de Sutton's Hospital*, 10 Co. 29. (a.) Wood's Inst. 109.

(6) An interest for a definite space of time. 1 Preston on Estates, 203. *Sir Andrew Corbet's case*, 4 Co. 81. (b.)

(7) *Rex v. Hexham (Lord of Manor of)*, 5 A. & E. 509. 1 N. & P. 53. Doe d. North v. Webber, 5 Scott, 189. 3 Bing. N. C. 922.

(8) 1 Cruise's Dig. 2. & 3.

(9) Co. Litt. 14. (b.) Stat. 4 Geo. 2 c. 28. s. 5., as to a rent-charge. *Capit. Jackson, M'Clell*, 495.

(10) *Service (Lanyon v. Carne, 2 Sand 168.)*, custom (Coke's Copyholder, s. 34.) or a pecuniary payment in lieu of a heriot. *Croome v. Guise*, 4 Bing. N. C. 148. 5 Scott, 453.

(11) *Tomkins v. Crocker*, 2 Salk. 604. Carth. 520.

(12) An annuity under a will is within the section. *James v. Salter*, 4 Scott, 168. 3 Bing. N. C. 544. 5 Dowl. P. C. 496.

(13) Where, on the death of a father intestate seized of lands in fee, his second son enters without title, such entry is deemed to be for the use of the eldest son, and the Statute of Limitations does not run against such eldest son, the possession of the second son being his possession. *Dowdall v. Byrne*, Esty

titled to the estate or interest claimed, as heir (1), issue in tail (2), tenant by the courtesy of England (3), tenant in dower, successor (4), special (5) or general (6) occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (7); and the word 'person' shall extend to a body politic, corporate, or collegiate (8), and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

"After the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land (9) or rent but within twenty years next after the time at which the right (10) to make such entry or distress, or to bring such action shall have first (11) accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." (12)

"In the construction of this act (13), the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued

STAT. 3 & 4
WILL. 4. c. 27
ss. 1—3.

Person through
whom another
claims.

"Person."

Number and
gender.

Sec. 2.
No land or
rent to be re-
covered but
within twenty
years after the
right of action
accrued to the
claimant, or
some person
whose estate he
claims.

Sec. 3.
When the right

(Irish), 373. Doe d. *Duroure v. Jones*, 4 T. R. 300. Doe d. *George v. Jesson*, 6 East, 80.

(1) *Counden v. Clerke*, Hob. 31.

(2) *Woodright v. Wright*, 10 Mod. 370. Str. 25.

(3) *Paine's case*, 8 Co. 34. (b.) Dyer, 25. pl. 159.

(4) Co. Litt. 94. (b.)

(5) If an estate *pur autre vie* be limited to A., his heirs, executors, administrators, or assigns, and be not devised, it descends to the heir as special occupant. *Atkinson v. Baker*, 4 T. R. 229.

(6) Doe d. *Foster v. Scott*, 7 D. & R. 190. 4 B. & C. 706.

(7) *Burgess v. Wheate*, 1 Eden, 177. *Henchman v. Att. Gen.* 2 S. & S. 498. Stat. 4 & 5 Will. 4. c. 23.

(8) *Phillips v. Bury*, 2 T. R. 346.

(9) Doe d. *Jones v. Williams*, 5 A. & E. 291. This includes "common" enclosed for twenty years, and after which time the right of entry is gone. *Hawke v. Bacon*, 2 Taunt. 159. *Creach v. Wilmot*, *ibid.* 160. n.

(10) The claimant must have a right of possession, as well as a right of property. *Taylor v. Horde*, 1 Burr. 119. Doe d. *Cook v. Danvers*, 7 East, 299. Doe v. *Roffe*, 3 N. & P. 648. Doe d. *Harris v. Saunder*, 5 A. & E. 664. *Cor v. King*, 4 Scott, 553. A right to a watercourse is not destroyed by the owner's altering the course of the stream; and the owner may establish his claim notwithstanding an interruption without twenty years of his action brought to enforce the right. *Hall v. Swift*, 4 Bing. N. C. 381.

(11) This section includes a wrongful holding over of possession, after the expiration of a title under which the adverse party lawfully entered. Doe v. *Gregory*, 4 N. & M. 308.

(12) Where a lessor permits his lessee, during the continuance of the lease, to pay no

rent for twenty years, the lessor is not therefore barred by stat. 3 & 4 Will. 4. c. 27. s. 2. from recovering the premises in ejectment. The case falls within the latter branch of the third section, which, in the case of an estate or interest in reversion, provides, that the right of action shall be deemed to have first accrued, when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease. Doe d. *Davy v. Ozenham*, 7 M. & W. 131.

Where in 1788 estates were settled by marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settler (whose heiress at law she was) in fee; and in 1818, by deeds to which the husband and wife and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G. the son for life, remainder to his issue in tail, remainder to I. F. his sister for life, with other remainders over; and the husband died in 1819, the wife in 1822, and R. G. in 1828: It was held, that inasmuch as the estate of I. F. was carved out of the estate tail of R. G., she had the same period for bringing an ejectment in respect of any of the estates comprised in any of the above deeds, as he would have had if he had continued alive, viz. twenty years from the year 1822, when his remainder came into possession. Doe d. *Curzon v. Edmonds*, 6 *ibid.* 295.

(13) By stat. 3 & 4 Will. 4. c. 27. s. 3. the doctrine of non adverse possession is done away with, except in the cases provided for by s. 15., and an ejectment must be brought within twenty years after the original right of entry of the plaintiff, or of the party under whom he claims accrued, whatever be the nature of the defendant's possession. *Nepean (Bart.) v. Knight*, 2 *ibid.* 894.

STAT. 3 & 4
WILL. 4. c. 27.
s. 3.

shall be deemed
to have first ac-
crued in the
case of an estate
in possession.

On dispossession.

On abatement
or death.

On alienation.

In cases of
future estates.

In case of for-
feiture, or
breach of con-
dition.

at such time as hereinafter is mentioned; (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession (1), or in receipt of the profits (2) of such land, or in receipt of such rent (3), and shall while entitled thereto have been dispossessed or have discontinued (4) such possession or receipt (5), then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (6); and when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death (7), and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by instrument (other than a will) (8) to him or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture (9) or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken." (10)

(1) The general possession of a lord of a manor will not suffice. *Cullen (Lord) v. Johnson*, Str. 1142. *Doe d. Davy v. Ozenham*, 7 M. & W. 131.

In *Doe d. Thompson v. Thompson* (6 A. & E. 721.) it was holden, under Stat. 3 & 4 Will. 4. c. 27. s. 2., that no title accrues to a party who was tenant at will, and held without interruption for twenty years, after the expiration of the first year, but who had quitted possession before the act passed; and as against the original landlord, and those claiming under him, such party is without title, independently of sect. 15. Nor can he, by virtue of the first mentioned clauses, recover in ejectment, even against a stranger.

Where B. S. was in possession of certain lands under a lease for thirty-one years, made in the year 1753, and continued in possession till 1811; no rent having been paid, or any act done by B. S. acknowledging a tenancy after the expiration of the lease in 1784:—It was held, that after the expiration of the lease, the possession of B. S. was that of a tenant at sufferance, and that there was no adverse possession by B. S. against the lessor in the lease, or those claiming under him. *Howard v. Sherwood*, 1 Alcock & Napier (Irish), 217. It also appeared, that after the death of B. S. in 1811, the defendants entered into possession of the lands, and continued in pos-

session without any act of acknowledgment of a tenancy, till the bringing of the ejectment, which was within twenty years from the death of B. S.:—And it was held, that this possession was no bar under the Statute of Limitations. *Ibid*.

Semble, that the judge at the trial might have left it to the jury to have presumed an ouster. *Ibid*.

(2) 1 Inst. 4. (b.) 4 Cruise's Dig. 284.

(3) The payment of tithes is an acknowledgment of the lessor's title. *Roe d. Pellan v. Ferrars (Clerk)*, 2 B. & P. 542.

(4) 1 Saund. (a.), 319. (a.)

(5) Though the rent be not received for six years, yet the right remains, for the remedy is only lost.

(6) *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413. 5 D. & R. 273.

(7) *Ante*, 1556. tit. EVIDENCE.

(8) Stat. 1 Viet. c. 26.

(9) A mere attempt to do an act will not operate as a forfeiture (*Jones v. Wye*, 2 Keen, 285.); and it cannot be acted on by one of several coparceners. *Doe d. Rutzen v. Lewis*, 5 A. & E. 277.

(10) "It should be kept in view, that forty years are not a bar against all the world. The twenty years form the regular bar, and the savings are the exception, and the forty years run only in the case of disabilities, in even which case not more than forty years are al-

" Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture, or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry (1) or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

" Provided also, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time, previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

" For the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim, as if there had been no interval of time between the death of such deceased person and the grant (2) of the letters of administration."

" When any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant (3) at will (4), the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy (5), or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that

STAT. 3 & 4
WILL. 4. c. 27.
ss. 4—7.

Sect. 4.

If advantage of forfeiture be not taken by remainder-man, he shall have a new right when his estate comes into possession.

Sect. 5.

Reversioner to have a new right.

Sect. 6.

An administrator to claim as if he obtained the estate without interval after death of deceased.

Sect. 7.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

lowed. But the twenty years run only from the time when the right first accrued, and that in the case of a remainder, for example, is not until it falls into possession, which event, in the common case of an estate for life with a remainder over, may not happen within forty years of its creation." 2 Sugden's V. & P. 353.

(1) If an estate commence by livery, it cannot be determined before entry (*Browning v. Beston*, Plowd. 135.); and an actual entry must be made before bringing an ejectment for a forfeiture of a freehold lease. Co. Litt. 218. *Sir Hugh Cholmley's case*, 2 Co. 53. (a.) *Doe v. Flynn*, 4 Tyrw. 625., ante, 1374—1497. tit. EJECTMENT.

(2) *Ante*, 1325—1915. tit. EXECUTORS AND ADMINISTRATORS.

(3) *Doe d. Bennett v. Turner*, 7 M. & W. 226.

(4) The occupation of an under-tenant, who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is not a holding at will, but quasi of a tenant at sufferance, and exists during the bare acquiescence, or without the disagreement of the party entitled to the possession being expressed (Co. Litt. 270. (b.) *Buller v. Duckmanton*, Cro. Jac. 169. *Wilkes v. —*, cit. 1 T. R. 161.); and the mere fact of occupation, coupled with the payment of rent for such time of occupation,

does not raise a different presumption. *Simkin v. Ashurst*, 4 Tyrw. 781. 1 C. M. & R. 261. Mansel on Limitation, 149.

(5) A feoffment made by a lessor, with livery of seisin made on the land, operates as a determination of the will, even though the tenant at will was off the land when the livery was made, and had not any notice of such determination (*Ball v. Cullimore*, 2 C. M. & R. 120.); so, also, where the tenant, or his representative, claims the land as his own. *Doe d. Burgess v. Thompson*, 1 N. & P. 215. 5 A. & E. 532.

Where A. in 1817 let B. into possession of lands as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:— It was held, that this entry amounted to a determination of the estate at will; and that B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties; and therefore, that unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as by stat. 3 & 4 Will. 4. c. 27. s. 7. his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, i. e. in the year 1818. *Doe d. Bennett v. Turner*, 7 M. & W. 226.

STAT. 3 & 4
WILL. 4. C. 27.
s. 7—12.

Sect. 8.
No person
after a tenancy
from year to
year to have
any right but
from the end of
the first year,
or last payment
of rent.

Sect. 9.
Where rent
amounting to
20s. reserved
by a lease in
writing, shall
have been
wrongfully
received, no
right to accrue
on the deter-
mination of the
lease.

Sect. 10.
A mere entry
not to be
deemed pos-
session.

Sect. 11.
No right to be
preserved by
continual
claim.

Sect. 12.
Possession of

no mortgagor (1), or *cestui que trust* (2), shall be deemed to be a tenant at will within the meaning of this clause, to his mortgagee or trustee."

"When any person shall be in possession, or in receipt of the profits of any land (3), or in receipt of any rent, as tenant from year to year (4) or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

"When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. (5) or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled." (6)

"No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon." (7)

"No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action." (8)

"When any one or more of several persons entitled to any land or rent as coparceners (9), joint-tenants (10), or tenants in common (11), shall have been in

(1) The mortgagor, after the mortgage is forfeited, has not any legal interest in the estate, as to the mortgagee (*Doe d. Roby, v. Maizey*, 3 M. & R. 107. 8 B. & C. 767.), and may be ejected without any demand of possession. *Thurder v. Belcher*, 3 East, 449. *Cholmondeley (Marquess) v. Clinton (Lord)*, 2 Meriv. 359. 2 J. & W. 138.

(2) *Smith (Sir William) v. Wheeler*, 1 Vent. 130.

(3) *Doe d. Davy v. Osenham*, 7 M. & W. 133.

(4) It may exist unless surrendered or determined by a regular notice to quit for an indefinite period (*Birch v. Wright*, 1 T. R. 380. *Doe v. Porter*, 3 T. R. 13. *Bolton (Lord) v. Tomlin*, 5 A. & E. 856. 1 N. & P. 247.); in case of attornment (*Doe d. Chawner v. Boulter*, 6 A. & E. 175. 1 N. & P. 650.), where the only evidence of a tenancy is payment of rent, the party paying is in all cases at liberty to explain the payment, and to shew on whose behalf it was received. *Doe d. Harvey v. Francis*, 2 M. & Rob. 57.

(5) Where the rent is less, the law remains as before; if no rent has been paid to another, the right of entry exists at the determination of the lease. The adverse receipt of rent is not material (*Doe d. Cook v. Danvers*, 7 East, 299. *Bushby v. Dixon*, 3 B. & C. 298. 5 D. & R. 126.); but

the landlord's title is barred if he knew of an attornment to another and acquiesced. *Cholmondeley v. Clinton*, T. & R. 107. *Hovenden v. Annesley (Lord)*, 2 Sch. & Lef. (Irish), 624. *Doe v. Flynn*, 4 Tyrw. 619. *Meredith v. Gilpin*, 6 Price, 146.

(6) The stat. of James did not begin to run against the remainder-man till the expiration of the lease. *Doe d. Cook v. Danvers*, 7 East, 299.

(7) *Doe d. Bennett v. Turner*, 7 M. & W. 229. To make an entry or claim available to avoid a fine with proclamations, possession must now be taken, &c.

(8) Co. Litt. 414. 415. *Ford v. Grey*, 1 Salk. 285.

(9) *Doe d. Crowthwaite v. Dixon*, 5 A. & E. 835. 1 N. & P. 255.

(10) *Fisher v. Wiggs*, 12 Mod. 301. 1 Co. Inst. 189.

(11) *Heatherley v. Weston*, 2 Wils. 232. *Doe d. Worn v. Horn*, 3 M. & W. 340. In 1799, D., M., and A., being entitled to a remainder in fee, as tenants in common, of lands then held by a tenant for life, D., and the tenant for life conveyed the third, in which D. had the remainder to C., who thereupon entered into possession of the whole. In 1800, the tenant for life died, A. having died before. The heir at law of A. filed a bill in Chancery, in respect of the land, against C. In 1835, while the pro-

possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession (1) or receipt of or by such last mentioned person or persons, or any of them." (2)

"When a younger brother, or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."

"Provided always and be it further enacted, that when any acknowledgment (3) of the title of the person entitled to any land or rent shall have been given to him or his agent in writing (3), signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or

STAT. 3 & 4
WILL. 4. c. 27.
ss. 12—14.

one coparcenor,
&c. not to be
the possession
of the others.

Sect. 13.
Possession of a
younger brother
not to be the
possession of
the heir.

Sect. 14.
Acknowledg-
ment in writing
given to the

ceedings were going on, the said heir at law died, having devised to J. all his lands, &c., whether in his own possession or that of others, as far as he lawfully could, specifying those which he was seeking to recover from C. In 1836, the devisee's heir at law brought ejectment against C. for A.'s third part:—It was held, that, under sects. 2. and 12. of stat. 3 & 4 Will. 4. c. 27., the defendant's possession could not be held to have been ever that of the other tenants in common; for that sect. 12. made the possessions of tenants in common separate from the commencement of the tenancy in common, and not merely from the time of the act passing. That therefore sect. 2. would have barred the lessor of the plaintiff, but that his right was saved by sect. 15., the ejectment having been brought within five years of the passing of the act, and the possession of C. not being adverse to the other tenants in common within the meaning of that section. But that the devise of 1835 (though made before sect. 3. of stat. 7 Will. 4. & 1 Vict. c. 26. came into operation) defeated the claim of the lessor of the plaintiff as heir at law to the devise; for that the devisee's right was more than such a mere right of entry as was then not devisable, he having never been disseised, and having a right which enabled him to devise, both before and since stat. 3 & 4 Will. 4. c. 27. ss. 2. 12. 15. *Cully v. Doe d. Taylerson*, 11 A. & E. 103.

(1) Where in 1788, estates were settled, by marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor (whose heirs at law she was) in fee; and in 1818, by deeds in which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over; and the husband died in 1819, the wife in 1822, and R. G. in 1828:—It was held, that, inasmuch as the estate of J. F. was carved out of the estate in tail of R. G., she had the same pe-

riod for bringing an ejectment in respect of any of the estates comprised in the above deeds, as he would have had, if he had continued alive, viz. twenty years from the year 1822, when his remainder came into possession. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(2) *Ante*, 1374—1497. tit. EJECTMENT. A party in possession adversely of land being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows, "Although, if matters were contested, I am of opinion, that I should establish a legal right to the premises, yet under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years." The bargain subsequently went off, and no rent was paid or lease executed:—It was held, that this letter was not an acknowledgment of title within the statute. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(3) Whether a writing amounts to an acknowledgment of title within stat. 3 & 4 Will. 4. c. 27. s. 14. is a question for the judge and not for the jury to decide. *Ibid*.

Where, on the death of a father intestate seized of lands in fee, his second son enters without title, such entry is deemed to be for the use of the eldest son, and the Statute of Limitations does not run against such eldest son, the possession of the second son being his possession. *Dowdall v. Byrne, Batty (Irish)*, 373. *Doe d. Durose v. Jones*, 4 T. R. 300. *Doe d. George v. Jesson*, 6 East, 80.

Where in an affidavit by the respondent in a petition for a receiver on a judgment, he denied, that the sum claimed by the petitioner was due, but said "that the entire sum due, on foot of the judgment, &c., is 474l. 8s., besides costs, which this deponent is advised he was not liable to:—" It was held, that he was thereby precluded from insisting on the Statute of Limitations as a bar to the full amount of that sum, because the affidavit was a sufficient acknowledgment in writing, within stat. 3 & 4 Will. 4. c. 27. *Tristram v. Hartie*, 1 Longfield & Townsend (Irish), 186.

STAT. 3 & 4
WILL. 4. c. 27.
ss. 14—18.

person entitled,
or his agent, to
be equivalent
to possession or
receipt of rent.

Sect. 15.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

Sect. 16.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

Sect. 17.

But no actions, &c. shall be brought beyond forty years after the right of action accrued.

Sect. 18.

No further time to be allowed for a succession of disabilities.

receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given."

"Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act." (1)

"Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (2), (that is to say,) infancy, coverture, idiotcy, lunacy (3), unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased (4) to be under any such disability, or shall have died (which shall have first happened)."

"Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry, or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him (5), but within forty years next after the time at which such right shall have first accrued, although the person under disability (6) at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired (7)."

"Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry, or distress, or to bring an action to recover any land, or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person."

(1) Where it appeared, in *Doe d. Linsey v. Edwards* (5 A. & E. 95.), that, A. being in occupation of copyhold lands attorned to B., who claimed the fee, and entered in the name of B., taking possession; and that after the attornment B. was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with proper formalities in the manor court, within the twenty years following:—It was held, that B. was, even though A. continued in possession

until within twenty years of the ejectment being brought, barred at the end of that time from an ejectment.

(2) Imprisonment is not mentioned.

(3) *Culley v. Doe d. Taylerson*, 11 A. & E. 1008.

(4) *Knipe v. Palmer*, 2 Wils. 130.

(5) *Doe d. Corbyn v. Bramston*, 3 A. & E. 66.

(6) A title is given, notwithstanding a succession of disabilities.

(7) *Collard v. Hare*, 2 R. & M. 775.

"No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his majesty), shall be deemed to be beyond seas within the meaning of this act."

"When the right of any person to make any entry or distress, or bring an action to recover any land or rent, to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited, or taken effect after, or in defeasance of, such estate or interest in possession."

"When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred." (1)

"When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable, in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry, or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action."

"When a tenant in tail of any land or rent shall have made an assurance thereof (2), which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twenty years (3) next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be and be deemed to be effective

STAT. 3 & 4
WILL. 4. c. 27.
ss. 19—23.

SECT. 19.
Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

SECT. 20.
When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

SECT. 21.
Where tenant in tail is barred, remainder-man, whom he might have barred, shall not recover.

SECT. 22.
Possession adverse to a tenant in tail, shall run on against the remainder-man whom he might have barred.

SECT. 23.
Where there has been possession, under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

(1) An adverse possession against the tenant in tail, will now run, at the same time, against the issue in tail and those in remainder, even though the issue, and those in remainder, cannot have a right of entry, while the tenant in tail lives, and his estate subsists.

(2) The assurance referred to is the one made by the tenant in tail. The operation of the clause, therefore, is not strictly to make time a bar, but to make time give a full operation to the assurance executed by the tenant in tail.

(3) This clause extends the inference formerly arising upon a long possession, adverse

to a tenant in tail, and to make such a possession for twenty years, coupled with the power of the tenant in tail to bar those in remainder, equivalent to a perfect assurance. In *Doe d. Smith v. Pike* (9 B. & Ad. 742. 1 N. & M. 385.) Lord Tenterden observed, "The father might have conveyed by fine and recovery, and so have barred the lessor of the plaintiff; he might also have conveyed by lease and release, which would have made a good title against himself only, and would not have barred his son, the next tenant in tail. We think the long possession by the defendants may be referable to such a state of things."

STAT. 3 & 4
WILL. 4. c. 27.
ss. 29—26.

Sect. 24.
No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Sect. 25.
In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

Sect. 26.
In cases of fraud no time shall run whilst the fraud remains concealed.

tual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail." (1)

"After the said 31st day of December, 1833, no person claiming any land or rent in equity shall bring any suit (2) to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity." (3)

"Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee (4), upon any express trust (5), the right of the cestuique trust (6), or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him." (7)

"In every case of a concealed (8) fraud (9), the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with

(1) This clause is framed with reference to the new plan of assurance by the substitution for Recoveries Act, to which it plainly refers, and there is no objection in point of law to an earlier statute operating on a later. The effect of the clause therefore is, that where tenant in tail executes a deed enrolled under the later act, which for want of the consent of the protector operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could without the consent of any third person have barred the remainders over under the substitution for Recoveries Act; but this operation will not be effected, if the assurance already executed would not, if then executed without consent, have operated to bar the estates in remainder. It will be necessary, therefore, in all such cases, to ascertain that the assurance was duly made and enrolled.

This clause, it is apprehended, has not a retrospective operation; it could hardly be held, to apply to a case, where the twenty years had wholly elapsed before the passing of the act, because not only the language of the section does not embrace such a case, but the substitution for Recoveries Act, makes good defective fines and recoveries, where such was the intention, and gives confirmation in certain cases in express words to voidable estates already created, or thereafter to be created by tenant in tail.

And where a base fee has been created before the new Statute of Limitations, but the twenty years have not run, the case does not seem to fall within the section; because, if the base fee were, as it is probable, created by a fine, that assurance would not, as an assurance, at any period have operated to bar the remainders (for non claim upon a fine is not now in question); and if it were a recovery, still that could have no operation, for that

assurance could not, since the substitution for Recoveries Act, be made at all, and the terms of the section require, that such assurance if then executed, would have operated to bar such estates. Besides, the language of the section is not retrospective. 2 Sugden's V. & P. 357, 358.

(2) From this clause equitable interests are placed on the same footing with legal estates. Where a bill for tithes was filed against occupiers of land within the time prescribed, and the bill was afterwards, and after the time limited, amended, by making the owner of the land a party, it was held, that the original and amended bill formed but one record, and that the suit was therefore in time. *Thorpe v. Mattingley*, 2 F. & C. 421.

(3) Where fraudulent sales were made by tenant for life, and he lived for thirty-five years afterwards, it was held, that the tenant in remainder, praying to redeem, and within twenty years after he became entitled, was within time. *Bandon (Earl) v. Beecher*, 3 C. & F. 479., et vide *Collard v. Russell*, 2 B. & M. 775.

(4) *Urch v. Walker*, 2 Jur. 487.

(5) In this case, no time as between the trustee and the cestui que trust will be lost. *Townsend v. Townsend*, 1 Cox, C. C. 8.

(6) *Burgess v. Wheate*, 1 Eden, 296.

(7) But the cestui que trust is barred by length of time, operating against the legal estate. *Hooven v. Annesley (Lord)*, 2 Sch. & Lef. (Irish), 629. *Chalmers v. Marquet*, 2 Clinton (Lord), 2 J. & W. 175.

(8) *Murray v. Palmer (Lord)*, 2 Sch. & Lef. (Irish), 487. *Gordon v. Gordon*, 3 Swanst. 400. *McCarthy v. Dicke*, 2 B. & M. 614.

(9) *Thoroughgood's case*, 2 Co. 9. *Cut v. Beck*, 3 Burr. 1910. *Keble v. Pope*, 3 N. & P. 531. *Bandon v. Beecher*, 9 Bligh 532. *Brown v. Howard*, 2 B. & B. 73.

reasonable diligence (1) might, have been first known or discovered, provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bond fide* purchaser for valuable consideration (2), who has not assisted in the commission of such fraud, and who, at the time that he made the purchase (3), did not know, and had no reason to believe, that such fraud had been committed." (4)

"Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence (5) or otherwise (6) to any person whose right to bring a suit may not be barred by virtue of this act." (7)

"When a mortgagee (8) shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him (9), shall not bring a suit to redeem (10) the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor (11), or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate (12), or to the agent of such mortgagor or person in writing, signed by the mortgagee or the person claiming through him (13); and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual, as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage

STAT. 3 & 4
WILL. 4. C. 27.
ss. 26—28.

Sect. 27.
Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

Sect. 28.
Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

is applicable to shareholders of a canal questioning an agreement made by the governing body (*Gray v. Chaplin*, 2 Russ. 126.); but it will not hold while there is on one side undue influence, and on the other distress of means. *Purcell v. Macnamara*, 14 Ves. 106. *Mansel on Limitation*, 160.

(6) As where the *cestui que trust* is a party to the conveyance. *Walker v. Symonds*, 3 Swanst. 64. *Pickering v. Stamford* (Lord), 2 Ves. jun. 583.

(7) "The act does not interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by the act." 2 Sugden's V. & P. 361.

(8) *Jones v. Smith*, 2 Ves. jun. 378.

(9) The remainder-man, where the whole interest is in mortgage, is included. *Harrison v. Hollins*, 1 S. & S. 471.

(10) If a decree for redeeming be obtained, it must be prosecuted within twenty years, or the right will be barred. *St. John* (Lord) v. *Turner*, 2 Vern. 418.

(11) *Swanton v. Raven*, 3 Atk. 105. *Stockley v. Stockley*, 1 Ves. & B. 23.

(12) Whether as heir, devisee, or assignee.

(13) As his assignee (*Matthews v. Walwyn*, 4 Ves. 118.); a mere agent is not sufficient. *Barron v. Martin*, 1 Coop. C. C. 189.

(1) *Rutledge v. Giles*, 2 Tyrw. 169.

(2) *Walwyn v. Lee*, 9 Ves. 33.

(3) This applies to the time of the conveyance. *Davies v. Thomas*, 2 Y. & C. 234.

(4) *Taylor v. Baker*, 1 Dan. 71.

McQueen v. Farquhar, 11 Ves. 478. *Hamilton v. Royse*, 2 Sch. & Lef. (Irish), 315.

Foster v. Cockerell, 9 Bligh, 333. *Miles v.*

Langley, 2 Russ. & M. 626. *Kennedy v.*

Green, 3 M. & K. 699.

(5) This does not however arise in acts of which the party is ignorant at the time, that he has a right to acquire or dispute. *Cholmondeley v. Clinton*, 2 Meriv. 362. *Randall v. Errington*, 10 Ves. 427. *Morse v. Royal*, 12 ibid. 355. A *cestui que trust* being of full age, and not under an incapacity, is, if he openly acquiesce in any objectionable conduct of a trustee for a considerable time, deemed to have acquiesced therein. *Trafford v. Boehm*, 3 Atk. 444. *Brice v. Stokes*, 11 Ves. 319. *Walker v. Symonds*, 3 Swanst. 64. *Ryder v. Bickerton*, ibid. 83. *Underwood v. Stevens*, Meriv. 712. So acquiescence for a long time in a mortgage transaction is a bar. *Hicks v. Cooke*, 4 Dow, 17. Or in cases of fraud or mistake (*Selsey v. Rhoades*, 2 Sim. & Stu. 41. 1 Bligh, N. S. 1.); or to a will questioned by the heir. *Tucker v. Sanger*, *McCl. 424*. 13 Price, 119. The same rule as to time holds, and the same principle

STAT. 3 & 4
WILL. 4. c. 27.
ss. 28—31.

money, or land, or rent, by, from, or under him or them, and any person, or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent as payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." (1)

Sect. 29.
No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumbencies and six years, or sixty years.

"Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital (2), or other spiritual or eleemosynary (3) corporation sole (4), to make an entry or distress, or bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say) the period during which two persons in succession shall have held the office (5) or benefice (6), in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period."

Sect. 30.
No advowson to be recovered but within three incumbencies or sixty years.

"No person shall bring any *quare impedit* (7) or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely (8) to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years, and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years."

Sect. 31.
Incumbencies after lapse to be reckoned within the period, but not

"Provided always, and be it further enacted, that when on the avoidance (9), after a clerk shall have obtained possession of an ecclesiastical benefice, adversely to the right of presentation or gift (10) of the patron thereof, a clerk shall be presented or collated thereto by his majesty (11), or the ordinary (12), by reason of a lapse (13), such last mentioned clerk shall be deemed to have obtained possession *adversely*

(1) *Vide post*, 2935. stat. 7 Will. 4. & 1 Vict. c. 28.

(2) *Le case de Sutton's Hospital*, 10 Co. 1.

(3) 1 Kyd on Corporations, 26.

(4) *Fulwood's case*, 4 Co. 64.

(5) Co. Litt. 44. (a.) *Gee (Chichester, Bishop of) v. Freedland*, Cro. Car. 47. 49.

(6) *Rennell v. Lincoln (Bishop of)*, 7 B. & C. 113.

(7) Booth on Real Actions, 223.

(8) Where the parties do not claim under the same title, the title of one is not consistent with that of the other; and the party

claiming has, in contemplation of law, been deprived of his right, and it has not been acknowledged by the other party. *Manual on Limitation*, 163.

(9) *Weston's case*, 3 Dyer, 347. (a.)

(10) Co. Litt. 344. (a.)

(11) *Rex v. Canterbury (Archbishop of)*, Cro. Car. 354.

(12) The bishop in his diocese. *Wrighton v. Browne*, 3 Lev. 211.

(13) Where on an omission by the patron to present a clerk, the ordinary may (*jure devoluto*) present. *Catesby's case*, Co. 61. (b.)

to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his majesty upon the avoidance of a benefice in consequence of the incumbency thereof having been made a bishop (1), the incumbency of such clerk (2) shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop."

"In the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right (3), which the owner of an estate tail in the advowson (4) might have barred (5), shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit shall be limited accordingly."

"Provided always, and be it further enacted, that after the said 31st day of December, 1833, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of 100 years from the time at which a clerk shall have obtained possession (6) of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest (7), or undivided share (8), or alternate (9) right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title."

"At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished." (10)

"The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act." (11)

"No writ of right patent (12), writ of right *quia dominus remisit curiam*, writ of right in *capite*, writ of right in London, writ of right clove, writ of right *de rationabili parte*, writ of right of advowson, writ of right upon disclaimer, writ *de rationabilibus divisio*, writ of right of ward, writ *de consuetudinibus et servitiis*, writ of *cessavit*, writ of escheat, writ of *quo jure*, writ of *secta ad molendinum*, writ *de essendo quietum de theolonio*, writ of *ne injuste vexes*, writ of mesne, writ of *quod permittat*, writ of *formdon in descender*, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, *darrein presentment*, *juris utrum*, or

STAT. 3 & 4
WILL. 4. c. 27.
ss. 31—36.

incumbencies
after promotion
to bishoprics.

Sect. 32.
When person
claiming an
advowson in
remainder, &c.,
after an estate
tail shall be
barred.

Sect. 33.
No advowson
to be recovered
after 100 years.

Sect. 34.
At the end of
the period of
limitation, the
right of the
party out of
possession to be
extinguished.

Sect. 35.
Receipt of rent
to be deemed
receipt of
profits.

Sect. 36.
Real and mixed
actions abo-
lished after the
31st December,
1834.

(1) This right in the queen can only be exercised during the lifetime of the party so promoted. *Armagh (Archbishop of) v. Att. Gen.* 3 Bro. P. C. 418.

(2) Stat. 13 & 14 Car. 2. c. 4.

(3) Stat. 3 & 4 Will. 4. c. 74. s. 15. In *re Wood*, 9 M. & C. 266.

(4) 1 Inst. 322. (b.) *Le case de Fines*, 3 Co. 85. (a.)

(5) Stat. 3 & 4 Will. 4. c. 74. s. 40. *Meath (Bishop of) v. Winchester (Marquis of)*, 3 Scott, 561. 3 Bing. N. C. 183.

(6) *Green's case*, 6 Co. 29.

(7) 1 Inst. 322. (b.)

(8) As of joint tenants (*Wilson v. Kirkshaw*, 7 Bro. P. C. 296.), or tenants in common. 2 Rol. Abr. Presentment (K), 372.

(9) As in coparcenors. Stat. Westm. 2. c. 5. Bro. Abr. *Quare Impedit*, pl. 118. 2 Rol. Abr. Presentment (I.), 346. *Barker*

v. London (Bishop of), 1 Hen. Black. 412.

(10) This means "wholly destroyed," and operates thus:—If A. have possession of land for twenty years uninterruptedly; and then B. gains possession, upon which A. brings an action of ejectment; even though he be the claimant, yet his former possession for twenty years will be a good title for him to recover under, because all right in the adverse party has been tolled thereby. *Stocker v. Beryn*, 2 Ld. Raym. 741., et vide *Rea v. Carpenter*, 6 A. & E. 794.

(11) Doe d. *Davy v. Oxenham*, 7 M. & W. 132.

(12) Where this writ will still lie, as in the cases provided for in s. 38., the demandant must in his count allege, and by his evidence prove, a seisin in his ancestor within sixty years. *Dumdsday v. Hughes (Bart.)*, 3 Bing. N. C. 439. 4 Scott, 209.

STAT. 3 & 4
WILL. 4. c. 27.
ss. 36—40.

Except for
dower, *quare
impedit*, and
ejectment.

Sect. 37.
Real actions
may be brought
until the 1st
June, 1835.

Sect. 38.
Saving the
rights of per-
sons entitled to
real actions
only at the
commencement
of the act, &c.

Sect. 39.
No descent,
warranty, &c.,
to bar a right of
entry.

Sect. 40.
Money charged

mort d'ancestor, writ of entry *sur disseisin*, in the *quibus*, in the *per*, in the *per* and *cui*, or in the *post*, writ of entry *sur intrusion* (1), writ of entry *sur alienation*, *dum fuit non compos mentis*, *dum fuit infra etatem*, *dum fuit in prison*, *ad communem legem*, in *casu proviso*, in *consimili casu*, *cui in vita*, *sur cui in vita*, *cui ante divortium*, or *sur cui ante divortium*, writ of entry *sur abatement*, writ of entry *quare ejecit infra terminum*, or *ad terminum qui prateriit*, or *causa matrimonii prælocuti*, writ of *aiel*, *besaiel*, *tresaiel*, *cosinage*, or *nuper obiit*, writ of waste, writ of partition, writ of *disceit*, writ of *quod ei deforceat*, writ of *conenant real*, writ of *warrantia chartæ*, writ of *curia claudenda*, or writ *per que servitia*, and no other action real or mixed (except a writ of right of dower, or writ of dower *unde nihil habet*, or a *quare impedit*, or an ejectment), and no plaintiff in the nature of any such writ or action (except (2) a plaintiff for free bench or dower) shall be brought after the 31st day of December, 1834."

"Provided always, and be it further enacted, that when on the said 31st day of December, 1834, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st day of June, 1835, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired."

"Provided also, and be it further enacted, that when, on the 1st day of June, 1835, any person, whose right of entry to any land shall have been taken away by any descent cast (3), discontinuance (4), or warranty (5), might maintain any such writ or action (6) as aforesaid in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period (7) during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away."

"No descent cast, discontinuance, or warranty, which may happen or be made after the said 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land."

"No action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage (8), judgment (9), or lien, or otherwise charged

(1) *Piercy v. Gardner*, 3 Bing. N. C. 748. 4 Scott, 512.

(2) Where a bill in equity is brought on such a judgment, to correct errors in it, a demurrer will be allowed if more than twenty years have elapsed since the right to the property accrued. *Plunkett v. Burlington (Lord)*, 1 Jur. 376.

(3) *Paramour v. Yardley*, Plowd. 545.

(4) 1 Inst. 325. (a.), 332. (b.) *Le Case del Alton Woods*, 1 Co. 44. (b.)

(5) As *Mary Portington's case*, 10 Co. 37. (b.)

(6) Co. Litt. 393.

(7) *Eltob v. Thorowgood*, 1 Ld. Raym. 283. *Kinsey v. Heyward*, *ibid.* 432. 12 Mod. 571.

(8) *Marks v. Marks*, 10 Mod. 424., *et vide post*, 2935., and stat. 7 Will. 4. 1 Vict. c. 28.

(9) Where a judgment has been revived by judgment in *scire facias*, the period of limitation imposed by stat. 3 & 4 Will. 4. c. 27. s. 40. runs from the date of the judgment in *scire facias*, and not from that of the original judgment. Where the Statute of Limitations was pleaded to a *scire facias* on a judgment, a replication, "that the judgment had been revived by judgment in *scire facias* within the period of limitation prescribed by the sta-

tute," was held good on general demurrer. *Farran v. Beresford*, 1 Smythe (Irish), 251.

The court will not allow a *scire facias* to issue to revive a judgment more than twenty years old against the heir and terre tenants of the cognisor, where a former *scire facias* had issued against the heir and terre tenants within the twenty years, but no interest had been paid, or acknowledgment given, within due time (*Palmer v. Algeo*, 1 Jebb & Symes (Irish), 501.), because the statute has not provided for the case of a "proceeding having been taken." *Ibid.* 586. n.

The court will not allow a *scire facias* to revive a judgment more than twenty years old to issue against the original cognisor, upon a written acknowledgment having been given after twenty years. *Brady v. Fitzgerald*, 1 Jebb & Symes (Irish), 503.

The Statute of Limitations does not begin to run against a judgment entered on a *post obit* bond, until the death occurs upon which the bond is payable. *Barber v. Shore*, 1 Jebb & Symes (Irish), 610. Stat. 1 & 2 Vict. c. 110. s. 19.

In *Vincent v. Willington* (1 Longfield & Townsend (Irish), 456.) it appeared, that a judgment was obtained on a joint bond and warrant of attorney against A. and B. in 1815;

upon or payable out of any land or rent, at law or in equity (1), or any legacy (2), but within twenty years next (3) after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money, or some interest thereon shall have been paid, or some acknowledgment (4) of the right thereto, shall have been given in writing, signed by the person by whom the same shall be payable, or his agent (5), to the person entitled thereto or his agent; and in such case no such action or suit, or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given." (6)

STAT. 3 & 4
WILL. 4. c. 27.
s. 40.

upon land and legacies, to be deemed satisfied at the end of twenty years if there shall be no interest paid, or acknowledgment in writing in the meantime.

B. had joined in these as a security for A. On the 16th of March, 1820, A. wrote to V.'s agent, "You have inclosed 150*l.* to my credit on account of V.'s interest, and in the account-book by V.'s agent (since dead) appeared an entry by the agent, of 17th of March, 1820, charging himself with a bill for 50*l.* drawn by A., and 100*l.* cash from A." In 1822, V.'s attorney applied by letter to B., calling for payment of the amount of the above debt; and B. on that occasion wrote to V.'s attorney, acknowledging the receipt of his letter, "applying for payment of his, B.'s, and A.'s joint bond;" and soon after B.'s agent sent a letter to V.'s attorney, inclosing a proposal of terms upon which the matters should be arranged by A., and said, "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839:—It was holden, that this was sufficient payment and acknowledgment to take the case out of stat. 3 & 4 Will. 4. c. 27. *Quære*, Does that statute repeal stat. 8 Geo. 1. c. 4. (Irish)?

(1) In a case of adverse possession, profits which a party so in possession might have realised but for his wilful default, are only allowed as against mortgagees in possession, and trustees guilty of a breach of trust. *Howell v. Howell*, 1 Jur. 492. 2 M. & C. 478.

(2) This does not extend to a suit to make an executor account for a sum of money bequeathed to him by his testator, upon certain trusts, and which has been severed by the executor from the testator's personal estate, and the interest of which has for a time been applied towards the trusts of the will. *Philippo v. Munnings*, 2 M. & C. 309.

Where a fund has ceased to bear the character of a legacy, and has assumed the character of a trust fund, although it is still vested in the executor or his representative, a bill filed for the fund will be considered as a suit for the administration of the fund, and not as a bill for a legacy, and therefore it will not fall within this provision of the act. 2 Sugden's V. & P. 363.

(3) It was held by nine judges against one, that the twenty years fixed by stat. 3 & 4 Will. 4. c. 27. s. 40. as the period within which proceedings on a judgment should be taken, begin to run from the date of the last judgment of revival, and not from the entry of the original judgment. Where to a *scire facias* (by the executors of the cognisee against a terre tenant of the lands of the cognisor) upon

a judgment of 1810; the defendant pleaded s. 40. of stat. 3 & 4 Will. 4. c. 27.; and the plaintiffs replied a judgment of revival in 1817, by themselves, against the cognisor, within twenty years:—it was decided to be no departure. *Farran v. Ottiswell*, 2 Jebb & Symes (Irish), 97.

(4) A reference being made to a master in Chancery, in certain suits in which the conusor of a judgment was a defendant, to take an account of all debts, charges, and incumbrances affecting certain freehold lands of the conusor; the master reported, that a certain sum was due to the administrator of the conusee (who did not appear to have been a party to the Chancery suits) on foot and by virtue of the said judgment, and that the same was a charge upon the said freehold lands of the conusor:—It was held, that the master's report was not a document within the meaning of the words "acknowledgment in writing" in stat. 3 & 4 Will. 4. c. 27. s. 40.; and that the master in Chancery is not an agent of the parties interested in a report, made by him in a cause in that court, or in the judgment which is the subject-matter of his report, within the meaning of the same enactment. *Hill v. Stowell*, 2 Jebb & Symes (Irish), 389.

(5) In *St. John (Lord) v. Boughton* (9 Sim. 219.), where an estate was devised to a trustee in trust to sell and pay the testator's debt, and subject thereto, in trust for A.:—It was held, that as the debts were charged upon or payable out of land, they were within the stat. 3 & 4 Will. 4. c. 27.; but that an acknowledgment of the debts in writing, signed by the trustee or his agent, was sufficient to preserve the creditor's right of suit for twenty years after the giving of the acknowledgment.

(6) A plea relying upon stat. 3 & 4 Will. 4. c. 27. s. 40., should both state the commencement of the period of the limitation, and negative the cases of exception in that section. To a *scire facias* to revive a judgment brought by the assignee of the assignees of J. P., a bankrupt, the defendant pleaded, "that after the rendition of the judgment, and the accruing of a present right to the said J. P. to receive the said debt and damages by virtue thereof, to wit, on &c., and within twenty years before and next preceding the suing forth of the *scire facias*, the defendant did not, nor did any agent of the defendant

STAT. 3 & 4
WILL. 4. c. 27.
s. 41—43.

Sect. 41.
No arrears of
dower to be
recovered for
more than six
years.

Sect. 42.
No arrears of
rent or interest
to be recovered
for more than
six years.

Sect. 43.
Act to extend
to spiritual
courts.

STAT. 3 & 4
WILL. 4. c. 42.
ss. 2—7. 37, 38.

Sect. 2.
Executors may
bring actions

"No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit."

No arrears of rent (1) or of interest (2) in respect of any sum of money charged upon (3) or payable out of any land (4) or rent (5), or in respect of any legacy (6), or any damages (7) in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (8): provided nevertheless, that where any prior mortgagee or other incumbrancer (9) shall have been in possession of any land, or in receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance (10) on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time (11) that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." (12)

"No person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity."

31. STAT. 3 & 4 WILL. 4. c. 42. ss. 2—7. 37, 38.

"An Act for the further Amendment of the Law, and the better Advancement of Justice." [14th August, 1833.]

"And whereas there is no remedy provided by law for injuries to the real (13) estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime; to another in respect of his property,

on his part, pay any part of the said debt and damages, or any interest thereupon, or give any acknowledgment in writing of the right thereto, signed in that behalf by the defendant, or by any person as such agent as aforesaid, to the said J. P., or other person entitled thereto, or to the agent of such person so entitled as last aforesaid, according to the form of the statute," &c.:—which was holden to be bad on special demurrer. *Fortescue v. McKone*, 1 Jebb & Symes (Irish), 341.

(1) *Seem*, that this does not apply to rent by deed or indenture. *Vide* 3 & 4 Will. 4. c. 42. s. 3. *Paddon v. Bartlett*, 3 A. & E. 884.

(2) *Milltown v. French*, 11 Bligh, 2.

(3) *Graves v. Graves*, 8 Sim. 43. *Mirehouse v. Scatfe*, 2 M. & C. 695.

(4) *Woolley v. Watling*, 7 C. & P. 610. *Jones v. Reynolds*, 4 A. & E. 805.

(5) *Maund's case* 7 Co. 28. (b.) *Goodman v. Pucker*, Sir T. Jones, 1.

(6) 1 Saund. 279. (e.) 2 Dyer, 151. pl. 5. *Ever v. Jones*, 2 Ld. Raym. 937. Since stat. 3 & 4 Will. 4. c. 27., a distress or action for an annuity accruing by will, must be resorted to within twenty years from the death of the testator. *James v. Salter*, 3 Bing. N. C. 544.

(7) 2 Saund. 171. (b.) *Holroy v. Ebizson*, 10 Mod. 274.

(8) A judgment collateral to secure an annuity granted by deed is within stat. 3 & 4 Will. 4. c. 27. s. 42., and not more than six

years' arrears of the annuity are recoverable thereon.

The mere issuing of a *scire facies* is not bringing an action or suit within the meaning of the latter part of the same section, as to take the case out of the operation of the statute. *Foley v. Dumas*, 1 Smythe (Irish), 76.

(9) As tenant in the nature of debt. stat. 1 & 2 Vict. c. 110. s. 11.

(10) Stat. 1 & 2 Vict. c. 110. ss. 15—18.

(11) The service of a citation constitutes "pendency of suit." *Ray v. Sherwood*, 1 Curt. 173.

(12) A defendant who does not by pleading claim the benefit of stat. 3 & 4 Will. 4. c. 27. s. 42., cannot rely upon it in the defence in bar of the account. *Walsh v. Walsh*, 1 Jones & Carey (Irish), 52.

Where to a *scire facies* on a judgment a defendant had pleaded several pleas, under which he could avail himself of the Statute of Limitations, 8 Geo. 1. c. 4., the court refused (there being no affidavits of merits, and it being admitted, that the judgment had not been paid) to allow him to add a plea under stat. 3 & 4 Will. 4. c. 27. upon any terms, although the proceedings were in a state in which pleas to the merits would have been allowed to be added on terms. *Domeville v. Lane*, 1 Crawford & Dix (Irish), 182. *Seem*, the stat. 3 & 4 Will. 4. c. 27. must be pleaded specially.

(13) The maxim, "*actio personalis moritur*"

real or personal ; for remedy thereof be it enacted, that an action of trespass (1), or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed (2) within six calendar months (3) before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages, when recovered, shall be part of the personal estate of such person ; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors (4) or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person, and the damages to be recovered in such action shall be payable in like order of administration (5) as the simple contract debts (6) of such person."

STAT. 3 & 4
WILL. 4. c. 42.
ss. 2—4.

for injuries to
the real estates
of the deceased.

And actions
may be brought
against execu-
tors for an in-
jury to property,
real or personal,
by their tes-
tator.

"All actions of debt for rent upon an indenture of demise, all actions of covenant (7) or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognisance (8), and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates (9), or for an escape (10), or for money levied on any *fiery facias* (11), and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force (12), that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after ; (that is to say,) the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, within ten years after the end of this present session, or within twenty years (13) after the cause of such actions or suits, but not after ; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after ; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after : provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited."

Sect. 3.
Limitation of
action of debt
on specialties,
&c.

"If any person or persons that is, or are, or shall be entitled to any such action or suit, or to such *scire facias*, is, or are, or shall be at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, *non compos mentis*, or beyond the seas (14), then such person or persons shall be at liberty to bring the same actions, so as they commence the same, within such

Sect. 4.
Remedy for
infants, femes
covert, &c.

cum personâ," still applies. *Wheatly v. Lane*, 1 Saund. 216.

Phypers v. Eburn, 3 Scott, 634. 3 Bing. N. C. 250.

(1) *Les Six Carpenters' case*, 8 Co. 146.

(2) *Skinner v. Newton*, 10 Mod. 140.

(3) This means "next."

(10) *Williams v. Mostyn (Bart.)*, 4 M. & W. 145. Stat. 13 Edw. 1. c. 11. 1 Rich. 2. c. 12.

(11) 2 Saund. 71. (a.)

(12) *Spencer (Earl) v. Swannell*, 3 M. & W. 154. 6 Dowl. P. C. 326.

(13) Debt on bond for arrears of an annuity is barred after twenty years by stat. 3 & 4 Will. 4. c. 42. s. 3., but not after six years under stat. 3 & 4 Will. 4. c. 27. s. 42. *Sims v. Thomas*, 12 A. & E. 596., vide etiam *Paget v. Foley*, 2 Bing. N. C. 679.

(14) *Vide post*, stat. 3 & 4 Will. 4. c. 42. s. 7.

(4) An executor de son tort is included. *Dyer*, 166. (b.) n. 11. *Serle v. Waterworth*, 4 M. & W. 9. 6 Dowl. P. C. 684.

(5) *Green v. Salmon*, 3 N. & P. 388.

(6) 2 Saund. 9. s. 5. 1 ibid. 331. 336.

(7) *Randall v. Rigby*, 4 M. & W. 130.

6 Dowl. P. C. 650.

(8) *Glynn (Bart.) v. Thorpe*, 1 B. & A. 159. *Buston v. Ridley*, 11 Mod. 223.

(9) The fine due to the lord is to be assessed after the admission. *Grand Junction Railway Company v. Dimes*, 2 Jur. 886.

STAT. 3 & 4
WILL. 4. C. 42
ss. 4—7. 37,
38.

Absence of
defendants be-
yond seas pro-
vided for.

Sect. 5.
Proviso in case
of acknowledg-
ment in writing,
or by part pay-
ment.

Sect. 6.
The limitation
after judgment
or outlawry re-
versed.

Sect. 7.
No part of the
United King-
dom, &c., is to
be deemed be-
yond the seas,
within the
meaning of this
act.

Sect. 37.
Executors of
lessor may dis-
train for arrears
in his lifetime.

Sect. 38.
Arrears may be

times after their coming to or being of full age, discover, of sound memory, or returned (1) from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons, against whom there shall be any such cause of action, is, or are, or shall be at the time of such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such time as are here before limited, after the return of such person or persons from beyond the seas."

"Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent (2), or part payment (3), or part satisfaction (4), on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid, or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty, or recognisance, may, by way of replication (5), state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea (6), of this statute."

"If in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plea (7), writ (8), or bill (9), or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, then in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

"No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the twenty-first year of the reign of King James the First, intituled 'An act for limitation of actions and for avoiding of suits in law.' "(10)

"It shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime." (11)

"Such arrears may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided that such distress be made within the space of six calendar months after the determination (12) of such term or lease, and during

(1) "First return" is here intended.

(2) *Morrell v. Frith* (Clerk), 3 M. & W. 409. 8 C. & P. 246.

(3) *Evans v. Davies*, 4 A. & E. 840.

(4) *Irving v. Veitch*, 3 M. & W. 90. *Hooper v. Stephens*, 4 A. & E. 71.

(5) Under such circumstances the replication must conclude with a verification, and issue will be tendered by the rejoinder in the negative (*Priddle and Napper's case*, 11 Co. 10.), and accepted by the surrejoinder (i. e. a *similiter*).

(6) This plea will refer to the particular

period limited (*vide* a. 3.), as that "the cause of action did not accrue at any time within twenty years next before the commencement, or within ten years next before the end of the session of parliament."

(7) *Kitch*. 231.

(8) *Stats. 2 Will. 4. c. 39. s. 1. and 1 & 2 Vict. c. 110. s. 1.*

(9) *Stat. 2 Will. 4. c. 39. s. 19.*

(10) c. 16.

(11) *Dunk v. Hunter*, 5 B. & A. 322.

(12) 1 Inst. 45. (b.) *Ante*, 1315—1570.

tit. DISTRESS.

the continuance of the possession (1) of the tenant from whom such arrears become due: provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid."

STAT. 3 & 4
WILL. 4. c. 42.
s. 38.

distrained for
within six
months after
determination
of term.

32. STAT. 7 WILL. 4. & 1 VICT. c. 28.

"An Act to amend an Act of the Third and Fourth Years of his late Majesty (2), for the Limitation of Actions and Suits relating to real Property, and for simplifying the Remedies for trying the Rights thereto."

STAT. 7 WILL. 4.
& 1 VICT. c. 28.

"It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry, or bring an action at law, or suit in equity, to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage (3), although more than twenty years may have elapsed since the time at which the right to make such entry (4), or bring such action (5), or suit in equity (6), shall have first accrued, any thing in the said act notwithstanding."

Mortgagees
within the de-
finition in stat.
3 & 4 Will. 4.
c. 27. s. 1. may
bring actions to
recover land
within twenty
years after last
payment of
principal or
interest.

(1) *Savage v. Dent*, Str. 1064. *Antd*, 1057—1172. tit. COVENANT.

(5) *Antd*, 1173—1278. tit. DEBT (1 Saund. 201. (a.) n. n.); covenant (2 ibid. 107. (a.) n. b.).

(2) c. 27.

(3) *Marks v. Marks*, 10 Mod. 424.

(6) For foreclosure. *Upperton v. Harrison*, 7 Sim. 444. *Brucers v. Wharton*, ibid. 483

(4) *Antd*, 1374—1497. tit. EJECTMENT. *Rogers v. Humphreys*, 4 A. & E. 299.

ADDENDA, 2937—2995.

ARBITRATION AND AWARDS.

[P. 63.] An appointment of an umpire by two arbitrators, under a power to appoint before "entering on the cause of the matters in difference," is good, though the arbitrators have, before such appointment, enlarged the time. (1)

[P. 67.] If one of the arbitrators insist upon producing further evidence, and the other refuse to allow it to be done, this is a sufficient "disagreement" between the arbitrators to authorise the interference of the umpire. (2)

[P. 80.] Where matters in difference are referred to the award of three arbitrators, or any two of them, two of such arbitrators cannot delegate their authority to the third, the parties to the submission having a right to the joint judgment of at least two of the arbitrators upon the points submitted to their decision. Where, therefore, a submission had been made to A., a barrister, and B. and C., two merchants, or any two of them, and after evidence had been given on each side, A. and B. agreed to make their award in favour of the plaintiffs for a certain sum, subject to the decision of A. upon a point of law, to which award C. did not altogether agree, but he agreed to the point of law being left to A.; and the latter, without any further communication with either B. or C., decided the point of law for the plaintiffs, and drew up the award in their favour for the sum which had been mentioned, and after signing it at Birmingham, sent it to London to be executed, by either of the other arbitrators who agreed with him, where it was executed on the following day by B.:—the court set the award aside. (3)

[P. 81.] An arbitrator to whom a case was referred, with liberty, if he should think fit, to report specially to the court, set out in his award a long statement of the evidence, leaving the court to draw inferences of fact:—It was held, that this was not a due exercise by the arbitrator of the authority entrusted to him. (4)

[P. 83.] An untrue recital, in an award, of an extension of the arbitrator's power by agreement of the parties, will not cure an excess, where the truth appears upon affidavit. (5)

[P. 87.] By order of *Nisi Prius*, all matters in difference in a cause were submitted to arbitration, with liberty to the arbitrator to reserve questions for the opinion of the court on certain points of law which had been raised at the trial. Evidence was offered before him, to which the defendant objected. The arbitrator thought the objections weighty, but refused to decide upon them, and declared his intention to receive the evidence, stating, that he should raise on his award such objections to it as appeared to him, on consideration, to be important; but he declined pledging himself to raise any objection in particular. The defendant, thereupon moved the court for leave to revoke his submission, stating that the admission of the evidence would make many additional meetings necessary, and cause great expense:—But it was holden no sufficient ground for giving leave (6) to revoke the submission, though the objections to evidence might be well founded. (7)

[P. 87.] Where an order of reference contained a clause empowering the arbitrator to examine the parties respectively, on oath, if thought necessary by him:—It was held, that he might examine either party in support of his own case. (8)

[P. 88.] Where arbitrators differ, and the case is referred to an umpire, and one of the parties requests him to recall the witnesses, and he declines to do so, and decides on the notes of the arbitrators, the award will be set aside. (9)

[P. 100.] Where an arbitrator enlarges the time for making his award "until" a particular day, the time is to be construed as inclusive of that day. (10)

THE UMPIRE.

When appointment of umpire may be made, after the time for making the award has been enlarged.

Refusal by one of two arbitrators, to admit evidence, is sufficient to authorise the interference of the umpire.

DELEGATION OF AUTHORITY BY ARBITRATORS.

Where two arbitrators cannot delegate their powers to a third arbitrator.

ARBITRATORS NOT AWARDED ON ALL MATTERS REFERRED.

The court cannot be left to draw inferences of fact.

EXCESS OF AUTHORITY BY ARBITRATORS.

An untrue recital in an award, will not cure an excess of authority.

RECEPTION OF EVIDENCE BY ARBITRATORS.

Reception of objectionable evidence, will not revoke an award.

When arbitrator can examine either party.

Arbitrator cannot refuse to call witnesses.

TIME WITHIN WHICH AN AWARD MUST BE MADE. If an award be enlarged "until" &c., the time is inclusive of that day.

(1) *Cudliff v. Walters*, 2 M. & Rob. 232.

(2) *Ibid.*

(3) *Little v. Newton*, 2 M. & G. 351.

(4) *Jephson v. Howkins*, *ibid.* 366.

(5) *Price v. Popkin*, 10 A. & E. 139.

(6) Under stat. 3 & 4 Will. 4. c. 42. s. 39.

(7) *Scott v. Van Sandau*, 1 A. & E. N. S. 102.

(8) *Wells v. Benskin*, 1 Dowl. P. C. N. S. 342.

(9) *In re Jenkins*, *ibid.* 376.

(10) *Kerr v. Jeston*, *ibid.* 588.

Under stat. 3 & 4 Will. 4. c. 42. s. 39., the time for an arbitrator to make his award may be enlarged, although he has allowed the time to elapse for making his award.

Where enlargements should be indorsed on the order of reference.

FINAL AWARD.

Where an hypothetical adjudication ought to be rejected as surplusage.

CERTAIN AWARD.

Where it is sufficient to state, that the plaintiff "has no cause of action."

Where the finding must be regarded as hypothetical, and only for the purpose of determining the costs.

UNCERTAIN AWARD.

Where the award is not final, from the amount of a sum of money not being specified.

Award uncertain from not specifying the value, quality, or description of fixtures to be set up by the lessee.

STAMP.

Affidavits in support of a motion to set aside an award, must be stamped.

[P. 100.] The court has power under stat. 3 & 4 Will. 4. c. 42. s. 39. to enlarge the time for an arbitrator to make his award, where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award to elapse without doing so. (1)

[P. 105.] Where the order of reference authorised the arbitrator to enlarge the time to the 2nd of November, 1841, "or to such other or ulterior day, as the said arbitrator shall ultimately appoint and signify in writing under his hand, to be indorsed on the said order of reference:"—It was held, that the enlargements subsequent to the 2d of November, 1841, only need be indorsed on the order of reference. (2)

[P. 107.] On a submission to arbitration, not giving power to raise questions of law for the opinion of the court, the arbitrators awarded 82*l.* as a compensation for damage; and in a subsequent part of their award they stated, "for the purpose of raising the question for the determination of the court, in case it should be pleased to entertain the same," that they awarded the 82*l.* on a certain principle, which they explained; but, if the court should think, that the damage ought to be estimated on another principle, which they likewise stated, then they awarded a compensation of 102*l.* On motion to set aside the award as not final, it was held, that as the sum of 82*l.* was positively awarded, the hypothetical adjudication which followed might be rejected as surplusage, and the award sustained. (3)

[P. 114.] Where a cause and matters in dispute are referred to an arbitrator, it is sufficient for him in his award to state, that he finds the plaintiff "has no cause of action," without making any reference to matters in dispute, independent of the action, it not being shewn that any matters in dispute, beyond the action, are brought before him. (4)

[P. 115.] In *assumpsit* on a retainer to project certain works, and to examine certain bills, with care, skill, and diligence, it was pleaded, 1. *non assumpsit*; 2. no retainer; 3. that defendant did use care, &c., in projecting the works; 4. that he did use care, &c., in examining the bills. The cause and all matters in difference were referred by order of *Nisi Prius*; costs of the cause to abide the event. The award found for the defendant on the 1st, 2d, and 4th issues, and for the plaintiff on the 3d:—It was held, that the award was good, and not repugnant; for that the finding on the 3d and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them; and that it could not be inferred from such finding, that there was matter in difference in respect of work done, other than the work-included in the action. (5)

[P. 117.] By a deed of submission to arbitration between R. and J. it was recited, that they had been partners; that J. had deposited with C. and Co., bankers, certain securities for such sums as they had advanced, or might advance to J. as surety for R., that R. being indebted to the bankers in 4000*l.*, J. had mortgaged to them securities for a sum not exceeding 3000*l.*; that R. and J. had dissolved partnership, and had agreed to refer all matters in difference, &c. There was a proviso that, if the arbitrators should award any money to be paid by J. to R., they should, in their award, if the mortgage were still outstanding, authorise such payment to be made to the bankers in reduction of the mortgage debts, and should further award, that R. should, at a time to be named by the arbitrators, pay in to the bankers' such a sum as would be sufficient to entitle J. to have the mortgage discharged, and the securities deposited by him released. The arbitrators by their award found that 3121*l.* was due from J. to R., and the mortgage outstanding; and they ordered J. to pay the 3121*l.* on certain days, with liberty to him to pay it in to the bankers' as above stated. They also awarded that, within one month from the payment of the 3121*l.*, R. should pay in to the bankers', such a sum as would be sufficient to entitle J. to have the mortgage discharged, and the securities deposited by him released; but it did not appear by the award, what that sum would be:—It was held, that the award was not final on this point, and therefore was bad. (6)

[P. 118.] On a submission of a cause and all matters in difference between a lessor and lessee, the costs to abide the event, an award, that certain fixtures have been wrongfully removed by the lessor, to the value of 11*l.*, and that the lessee shall set up others in their place, to be left for the lessor at the end of his term, and that the lessor shall pay the lessee 11*l.* on a specified day, is bad for want of authority, though the removal of such fixtures was in fact a matter in difference on the arbitration. And such an award is likewise uncertain, in not specifying the value, quality, or description of fixtures to be set up by the lessee, and might be set aside by the lessor. (7)

[P. 131.] Affidavits in support of a motion to set aside an award must be stamped, s. stat. 5 Geo. 4. c. 41. applies only to affidavits to be read or used in a "suit or action." (8)

(1) *Parbery v. Newnham*, 7 M. & W. 378.

(2) *Davison v. Gauntlett*, 1 Dowl. P. C. N. S. 198.

(3) *Wright v. Cromford Canal Comp.* 1 A. & E. N. S. 98.

(4) *Wyatt v. Curnell*, 1 Dowl. P. C. N. S. 327.

(5) *Beaufort (Duke of) v. Welch*, 10 A. & E. 527.

(6) *Hewitt v. Hewitt*, 1 A. & E. N. S. 110.

(7) *Price v. Popkin*, 10 A. & E. 139.

(8) *Templeman v. Reed*, M.S. B. R. E. T. 1841.

[P. 192.] Where B. evicted M. by title paramount, and an award was made on a submission to arbitration, "to declare what amount may be the profits to be derived by B. from the expenditure of M., with allowance for ditching and draining, as well as building and manure, so as to extend its benefits to any future crop;" and it was awarded, that B. should give M. 107*l.* for profit, calculated to accrue to B. from M.'s improvements, and that B. should give M. the use of the house he occupied to a certain day, on which M. should give to B. possession of the premises: — It was held, that this award was not invalid, though relating to an interest in land, but was sufficiently supported by the submission. (1)

EFFECT OF AN AWARD.

Where award not invalid though relating to an interest in land.

[P. 141.] A rule for setting aside an award cannot be argued on the last day of term, notwithstanding the objection to the award rests upon the misconduct of the arbitrators. (2)

MODE OF SETTING ASIDE AN AWARD.

Rule for setting aside an award cannot be argued on the last day of term.

[P. 141.] On shewing cause against a rule requiring a party to pay money pursuant to an award, it is competent to object to the goodness of the award in the same manner, as on a rule for an attachment for its non performance; but the court will not entertain the discussion on the last day of term. (3)

It is competent to object to the goodness of an award in the same manner, as on a rule for an attachment for its non performance.

[P. 141.] The service of a rule nisi under stat. 1 & 2 Vict. c. 110. s. 18. for non payment of money, pursuant to an award, should be personal, but on a statement of special circumstances, a less strict service may be allowed. (4)

Personal service of a rule under stat. 1 & 2 Vict. c. 110. s. 18. may be dispensed with under special circumstances.

[P. 148.] The plaintiff having obtained a verdict, a rule was made absolute for a new trial, no mention being made of costs. The parties afterwards agreed to refer the cause; the costs to abide the event. The arbitrator awarded in favour of the defendant: — It was held, that he was not entitled to the costs of the first trial. (5)

Coers.

Where rule made absolute for a new trial, no mention being made of costs.

[P. 149.] Upon the reference of a cause, and after matters in difference, though the arbitrator finds no damages, and orders no damages to be entered, the costs may be taxed upon the award. (6)

Costs may be taxed, although the arbitrator finds no damages.

[P. 158.] Three actions by the same plaintiff were referred; the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded, that each party should pay half the costs of the reference. One attorney attended for all the defendants, and the master allowed him one third of his travelling expenses: — It was held, that the taxation was wrong, and that the master should have calculated the costs on both sides, and then have divided them. (7)

When the master should calculate the costs on both sides and then divide them.

[P. 158.] Where, upon a reference of a cause and all matters in difference by articles of agreement, an award is made, under which the costs of the cause and of the award are to be paid by the defendant, the plaintiff is entitled to have the costs taxed, without waiting for the period during which the defendant would be at liberty to move to set the award aside. (8)

Costs can be taxed before the period for setting aside the award has expired.

[P. 158.] Where the master has taxed costs, as between attorney and client, pursuant to the directions of an award, which directions, it is suggested, are an excess of authority on the part of an arbitrator, the court will not direct the taxation to be reviewed, the proper preliminary step being to move to set aside the award. (9)

Where a review of taxation of costs will not be allowed.

[P. 158.] A cause, and all matters in difference, having been referred to arbitration, an award was made, directing the payment of a certain sum by the defendant, together with the costs of the cause, and of the award: at the taxation of costs, the *allocatur* was made by the master, without objection by the defendant, for the aggregate amount of both classes of costs, for which sum on the same day (4th of June) judgment was entered up. The plaintiff having died on the 18th of November, a *scire facias* was sued out on the 12th of January following, to which the defendant pleaded on the 19th. On an application made on the 24th to set aside the judgment on the ground of its falsity, by reason of its including the costs of the award, which were not properly recoverable in the cause: — It was held, that the objection resolved itself into a point of irregularity upon the *allocatur*, which was answered, first, by the consent of the defendant to the master's taxation; and, secondly, by the waiver arising upon the lapse of time which was permitted to intervene between the period of the *allocatur* being made, and the application. (10)

Waiver of an irregularity upon the *allocatur*.

[P. 159.] A rule absolute for an attachment for non payment of the costs of a cause, and of an award made in that cause, will not be granted in the first instance, though the reference be of the cause only. (11)

Where an attachment for non payment of costs will not be granted in the first instance.

[P. 159.] An agreement having been entered into between the plaintiff and the defendant, by which the latter sold to the former his claim upon one B., in respect of certain matters

When amount of debt and costs under an award

(1) *Murphy v. Bellew*, 1 Longfield & Townsend (Irish), 250.

(7) *Day v. Norris*, 1 Dowl. P. C. N. S. 353.

(2) *Bignall v. Gale*, 2 M. & G. 364.

(8) *Little v. Newton*, 1 M. & G. 976.

(3) *Kerr v. Jeston*, 1 Dowl. P. C. N. S. 340.

(9) *Bartle v. Musgrave*, 1 Dowl. P. C. N. S. 325.

(4) *Jordan v. Berwick*, *ibid.* 271.

(10) *Bignall v. Gale*, *ibid.* 497.

(5) *Thomas v. Hawkes*, *ibid.* 346.

(11) *Daniell v. Beadle*, 1 M. & G. 960.

(6) *Taylor v. Marling*, 2 M. & G. 55.

Is recoverable by the plaintiff in an action for money had and received.

DAMAGES.

Where the damages in the declaration exceed the amount claimed in the particulars.

Where an arbitrator is not bound to assess contingent damages on a demurrer, not having been requested to do so by either party.

JURISDICTION IN GRANTING ATTACHMENTS.

Where the plaintiff is not precluded by proceedings under stat. 1 & 2 Vict. c. 110. s. 8. from enforcing an award by rule of court.

Insufficient affidavit to ground an attachment.

ENTRY OF VERDICT.

Certificate of arbitrator may be given after the assizes are over.

Entry of verdict for the defendant on all the issues.

EXECUTION.

Stat. 1 & 2 Vict. c. 110. s. 18. is only applicable when the money payable by the rule is expressed in the rule itself.

Under stat. 1 & 2 Vict. c. 110. ss. 18. & 19. the court can order a party by rule to pay a specific sum awarded by an arbitrator.

in difference then awaiting the decision of an arbitrator, which was subsequently satisfied by a formal deed of assignment, and the arbitrator having made an award in favour of the defendant, directing the costs of the reference to be paid between the defendant and B., and which was taken up and paid for by the plaintiff, the defendant was employed by the plaintiff to receive from B. the amount due to him under the award:—It was held, that that amount, both of debt and costs, was recoverable by the plaintiff in an action for money had and received. (1)

[P. 160.] A cause was referred at Nisi Prius, and a verdict entered for the plaintiff by consent, for the damages in the declaration, which exceeded the amount claimed in the particulars of demand. The arbitrator having awarded, that the verdict should stand at the amount for which it was entered:—It was held, that the arbitrator had not exceeded his authority; seemingly because the particulars of demand were not necessary before the arbitrator; and that, if the defendant intended to limit the plaintiff's demand to the amount claimed by the particulars, he ought to have brought the particulars before the arbitrator. (2)

[P. 161.] In *assumpsit* on an agreement to build a house according to certain plans, &c. the breaches alleged were, that the defendant did not build the house to the satisfaction of the plaintiff, and that he did not perform the work with the best materials. The defendant pleaded, 1. *non assumpsit*; 2. that he did the works to the satisfaction of the plaintiff; 3. that before breach the contract was rescinded; 4. leave and license; 5. that defendant deviated from the plans by the direction of the architect of the plaintiff; 6. an agreement to build a stone wall in lieu of the wall mentioned in the agreement; 7. that defendant, by command of the plaintiff, erected a stone wall in place of a brick wall. The plaintiff joined issue on the first two pleas, traversed the 3d, 6th, and 7th, replied *de injuriâ* to the 4th, and demurred to the 5th; the case was referred to an arbitrator, who awarded a general verdict for the defendant:—It was holden, that the award was not uncertain, inconsistent, or repugnant, and that it was unnecessary for the arbitrator to assess contingent damages on the demurrer, neither party having requested him to do so. (3)

[P. 162.] A party to whom money was due by an award, filed an affidavit of debt in the court of bankruptcy, under stat. 1 & 2 Vict. c. 110. s. 8.; the defendant gave a bond, with sureties conditioned for payment of the money, but omitting the alternative in the statute of rendering himself to custody:—It was held, that the plaintiff was not precluded by the proceeding from enforcing the award by rule of court. (4)

[P. 171.] Where an arbitrator, to whom a cause was referred, awarded, that the action should cease, and that a sum of money should be paid by the plaintiff to the defendant; and the defendant's costs having been taxed, both sums were demanded of the plaintiff:—It was held, that inasmuch as the arbitrator had exceeded his authority in directing payment of the sum of money to the defendant, an affidavit which stated, that the defendant demanded of the plaintiff the said sum of money, and also the amount of the costs, but that the plaintiff did not pay the same, or any part thereof, was not sufficient to ground an attachment. (5)

[P. 197.] Where a verdict for the plaintiff is taken by consent at Nisi Prius, subject to a certificate, the referee may certify, that a verdict shall be entered for the defendant, although no express authority to enter a verdict be given; and the certificate may be given after the assizes are over. (6)

[P. 197.] In debt for use and occupation, goods sold, &c., in which the defendant pleaded *numquam indebitatus* and a set-off, the verdict was entered at Nisi Prius for the plaintiff, subject to a reference of the cause to an arbitrator, who was to certify, whether the verdict should stand and for what amount, or whether it should be vacated and a verdict entered for the defendant. The arbitrator certified, that the verdict should be vacated, and a verdict entered for the defendant on both issues:—It was held, that he had a right to do so, and that the certificate was not inconsistent. (7)

[P. 199.] Under an agreement of reference, a sum was awarded to be paid by the plaintiff to the defendant; and afterwards the agreement was made a rule of court:—It was held, that the defendant could not, by virtue of the rule of court, issue execution for the sum under stat. 1 & 2 Vict. c. 110. s. 18., that clause being applicable, for such purpose, only where the money payable by the rule is expressed in the rule itself. (8)

[P. 199.] The court has authority, under stat. 1 & 2 Vict. c. 110. ss. 18 and 19, to order a party by rule to pay a specific sum of money awarded by an arbitrator to be paid by him; and on such rule being made absolute, execution may issue against the party for the amount so specified in the rule. (9)

(1) *Smith v. Jones*, 1 Dowl. P. C. N. S. 526.

(2) *Kenrick v. Phillips*, 7 M. & W. 415.

(3) *Cooper v. Langdon*, 1 Dowl. P. C. N. S. 392.

(4) *Mendell v. Tyrrell*, *ibid.* 453.

(5) *Poyner v. Hatton*, 7 M. & W. 211.

(6) *Tomes v. Hawkes*, 10 A. & E. 32.

(7) *Williams v. Mowledale*, 7 M. & W. 135.

(8) *Jones v. Williams*, 11 A. & E. 175.

(9) *Doe v. Amey*, 8 M. & W. 565.

ASSAULT AND BATTERY.

[P. 209.] In an action for an assault, the declaration stated, that the defendant assaulted the plaintiff, "and also then presented a certain pistol loaded with gunpowder, ball, and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff and blow out his brains." To this the defendant pleaded not guilty; and it was proved, that the parties being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol and cocked it, and presented it at the plaintiff's head, saying, that if the plaintiff was not quiet he would blow his brains out: — It was held, that if the defendant, at the time he presented the pistol, used words shewing, that it was not his intention to shoot the plaintiff, this would be no assault; and that it was incumbent on the plaintiff to substantiate the allegation in the declaration, that the pistol was loaded with gunpowder, ball, and shot, and that unless the jury were satisfied, that the pistol was so loaded, they ought to find for the defendant. (1)

ASSAULT DEFINED.
Where incumbent on the plaintiff to prove, that the pistol which was fired at the plaintiff was loaded, with ball.

[P. 217.] In trespass for an assault and battery, a plea of *son assault demenee*, beginning, "and for a further plea in this behalf," and alleging, that "just before the said time when" &c., the plaintiff assaulted the defendant, and would have beaten him, if he had not immediately defended himself, &c., "wherefore he, the defendant, did then defend himself against the plaintiff" &c.; and that, "if any hurt or damage then happened or was occasioned" to the plaintiff, the same happened and was occasioned by the assault of the plaintiff on the defendant, and in the necessary defence, &c.: — It was held on special demurrer, that the plea sufficiently confessed an assault and battery; that the hypothetical averment, "if any" &c., related merely to "hurt or damage," not to the fact of an assault, and that the form was no ground of objection. (2)

PLEADINGS.
Where on special demurrer the plea confesses an assault and battery.

[P. 221.] In trespass for assault and battery it was pleaded, that the plaintiff had complained of the same trespass to two justices, according to stat. 9 Geo. 4. c. 31. s. 27., who had dismissed the complaint; and thereupon did, "according to the said statute, forthwith make out a certificate," "stating the fact of such dismissal," and delivered it to the defendant, whereby the defendant was released, &c.: — It was held, on special demurrer, that the plea was bad for not shewing, that the complaint had been dismissed upon one of the grounds specified in sect. 27.; and it seems, that the certificate itself ought to shew the ground of dismissal. (3)

Defective plea for not shewing, that a complaint had been dismissed by two justices.

ASSUMPSIT.

[P. 238.] The plaintiff declared in *assumpsit*, and the declaration recited a deed under seal, which had been entered into for the performance of certain stipulated operations in chemistry, by the 21st of June, 1838, and which might be determined by the defendants upon notice given in case of the non fulfilment of the contract by that time, and alleged a subsequent parol agreement between the parties, extending the time for completing the contract to the 21st of December, 1838; but it contained no statement of the determination of the deed: — It was held upon demurrer, that the action was wrongly conceived in *assumpsit* upon the parol agreement, and that covenant should have been brought upon the original deed. (4)

ASSUMPSIT GENERALLY.

When covenant the proper remedy, and when *assumpsit* cannot be maintained.

[P. 240.] *Indebitatus assumpsit* will not lie for demurrage, unless there be an express contract to pay it. (5)

THE CONSIDERATION.

Where *indebitatus assumpsit* will not lie for demurrage.

[P. 241.] A declaration in *assumpsit* stated, in substance, that the defendant agreed to let, and the plaintiff to take, a certain messuage and premises on certain specified terms, and that afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff, without restriction as to the purpose for which the same should be used and occupied: — It was held on special demurrer, that such a promise could not be implied from the relation of the parties, and that the consideration alleged was insufficient to sustain it. (6)

Where a promise cannot be implied from the relation of the parties.

[P. 256.] The plaintiff declared upon an agreement by which the defendant undertook to become answerable for certain sums of money, and give security for their payment, upon the stay of proceedings in an action against himself; and that proceedings were stayed by

Where a condition is imposed, before proceedings are stayed.

(1) *Blake v. Barnard*, 9 C. & P. 626.

(5) *Horn v. Bensusan*, 2 M. & Rob. 326.

(2) *Wise v. Hodson*, 11 A. & E. 816.

(6) 1 Dowl. P. C. N. S. 96. *Jackson v.*

(3) *Skuse v. Davis*, 10 ibid. 635.

Cobbin (Clerk), 8 M. & W. 790.

(4) *Gwynne v. Davy*, 9 Dowl. P. C. 1.

**CONTRACTS IN
CONTRAVENTION
OF PUBLIC
POLICY.**

An agreement for the non exercise of a business being limited both in time and space, is valid.

Judgment of
Chief Justice Tindal in *Proctor v. Sargent*.

**GOODS BARGAINED
AND SOLD.**

For breaches of contract, it is competent for the defendant to shew how much less the subject-matter of the action was worth, by reason of the breach of contract.

In an action for goods sold, it must be proven, that the defendant in fact ordered the goods, and that he accepted them as owner.

WORK AND LABOUR.

Where a delivery is stipulated for, it will be construed to be a delivery within the ordinary hours of business.

Where *assumpsit* for work and labour cannot be maintained.

order of a judge. The defendant pleaded, that the order of the judge directed a conditional stay of proceedings only; the plaintiff replied, taking issue upon the stay of proceeding. Evidence being given of the order of the judge, imposing a condition before the proceedings were stayed, it was held, that the defendant was entitled to a verdict. (1)

[P. 263.] The declaration set out a contract, whereby the plaintiff agreed to employ the defendant in his service, and the defendant agreed to serve the plaintiff in his business for one month certain, and until the expiration of a month's notice, to be given by either party. In consideration whereof the defendant did thereby agree, that he would not, during the continuance of such service, nor within the space of twenty-four months after quitting or being discharged from the same, commence, &c. the business of a cowkeeper within five miles from Northampton Square, in the county of Middlesex; and if at any time during such service, or within twenty-four months after the determination thereof, the defendant should commence, &c. such business, that he would pay 10s. for every day that he should act contrary to the agreement. The declaration then averred, that the defendant entered into the plaintiff's service, and continued therein until &c., when he quitted and was discharged from the same; and although the plaintiff had always performed and fulfilled the agreement in all things therein contained to be performed on his part, yet the defendant did not perform the said agreement, &c., stating the breach to be, that the defendant did commence, &c. such business within the specified time and space: to which it was pleaded, that the plaintiff did not give to the defendant a month's notice in writing to determine the contract and service, concluding with a verification. On demurrer to this plea it was held bad, that the general allegation of performance of the agreement by the plaintiff in the declaration was sufficient on general demurrer; and also, that if the defendant had been improperly discharged by the plaintiff, such wrongful discharge was no answer to the action, but would be merely the subject of a cross-action; and that the agreement was valid, being limited both in time and space, and not appearing to be an unreasonable restraint of trade (2); Chief Justice Tindal observing, "I think that when we are deciding upon the unreasonableness of a contract of this kind, we cannot leave out of consideration the duration of the restraint; for, although I admit, that where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good, yet where the question is, whether the restraint be unreasonable or not, in point of space, that which would be unreasonable, were it to continue for any length of time, may not be so when it is to last only for a day or two. I approve of the ruling in *Ward v. Byrne* (3), but I deny its application to the present case."

[P. 282.] In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to shew, how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more. (4)

[P. 292.] In *assumpsit* for goods sold and delivered, where the price is above 10l., and where nothing has been paid as earnest to bind the bargain, nor any memorandum in writing signed by the defendant or his agent; two things must be proved to entitle the plaintiff to recover, first, that the defendant in fact ordered the goods; and secondly, that he accepted them with an intent to take them as owner. (5)

[P. 301.] Where, upon a sale of merchandise it was stipulated, that the delivery should be within the last fourteen days of March, the delivery stipulated for was construed by the court (*Erskine J. dissent.*) to be a delivery within the ordinary hours of business. (6)

[P. 304.] R. having undertaken, by a written contract, to build for the corporation of Henley a house on a farm occupied by A., engaged S. to do the carpenter's work; and the following agreement was made and signed by R. and S., and witnessed by A.—"It having been arranged, that A. shall build a new house on the farm occupied by A., it is hereby agreed and understood between the said R. and S. that S. shall do all the carpenter's work, &c., under the inspection and control of the said A., and that the amount of the said work shall be paid by A. to S. only, and that this agreement shall be his guarantee for so doing." On the same day A. wrote to S. as follows:—"It having been agreed that R. shall build a new house on the farm occupied by me, and that, by an agreement this day shewn me between you and S., you are to do the carpenter's work, &c., and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same by having a proper discharge:—"It was held, that S. having done the work, could not maintain an action of *indebitatus assumpsit* for work and labour against A. for the value of it. (7)

(1) *Filmer v. Barnby*, 9 Dowl. P. C. 466.

(2) *Proctor v. Sargent*, 2 M. & G. 20.

(3) 5 M. & W. 548.

(4) *Mondel v. Steel*, 8 ibid. 858. 1 Dowl. P. C. N. S. 1.

(5) *Smith v. Rolt*, 9 C. & P. 696.

(6) *Startup v. Macdonald*, 2 M. & G. 395.

(7) *Sweeting v. Asplin*, 7 M. & W. 165.

[P. 305.] It seems that, to raise an implied warranty, it is not necessary, that the vendor should also be, or should represent himself as, the manufacturer, where he is told of the purpose for which the goods are required, and the purchaser does not select them himself, but relies on the skill and judgment of the vendor. (1) Where A., a wine merchant, ordered a crane rope of B., a dealer in, and who represented himself as a manufacturer of ropes; and B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and being told that it was wanted to raise pipes of wine from the cellar, said that a rope must be made on purpose; but B. did not make the rope himself, but sent the order to his manufacturer, who employed a third party to make the rope:—It was holden, in an action on the case by A. against B. to recover damages resulting from the insufficiency of the rope, that B., as between him and A., was to be considered as the manufacturer of the rope; and that an implied warranty arose out of the contract, that the rope was a fit and proper one for the purpose for which it was ordered. (2)

[P. 306.] Where a plaintiff declared specially in *assumpsit*, that in consideration, that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the latter had promised to deliver to the plaintiff prussiate of potash to the same amount; and the plaintiff averred the delivery of the twenty tons of best Dutch lead, and stated as a breach, that the defendant would not deliver the full quantity of potash; to which the defendant pleaded *non assumpsit*:—It was held, that as the defendant had not pleaded, that the plaintiff had not delivered best Dutch lead, he could not go into evidence to shew, that the lead was of inferior quality. (3)

On a count for a *quantum valebant*, the plaintiff may give evidence of an agreed price for the goods, and the defendant on a plea of *non assumpsit* may also go into evidence to induce the jury not to give that price, by shewing, that the articles delivered were inferior to those, that the price was agreed to be paid for. (4)

[P. 312.] In an action to recover the amount of a chemist's bill, it being suggested, that the items are properly within the scope of an apothecary's profession, the proper question for the jury is, under stat. 55 Geo. 3. c. 194. ss. 14. & 28., whether the plaintiff has acted as an apothecary, and not whether he has charged as a chemist or as an apothecary. (5)

[P. 328.] A. an agent for B., residing in Tralee, sold 1200 barrels of barley to W. residing in Cork, to be delivered free on board the D., then in Tralee; payment to be made on receipt of bill of lading and invoice. On the 9th of November the barley was delivered on board the D., and a bill of lading made out to shipper's order, which was not forwarded. The vessel and barley were lost, on the voyage to Cork, on the 12th; and before W. knew of the loss, B. produced the bill of lading to W. on the 6th of November, and detained 800*l.* on account, without informing him of the loss of the barley:—It was held, that the property vested in the vendee by the delivery on board; and that the 800*l.* could not be recovered in an action for money had, &c. (6)

[P. 335.] In *Wilson v. Ray* (7) it appeared, that the plaintiff being about to compound with his creditors, the defendant, a creditor, refused to subscribe the deed unless he were paid in full. The plaintiff to obtain his signature, gave a bill, payable to the defendant's agent for the difference between 20*s.* in the pound, and 8*s.* the proportion compounded for. The defendant then signed the deed. The plaintiff did not honour the bill when due; but, on subsequent application, he paid it some months after the dishonour, by two instalments, to the payee, and the defendant received the money. The other creditors were paid according to the deed:—It was held, that the plaintiff could not recover back the amount paid to the defendant above 8*s.* in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened, and that it made no difference, that the sum in question had not been recovered by action.

[P. 360.] Where A., one of the defendants, was shewn an account by the clerk of the plaintiffs' at their counting-house, and he objected to one of the items, but made no remark with respect to the rest:—It was held, that this was evidence of an account stated by A. of the items of the account to which no objection was made. (8)

[P. 361.] A third person employed by the plaintiff examined the accounts of the plaintiff and defendant in their presence, and struck a balance against the defendant without any express authority from him so to do, or any expression of dissent:—It was held to be sufficient evidence of an account stated. (9)

[P. 363.] To connect B. with A. as a co-promisor, it was shewn, that they were the trustees of an insolvent estate, in respect of which the debt arose; that A. and B. were at the counting-house of the plaintiffs on several occasions together; that at a meeting of

Where an implied warranty arises out of the contract that the article ordered is fit and proper for the purpose for which it was ordered.

Where defendant will not be allowed to go into evidence, that the goods were of inferior quality.

Question for the jury, where it is suggested, that the amount of a chemist's bill is properly within the scope of an apothecary's profession.

MONEY HAD AND RECEIVED.

Where an action for money had and received will not lie for money advanced on a bill of lading.

TAKING IMPROPER ADVANTAGE OF A PERSON'S SITUATION.

When a transaction has been closed by a voluntary payment with full knowledge of the facts, it will not be re-opened.

ACCOUNT STATED.

What is evidence of an account stated, to which no objections were made.

A third party striking a balance of an account in the presence of the creditor and debtor, is evidence of an account stated.

When it will be

(1) *Brown v. Edgington*, 2 M. & G. 279.

(2) *Ibid.*

(3) *Pegg v. Stead*, 9 C. & P. 636.

(4) *Ibid.*

(5) *Richmond v. Coles*, 1 Dowl. P. C. N. S. 560.

(6) *Wise v. M'Mahon*, 1 Longfield & Townsend (Irish), 192.

(7) 10 A. & E. 82.

(8) *Chisman v. Count*, 2 M. & G. 307.

(9) *Dyne v. O'Neill*, 1 Crawford & Dix (Irish), 329.

presumed that A., in stating the account with the plaintiff, had authority to bind.

Where the absence of a note in writing of the contract actually executed, is no objection to the recovery of the plaintiff's demand.

THE DECLARATION.

Venue may be changed on a written contract, which is to be performed in a particular place, and where the breach arises wholly in the county.

Member of a joint stock company cannot be sued for goods ordered by the company before he became a member of it.

What is a variance between the declaration and an agreement, the latter purporting to convey the fee simple.

Where it should be alleged, that the plaintiff was ready and willing to do a concurrent act.

THE PLEADINGS.

A plea that the materials delivered were rendered illegal by stats. 10 Will. 3. c. 2. and 6 Anne, c. 8. must be pleaded singly.

What is a good plea of a person being absolved from his promise to marry.

Pleadings will be defective, if they do not shew that the work and materials were not done and provided on the defendant's credit.

Where the plea is no answer to an action for stock sold, and where the contract is not within stat. 7 Geo. 2. c. 8. s. 8.

Where the aver-

the creditors of the insolvent estate, the amount of the plaintiffs' debt was stated by one of the defendants in the presence of the other; and that B. had admitted in a letter, that there was a debt due to the plaintiffs:—It was held, that the jury were justified in coming to the conclusion, that A., in stating the account with the plaintiffs, had authority to bind B. (1)

[P. 363.] Where in *assumpsit* on an account stated, and the consideration was, the transfer of an interest in land previously effected:—It was held, that the absence of a note in writing of the contract actually executed, was no objection to the recovery of the plaintiff's demand. (2)

[P. 364.] The venue may be changed in an action on a written contract, which is to be performed in a particular place, and for the breach of which the cause of action arises wholly in one county; and it seems, that it may be so changed, in all actions on contracts, though in writing, except on specialties, bills, and notes. (3)

[P. 365.] A member of a joint stock company is not liable to be sued for the price of goods ordered by the company to be made for them before he became a member, although such goods were delivered afterwards. (4)

[P. 370.] Where a declaration stated, "that the defendant agreed to sell the plaintiff a dwelling-house and fixtures for the residue of a term of years, then and still unexpired therein, to commence on and from a certain day, to wit, the 1st of January, 1840, for the sum of 60*l*." And the evidence produced was the following, "I agree to sell the house and fixtures, 163. Piccadilly, to commence from the 1st of January next, for 60*l*."—It was held a variance between the declaration and agreement, as the latter purported to convey the fee simple. (5)

[P. 378.] Where by an agreement concurrent acts are to be done by the plaintiff and the defendant, a declaration against the defendant for not doing the act on his part should allege, that the plaintiff was ready and willing to do the concurrent act on his part. But if the plaintiff merely allege, that he was ready and willing to perform the agreement on his part, it is sufficient if the defendant demur generally, or if he plead over. (6)

Where a declaration in *assumpsit* describes the terms of the contract in language denoting, that a particular act which the plaintiff has engaged to do, is to be independent of, or concurrent with, an act or acts to be done on the part of the defendant; and if, from the position of the parties, or from the nature of the agreement, such act is to be considered as intended to constitute a condition precedent, the proper course is to plead *non assumpsit*, and give the special matter in evidence. (7)

[P. 387.] Where a defendant, in an action for a tailor's bill, pleaded that buttons and button holes of materials, rendered illegal by stats. 10 Will. 3. c. 2. and 6 Anne, c. 8, had been used on the garments supplied by the plaintiff, the court would not allow that plea to stand with another plea, but compelled the defendant to make his election between the two. (8)

[P. 388.] To a declaration in *assumpsit* founded on mutual promises to marry within a reasonable time, it is a good plea, that after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise and the performances thereof. (9)

[P. 388.] To a declaration for goods sold and delivered, and work done, and materials provided at the defendant's request, a plea, that the goods were sold to the defendant, as the agent and broker of F. and M., to whom the plaintiff consigned the goods, and that the work and materials were done and provided in and about the shipping and consigning of the goods to F. and M., is bad, as not shewing, that the work and materials were not done and provided on the defendant's credit. (10)

[P. 389.] To an action of *indebitatus assumpsit* for stock sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted, it was pleaded, that the stock alleged to be caused to be transferred was so caused to be transferred by virtue of an agreement with the plaintiff for the transfer of the same in consideration of 453*l* 5*s*., to be therefore paid to the plaintiff for the same, and that at the time of the making of such agreement, the plaintiff was not actually possessed of or entitled to the stock in his own right, &c., by means whereof the said contract became and was null and void:—It was holden, that the plea was no answer to the action, and that the contract was not within stat. 7 Geo. 2. c. 8. s. 8. (11)

[P. 389.] A declaration stated, that the defendants bought of the plaintiff a quantity of

(1) *Chisman v. Count*, 2 M. & G. 307.

(2) *Dynes v. O'Neill*, 1 Crawford & Dix (Irish), 329.

(3) *Mondel v. Steele*, 8 M. & W. 640. 1 Dowl. P. C. N. S. 155.

(4) *Whitehead v. Barron*, 2 M. & Rob. 248.

(5) *Hughes v. Barker*, 1 Dowl. P. C. N. S. 80.

(6) *Kemble v. Mills*, 1 M. & G. 757.

(7) *Ibid*.

(8) *Goodman v. Morrell*, 1 Dowl. P. C. N. S. 283.

(9) *King v. Gillett*, 7 M. & W. 55.

(10) *Crawshaw v. Barry*, 1 M. & G. 235.

(11) *Mortimer v. McCallan*, 7 M. & W. 30.

linseed to be worked by them within a specified time, and to be paid for in ready money, or by the defendant's acceptance at two months; that the plaintiff tendered the linseed to the defendants, who, although requested, refused to pay in ready money, or to give their acceptance, and discharged the plaintiff from tendering a bill for that purpose. The defendants pleaded, 1st, that they were not requested to pay for the linseed in ready money, or give their acceptance; 2dly, that they did not refuse to give their acceptance, or discharge the plaintiff from drawing upon them: — It was held, that the pleas were bad, the averments traversed being immaterial. (1)

ments traversed are immaterial.

[P. 389.] To an action for money paid, the defendant pleaded, 1st, that she was an alien, and that she requested the plaintiff to purchase an estate for her benefit; that he bought the estate, and paid the money in his own name, in order to enable her to have the benefit of it, but had retained possession of it himself; 2dly, that the money was paid in furtherance of an illegal object, and in contravention of the Alien Act: — It was held, that the pleas raised distinct matters of defence; and it seems, that the first plea would have been bad on demurrer. (2)

When pleas raise distinct matters of defence.

[P. 389.] To an action of *assumpsit* for money paid, it was pleaded, that the money was paid by the plaintiff as agent for the defendant in the purchase of railway shares; that the plaintiff thereupon received certificates of the title of the said shares, and ought to have delivered them to the defendant, but refused to do so, and afterwards wrongfully converted them to his own use, whereby the shares and certificates became lost to the defendant: — It was held, that the plea was bad, inasmuch as it either amounted to the general issue, or alleged matter, that was no avoidance of the contract, but only ground of a cross-action. (3)

Where the plea is bad, from its amounting either to the general issue, or alleging matter which is only ground of a cross-action.

[P. 390.] Under a plea of *non assumpsit* to a count on an account stated, the defendant may shew, that accounts between the plaintiff and himself, the correctness of which he has admitted, were in fact incorrect. (4)

[P. 390.] In an action of *assumpsit* upon a decree obtained against the defendant in the court of sessions in Scotland, the latter pleaded, that he was not, at the time of the commencement of the suit in the Scotch court, or at any time during the proceedings thereon, in Scotland, or at any place within the jurisdiction of the said court; nor was he at any time before the making or pronouncing of the decree in any manner, according to the course and practice of the said court, notified; nor did he then know of the proceedings, so that he could or might by himself, his protector, attorney, or agent, appear or plead, or in any way defend himself in the said action; nor did he appear to any of the proceedings, whereby the said decree was and is contrary to natural justice, and wholly inoperative and void: — It was held, that the plea was insufficient, and that the statement in the plea, that the decree was contrary to natural justice, &c., was to be regarded as a mere conclusion of law from the facts previously alleged, and consequently was not traversable. (5)

Under a plea of *non assumpsit*, defendant may shew, that the accounts between himself and plaintiff were incorrect. Insufficient plea, to an action upon a decree.

[P. 400.] To *assumpsit* for goods sold, &c., it is a good plea in bar of further maintenance, &c., that, after action commenced, the plaintiff took the benefit of the Insolvent Debtors' Act (6), and assigned to the provisional assignee, whereby the plaintiff's right of action vested in such assignee; but a replication to such plea, that, after assignment, the provisional assignee had notice of such suit, and permitted it to continue, until he afterwards (and after the above plea pleaded) assigned to other assignees appointed by the Insolvent Debtors' Court; that such assignees afterwards had notice of the suit, and assented to its being continued for the benefit of the creditors; and that it is so continued with their assent and on their behalf as such assignees: — was held bad on general demurrer. (7)

REPLICATION. Where replication for goods sold, &c., will be bad.

ATTORNEY.

[P. 406.] If an attorney be about to quit England, he may be arrested pursuant to stat. 1 & 2 Vict. c. 110. s. 3, notwithstanding his being an officer of the court. (8)

[P. 429.] If an attorney conducting a suit, commit an act of negligence by which all the previous steps become useless in the result, he cannot recover for any part of the business done. Whether or not, in such a case, the work became wholly useless by the plaintiff's fault, is a question for the jury (9); and such failure of the work is a defence admissible *non assumpsit*, in an action upon the attorney's bill: thus, in *Bracey v. Carter* (10) Mr. Justice Patteson observed, "It is a defence on *non assumpsit*, that no benefit was received; and if the plaintiff has received no benefit ultimately, he has never been benefited. The question on that point was for the jury."

GENERAL PRIVILEGES. An attorney may be arrested under stat. 1 & 2 Vict. c. 110. DUTIES OF AN ATTORNEY. An attorney negligently conducting a cause, cannot recover costs for business done.

(1) *Spaeth v. Hare*, 1 Dowl. P. C. N. S. 5.

(2) *Bailey v. Cathrey*, *ibid.* 456.

(3) *Francis v. Baker*, 10 A. & E. 642.

(4) *Thomas v. Hawkes*, 8 M. & W. 140.

(5) *Cowan v. Braidwood*, 1 M. & G. 882.

(6) Stat. 7 Geo. 4. c. 57.

(7) *Swan v. Sutton*, 10 A. & E. 623.

(8) *Thomson v. Moore*, 1 Dowl. P. C. N. S. 283.

(9) *Bracey v. Carter*, 12 A. & E. 373.

(10) *Ibid.*

LIABILITIES OF AN ATTORNEY.

In an attachment against an attorney for disobeying a rule of court, it is sufficient if it can be collected, that such rule has been personally served.

An attachment will not be issued for not delivering papers, unless the demand be made by an authorised person.

PROCEEDINGS FOR THE RECOVERY OF COSTS.

Not requisite for an attorney plaintiff to deliver a signed bill of costs a month before action brought, where the defendant has been admitted an attorney after the bill became due. Taxation of costs will not be recovered, because some of the charges were too low, and others omitted in the original bill.

EVIDENCE.

An order to refer an attorney's bill to taxation and an *allocatur* thereon, is sufficient evidence of the business having been done.

Insufficient evidence of a tender.

CONDITIONS OF SALE.

If a particular custom be notorious, it will be assumed, as having been ingrafted on the contract.

When a purchaser has and has not a right to concealed property in a purchased bureau.

Where replication in an action against vendors for breach of the conditions of sale does not introduce new matter.

RIGHTS AND LIABILITIES OF BIDDERS.

Where a purchaser is not entitled to the costs of investigating a title,

[P. 485.] On a motion for an attachment against an attorney for disobeying a rule of court, it is sufficient if it can be collected from the affidavit of service, that such rule has been personally served; it is not necessary that the words "personal service" should be used in the affidavit. (1)

[P. 448.] The court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless it appear, that the demand was by a party duly authorised to make it, and that the authority of the party making the demand was shewn at the time of making it. (2)

[P. 465.] It is not necessary, that an attorney plaintiff should deliver a signed bill of costs a month before action brought, where the defendant has been admitted an attorney after the bill became due, but before the commencement of the action. (3)

[P. 488.] Where, in an attorney's bill of costs, several items, not for fixed fees, but of a discretionary nature, had no charges set opposite to them, and others were charged, some too low and some too high; and the master, on taxation, reduced the latter to the proper scale, but declined to increase the former, or to insert the charges omitted altogether; the court refused to review the taxation. (4)

[P. 488.] An order to refer an attorney's bill to taxation, and an *allocatur* thereon, after attendance on the master by the party's new attorney, are sufficient evidence of the business having been done, though there be not the usual undertaking to pay, in the order. (5)

[P. 492.] To a declaration in *assumpsit* for an attorney's costs, in an action commenced by him against the defendant, the defendant pleaded, that he was always ready and willing to pay a just and reasonable sum in satisfaction of the demand, and that before the commencement of the suit, he offered to pay such just and reasonable sum: it was proved, that he had offered to pay the costs when the bill was taxed: — It was held that such evidence did not support the plea, and that the plaintiff was entitled to a verdict. (6)

AUCTION.

[P. 494.] The plaintiff was employed to sell ground rents by auction, on the terms of receiving a commission of one *per cent.* "on sale." After he had advertised the sale, but before the day of sale, the defendant sold the ground rents by private contract. The auctioneers proved the custom of the trade to be, that after an auctioneer was employed and the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency. Upon such facts the question left to the jury was, whether this custom was so notorious, that the defendant must have known it, and that if so, it was ingrafted in the contract. (7)

[P. 497.] A person purchased at a public auction a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew, that the bureau contained any thing whatever: — It was held, that if the buyer had express notice that the bureau alone, and not its contents, if any was sold to him; or if he had no reason to believe, that any thing more than the bureau itself was sold, the abstraction of the money was a felonious taking and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny. (8)

[P. 497.] On the sale by auction of certain property, the conditions provided, that the vendors should, within twenty days after the sale, deliver an abstract of title, and that all objections thereto which should not be taken in writing within ten days afterwards, should be considered as waived. In an action by the purchaser against the vendors for breach of the conditions of sale, the latter pleaded that they, within twenty days after the sale, delivered an abstract, but that the plaintiff did not, within ten days afterwards, take any objection to the title in writing. The plaintiff replied, that although the defendants did within twenty days deliver an abstract, yet that they did not by the said abstract disclose "a good and sufficient title," and that the plaintiff did, within ten days after the delivery of the abstract, take objections to the title in writing, concluding to the country: — It was held, that the replication did not introduce new matter, but amounted to a traverse of the latter allegation in the plea, and therefore properly concluded to the country. (9)

[P. 509.] A purchaser under a decree having obtained a conditional order to confirm the sale, applied to the plaintiff's solicitor for the abstract of title and title deeds, which the latter gave him, stating, that he (the purchaser) was not entitled to them "until after the expiration of the eight days." Afterwards, and before the sale was absolutely confirmed, the biddings were opened: — It was held, that under the circumstances, the purchaser was not

(1) *Short v. Smith*, 1 M. & G. 211.
(2) *Doe d. Hickman v. Hickman*, *ibid.* 566.
(3) *Windsor v. Herbert*, 7 M. & W. 375.
(4) *Eyre v. Shelley*, 8 *ibid.* 154. 1 Dowl. P. C. N. 8. 83.

(5) *Wilson v. Knapps*, 2 M. & Rob. 161.
(6) *Filmer v. Burnaby*, 9 Dowl. P. C. 465.
(7) *Rainy v. Vernon*, 9 C. & P. 559.
(8) *Merry v. Green*, 7 M. & W. 623.
(9) *Smith v. Tanner*, 1 M. & G. 802.

entitled to the costs of investigating the title, and preparing and submitting a case for the opinion of counsel thereon. (1)

[P. 511.] On sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney subscribing himself as "agent for the said S. S.," the vendor. The purchaser paid his deposit to the attorney, who gave a receipt signed by himself as "agent for S. S." The sale going off through the vendor's default, and the deposit money not being returned, it was holden, that the purchaser could not bring an action of money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor. (2)

and preparing and submitting a case for the opinion of counsel thereon.

THE DEPOSIT.

Where payment of the deposit to an attorney, is payment to the vendor.

BANKRUPTCY.

[P. 608.] Stat. 6 Geo. 4. c. 16. s. 127. does not extend to the case where a trader has twice become bankrupt and obtained certificates, not paying 15s. in the pound under the last commission, but both bankruptcies and certificates are prior to the statute. In that case, therefore, the after acquired effects do not vest in the assignees under the second commission, and the act does not prevent the assignees under a third commission from claiming property of which the bankrupt has had the reputed ownership within sect. 72. since the second commission; but if the second certificate were subsequent to May 2. 1825, when the act took effect as to certificates, then sect. 127. will apply. (3)

[P. 608.] Whether a trader was, at the time of his bankruptcy, the reputed owner of particular property, is a question of fact depending upon a consideration of all the circumstances attending the possession of such property.

Where, therefore, in trover by the assignees of A., a bankrupt, for a policy of insurance, the defendants pleaded not guilty, and that the plaintiffs were not possessed as assignees; and at the trial it appeared, that in 1836 the policy had been deposited by A. with the defendants, as a security for an advance of money; that in March, 1837, A. became embarrassed, and a meeting was called of his creditors, at which a list of his debts was read aloud and handed round the room, which list contained a statement, that the policy in question was deposited with the defendants as a security for 3000*l.*, from which sum 1900*l.*, the estimated value of the policy, was deducted, leaving the defendants creditors for the balance of 1800*l.*; that on the 15th of July, 1837 (the fiat being granted on the 27th), an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, at the same time stating, that the policy had been deposited with the defendants; that the insurance company kept a book for the purpose of entering written notices of assignment and deposits of policies, which book contained no such entry with respect to the policy in question, and that the insurance office paid no regard to a verbal notice:—It was held, that a direction, — that the defendants had not got rid of the apparent ownership of A. by what passed at the meeting of the creditors, and by the conversation at the office, not followed up by a notice in writing, — was wrong, it being a question for the jury whether, under those circumstances, A. was the reputed owner of the policy at the time of his bankruptcy. (4)

[P. 611.] Goods were taken under a *fiery facias* as the goods of Sophia W., and on an issue directed to try whether the goods were the property of J. B. it was proved, that the goods, prior to 1836, belonged to Martin W., when they were distrained for rent, and the sum for which they were distrained paid in the name of Sophia W., with the money of the plaintiff; in 1837 Martin W. became bankrupt, and the plaintiff paid 128*l.* to the official assignee for Martin W.'s interest in the goods; early in 1839 Martin W. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods; in November, 1839, Sophia W. executed an assignment of the goods to the plaintiff, and in March, 1840, the goods were seized under a *fiery facias* against Sophia W.; the goods having always remained in the possession of Martin W. as the ostensible owner of them, and Sophia W. never having been in possession of them:—It was held, that on these facts J. B. had made out his property in the goods, and that as Sophia W. had never been in the possession of the goods, and never could have gained false credit by them, there was nothing from which the jury ought to infer, that the assignment was fraudulent; that the fact, that the assignment was made at Martin W.'s house was immaterial, and that it was also immaterial, that no possession of the goods had been delivered by Sophia W. to the plaintiff, as the right to them could pass by the execution of the deed. (5)

[P. 639.] Stat. 2 & 3 Vict. c. 29. has not rendered valid executions on judgments on warrants of attorney executed by seizure, after a secret act of bankruptcy, but not completed by sale of the goods prior to the issuing of the fiat. (6)

REPUTED OWNERSHIP.

Stat. 6 Geo. 4. c. 16. s. 127. does not extend to the case where a trader has twice become bankrupt, and obtained certificates.

Where the trader was at the time of his bankruptcy the reputed owner of a particular property, is a question of fact.

Where a bankrupt could never have gained a false credit by the possession of goods.

PROTECTED AND UNPROTECTED TRANSACTIONS.

Where stat 2 & 3 Vict. c. 29. has not rendered valid executions on judgments on warrants of attorney.

(1) *Walsh v. Walsh*, 1 Crawford & Dix (ish), 249.

(2) *Barnford v. Shuttleworth*, 11 A. & E. 926.

(3) *Benjamin v. Belcher*, *ibid.* 350.

(4) *Edwards v. Scott*, 1 M. & G. 962.

(5) *Burling v. Paterson*, 9 C. & P. 570.

(6) *Whitmore v. Robinson*, 1 Dowl. P. C. N. S. 135.

Where execution protected by stat. 2 & 3 Vict. c. 29.

Judgment of Mr. Baron Alderson in *Edmonds v. Lawley*.

ACTIONS BY ASSIGNEES.

Where right of action passes to assignees under an Irish commission of bankruptcy.

When warrant of attorney is not valid as against the assignee of a bankrupt.

Amendment of proceedings by making the official assignee a party.

Where bankrupt makes default in proceeding with a contract, and the parties with whom the contract is made seize his tools, &c. after an act of bankruptcy.

Where assignees are not entitled to demand back money lodged in the hands of an arbitrator.

Where trover lies by assignees of a bankrupt against a creditor by judgment on a warrant of attorney.

When assignees cannot recover a policy of insurance.

THE PLEADINGS.

[P. 639.] An act of bankruptcy having been committed on the 6th of July, a *bond fide* execution was issued on the 8th, under which the goods of the bankrupt were levied. On the 19th of July stat. 2 & 3 Vict. c. 29. was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees: — It was holden in *Edmonds v. Lawley* (1), that this execution was protected by the statute, Mr. Baron Alderson observing, "At the time that the act passed the state of things was this, an act of bankruptcy had been committed, upon which a fiat might at some future period be taken out, but none had then been issued; intermediately a *bond fide* execution had been levied. Under the old law the creditor would have had the property to satisfy his debt, subject to its being divested in case a fiat issued, overruling its execution within two months. The legislature seems to have thought that that was not a very just position for the creditor to be placed in, and they say that that shall not take place in future. I think that by thus construing the act, we give it a prospective and not a retrospective operation."

[P. 669.] Under the Irish Bankrupt Act (2) the right of suing in an English court upon a contract made by the bankrupts in England with a person resident in England passes to the assignees under an Irish commission of bankruptcy. (3)

[P. 669.] Under stat. 3 Geo. 4. c. 39. ss. 1 & 2, a warrant of attorney is not valid as against the assignees of a bankrupt, unless it be filed, or judgment be signed upon it, within twenty-one days after its date, although the petitioning creditor's debt was not contracted until after the expiration of twenty-one days. (4)

[P. 672.] To a *scire facias* by the assignees of a bankrupt on a judgment, the defendant pleaded, 1st, denial of the bankruptcy; 2d, satisfaction to the bankrupt, on which plea issues were joined. The court permitted the proceedings to be amended on payment of costs, by joining the official assignee (who had been inadvertently omitted as a co-plaintiff), though the application had been delayed a year and a half after the issuing of the writ, the defendant being allowed to plead *de novo*. (5)

[P. 674.] A contract under seal by a trader to execute certain works for the defendant contained a stipulation, that if the contractor should become bankrupt or insolvent, or should from any other cause (not arising from the act of the defendant) be prevented from or delayed in proceeding with the works, it should be lawful for the defendant to give a notice to the contractor requiring him to proceed regularly with them; and in case the contractor should for seven days after the notice, make default in proceeding, it should be lawful for the defendant to employ others to complete the work at the contractor's expense; and that all advances made by the defendant, on account, before such default, should be taken as full payment for all the work done by the contractor; and that all the balance due to him, and all tools and materials then delivered for, and being upon the works should, upon such default, become the absolute property of the defendant; and that all materials brought and left at the works by the contractor to be permanently used on or about the same should, from the time of being so brought and left, be considered as the property of the defendant, and should not be removed without his consent. The contractor having made default in proceeding with the work, the defendant, on 11th April, duly served him with notice to proceed. On 17th April the contractor committed an act of bankruptcy: — It was held, that the defendant could not, on 19th April, take possession of the tools and materials left by the bankrupt upon the work at the time of the bankruptcy, because the title of the assignees was complete by relation on the 17th. (6)

[P. 675.] Where in a submission to arbitration by an order of Nisi Prius in an action between A. and B., it was stipulated, that a certain sum of money should be placed by B. in the hands of C., the arbitrator, to abide the event of the award; and B., after placing the sum in the hands of C., became a bankrupt: — It was held, that the submission was not revoked, nor were the assignees of B. entitled to demand back the money. (7)

[P. 675.] Trover lies by the assignee of a bankrupt against a creditor by judgment on a warrant of attorney to whom a sheriff has paid over the proceeds of a sale of goods of the plaintiff, seized prior to the act of bankruptcy under a writ of execution on such judgment, and sold after the act of bankruptcy, without notice to the sheriff or execution creditor of such act of bankruptcy. (8)

[P. 676.] Assignees of a bankrupt cannot recover in trover a policy of insurance on life, effected by the bankrupt, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him. And an instrument so deposited, is not in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of stat. 6 Geo. 4. c. 16. s. 72. (9)

[P. 679.] In trespass *quare clausum fregit*, the defendants sought to plead first, not

(1) 6 M. & W. 285. 8 Dowl. P. C. 234.

(2) Stat. 6 & 7 Will. 4. c. 14.

(3) *Ferguson v. Spencer*, 1 M. & G. 987.

(4) *Everett v. Wells*, 2 *ibid.* 269.

(5) *Holland v. Phillippe*, 10 A. & E. 149.

(6) *Rouch v. Great Western Railway Comp.* 1 *ibid.* N. S. 51.

(7) *Taylor v. Marling*, 2 M. & G. 55.

(8) *Hudson v. McAllen*, 1 Longfield & Townsend (Irish), 299.

(9) *Gibson v. Overbury*, 7 M. & W. 555.

guilty; secondly, not possessed; thirdly, a plea stating that one T. was seised in fee of the close, who demised to B., and after stating various demises, that one F. demised to H., who became bankrupt, and that the defendants entered as his assignees; fourthly, a like plea, stating, however, that H. mortgaged to one R., and continued in possession as tenant to R., and that the defendants entered as assignees of H. who had become bankrupt; fifthly, a like plea to the fourth, only stating that H. and R., to defraud the creditors of H., demised to the plaintiff: — It was held, that those pleas were not in contravention of the statute of Anne, and might be pleaded, (1)

Where pleas are not in contravention of the statute of Anne.

[P. 679.] Under stat. 6 Geo. 4. c. 16. s. 8., which enacts, that a petitioning creditor illegally compounding with the bankrupt, shall forfeit his debt, such forfeiture takes effect for the benefit of the creditors under the commission, and cannot be enforced, if there be no longer a commission subsisting. Neither can bills of exchange, if given to the petitioning creditor by way of such illegal composition, be enforced by him; but if, since the agreement was executed, no further proceedings have been taken in the bankruptcy, he may sue the bankrupt on the original consideration.

Requisites of a plea, when a petitioning creditor has illegally compounded with the bankrupt.

In pleading such illegal composition to an action on the original debt, it must be shewn, that the original fiat was proceeded with, or a new one issued, after the composition: and if the illegal composition be not pleaded with sufficient certainty by alleging, that the defendant, being indebted to the plaintiff and others, became bankrupt; that a fiat issued on the plaintiff's petition; that, the fiat being in force, and the defendant still indebted to the plaintiff and the said others, and before the defendant was adjudged a bankrupt, it was, contrary to the statutes of bankruptcy, agreed between the plaintiff and the defendant, without the consent of the said other creditors, that the plaintiff should abandon the fiat, and the defendant, in consideration thereof, should pay to him a sum reducing his debt to 90*l.*, and give him bills for the residue; and that, in pursuance of such agreement, the defendant did afterwards, viz. on &c., pay the plaintiff the sum &c., and give him bills for the residue, which be plaintiff received in satisfaction of such residue. (2)

Quere, Whether such illegal composition be sufficiently shewn by stating, that the agreement was to be executed in order that and whereby the plaintiff might receive more in the pound than the other creditors; that when it was executed, the fiat remained in force; that the defendant continued indebted to the plaintiff and the said other creditors; and that he plaintiff received the payment and securities in satisfaction &c., whereby he might receive more in the pound on his debt than the said other creditors. (3)

[P. 679.] In *assumpsit* by the assignees of a bankrupt for goods sold and delivered by he bankrupt, with counts for money paid, had, and received, and on an account stated; he defendant pleaded by way of set-off, that before notice of any act of bankruptcy, and before the issuing of the fiat, and before action brought, the defendant gave credit to the bankrupt, by accepting certain bills of exchange for his accommodation and at his request, without any consideration or value; which said bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given were kely to end in debts from the bankrupt to the defendants; and that afterwards, and before the commencement of the action, the defendant paid the said bills: — It was held to be good set-off under stat. 6 Geo. 4. c. 16. s. 50., on the ground, that a mutual credit was shewn, and that the assignees could not reply a fraudulent delivery of the goods. (4)

Set-off under stat. 6 Geo. 4. c. 16. s. 50. will be holden good, if it shew a mutual credit.

[P. 688.] In *trover* by the assignees of a bankrupt, the defendant pleaded, that before the bankruptcy, he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought: to which it was replied, that it was corruptly, and against the form of the statute, &c., agreed between the defendant and the bankrupt, that the latter should pay the defendant for the loan of the money 10 per cent.: — It was held, on special demurrer, that the averment of the contract being against the form of the statute, was not sufficient allegation that it was illegal; and that the replication was bad, for not alleging ther that the contract was made before stat. 7 Will. 4. & 1 Vict. c. 80. and 2 & 3 Vict.

When replication bad for not alleging that a contract was made previously to stat. 7 Will. 4. & 1 Vict. c. 80. and 2 & 3 Vict. c. 37.

37. came into operation, or that it was excepted from the provisions of those acts. (5)

[P. 694.] A defendant who has become bankrupt and obtained his certificate since a fiat, may apply to set aside a verdict against him, on the ground, that no notice of fiat has been given. (6)

ACTIONS BY BANKRUPTS.

Where bankrupt can apply to set aside a verdict against him.

[P. 694.] A. agreed in writing with B. and C., on behalf of themselves and D. as partners in the business of type-founders, faithfully to serve them, and the survivor of them, for seven years as their foreman, and not to engage in trade on his own account for that period without their consent; and B. and C. agreed to pay him wages after the rate of 3*s.* weekly, as long as he should serve them faithfully: — It was held, that the right of action for a breach of this agreement, by the dismissal of A. from their service without

Right of action for the dismissal of a foreman without a reasonable cause, does not pass to assignees.

(1) *Pym v. Grazebrook*, 1 Dowl. P. C. S. 489.

(2) *Davis v. Holding*, 11 A. & E. 710.

(3) *Ibid.*

(4) *Russell v. Bell*, 8 M. & W. 277. 1 Dowl. P. C. N. S. 107.

(5) *Turquand v. Moseden*, 7 M. & W. 504.

(6) *Shepherd v. Thompson*, 1 Dowl. P. C. N. S. 345.

reasonable cause, did not pass to the assignees of A. on his bankruptcy; the contract relating to the employment of the personal skill and labour of the bankrupt, and the damages for the breach of it being compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate. (1)

Where debt does not pass to assignees under the bankruptcy of a husband.

[P. 695.] *Assumpsit* by husband and wife for money lent to the defendant by the wife, whilst she was sole and unmarried. Plea, that B., the husband, became bankrupt, and that his assignees were duly appointed, and accepted the appointment before the commencement of the suit; by reason whereof the assignees became entitled to the supposed debt and causes of action in the declaration mentioned. Replication, that before the intermarriage of the plaintiff, and whilst C., the wife, was sole and unmarried, to wit, on &c., by an indenture then made between the said B. of the first part, the said C. of the second part, and T. H. and R. T. J. of the third part (being a settlement entered into before the intermarriage of the plaintiff), the sums of money in the declaration mentioned, were assigned to the said T. H. and R. T. J. to have, receive, and recover, and to hold the same to them, upon certain trusts in the indenture mentioned, in favour of the said C., and for her sole and separate use during her life, and for the child or children of the intended marriage. The replication then stated, that the plaintiffs appointed T. H. and R. T. J. as their attorneys to recover the said sums from the defendant, for the purpose of holding the same upon the trusts aforesaid, and that the action was commenced and prosecuted in the names of the plaintiff at the instance and by direction of the said T. H. and R. T. J., by virtue of the power given to them, and for the purpose of recovering, receiving, and holding the said sums of money as the trustees named in the said indenture, and upon the trust in favour of the said C., and of the children of the said marriage, and not for the use or benefit of the plaintiff B., or of his creditors under the fiat: — It was held on demurrer, that the replication was good, and that the debt did not pass to the assignees under the bankruptcy of the husband, but might be sued for by the husband and wife. (2)

EVIDENCE.

Where depositions are evidence of the act of bankruptcy, as against a petitioning creditor.

Admissibility of declarations of bankrupt.

[P. 700.] Where a petitioning creditor, having ascertained, that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat: — It was held, that the deposition then made was evidence of the act of bankruptcy as against such creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue. (3)

[P. 702.] In an action by the assignees of a bankrupt to recover property of the bankrupt, a letter written by him during his absence from home, stating, that he was absent to avoid two writs that were out against him, is admissible evidence for the plaintiffs of an act of bankruptcy, without proof, that there was in fact any writ issued, or any pressure of creditors. In order to make the declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential, that the declaration and act of bankruptcy should be contemporaneous. (4)

Where petitioning creditor is not a competent witness.

When bankrupt a competent witness.

[P. 705.] In an action brought by a bankrupt against his assignees to try the validity of the fiat, the petitioning creditor is not a competent witness to prove the debt due to him, although he has assigned it over to a third person. (5)

[P. 707.] A trader who has obtained his certificate under a commission of bankruptcy issued against him in Ireland, under stat. 6 & 7 Will. 4. c. 14., is a competent witness to support an action brought in England by his assignees for a debt alleged to have been due to him before his bankruptcy; and to negative a set-off upon a debt alleged to have been due from the witness to the defendant before the witness became bankrupt. (6)

Where bankrupt a competent witness to prove that an assignment was made for a valuable consideration.

[P. 707.] In an action against the assignees of a bankrupt for seizing goods alleged to have been assigned to the plaintiff by the bankrupt before his bankruptcy, the bankrupt is a competent witness for the plaintiff to prove, that the assignment was made for a valuable consideration, and in consequence of pressure, although the defendants rely on the assignment as constituting in itself an act of bankruptcy. In such action, where no notice has been given of disputing the trading, act of bankruptcy, or petitioning creditor's debt, the petitioning creditor (having assigned his debt, and executed a release to the assignees) is a competent witness for them to prove an act of bankruptcy prior to that on which the adjudication took place, for the purpose of over reaching the alleged assignment to the plaintiff. (7)

Where petitioning creditor not a competent witness.

Witness out of the jurisdiction of the court.

[P. 708.] To let in the examination of a witness taken before the master, as evidence under stat. 1 Will. 4. c. 22., on the ground, that the witness is abroad, evidence must be given to satisfy the judge, that the witness is actually out of the jurisdiction of the court at the time of the trial; and it will not be sufficient to prove, that on the evening before the trial the witness was with his luggage on board a ship bound for Montreal, the ship being then three quarters of a mile below Gravesend waiting for her captain to come on board. (8)

(1) *Beckham v. Drake*, 8 M. & W. 846.

(2) *Parham v. Hurst*, *ibid.* 743.

(3) *Gardner v. Moulst*, 10 A. & E. 464.

(4) *Rouch v. Great Western Railway Comp.*
1 A. & E. N. S. 51.

(5) *Carruthers v. Graham*, 2 M. & Rob. 368. 1 C. & Marsh. 5.

(6) *Ferguson v. Spencer*, 1 M. & G. 967.

(7) *Smith v. Groom*, 2 M. & Rob. 388.

(8) *Carruthers v. Graham*, 1 C. & Marsh. 5. 2 M. & Rob. 368.

BARON AND FEME.

[P. 715.] The general rule is, that a wife cannot bind her husband by her contract except as his agent; but in cases of orders given by the wife in those departments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband) ought to infer agency, if nothing appear to the contrary; but if the order be excessive in point of extent, and such as the husband never would have authorised, that will alone be sufficient to repel the inference of agency. If it be proved, that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence, that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers' from her separate funds, also goes to prove, that the wife was not acting as the agent of the husband; and the fact, that the husband sold some of the goods which were supplied to the wife, and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband. (1)

[P. 719.] A deed of separation between husband and wife contained a covenant by the wife and her trustees that she, her executors or administrators or the trustees, or some or one of them, should and would at all times save, defend, and keep harmless and indemnified the husband from and against the debt or debts, sum or sums of money, which she the wife had then, at the time of the making of the indenture, contracted, or which she should at any time thereafter, during the separation, contract:—It was decided, that this covenant included debts previously contracted by the wife for necessities while living with her husband. To an action on this covenant, assigning a breach in not indemnifying against a debt of the wife, the defendant pleaded, that the alleged debt in the declaration mentioned, was not contracted within the true intent and meaning of the covenant, concluding to the country:—It was holden bad, as being a traverse of matter of law. (2)

[P. 727.] Where A. and his wife I., who had property settled to her separate use, made her promissory note, and A. having died before payment of the note, I., his widow, being called on for payment, said, "It is a just debt, and I will pay it as soon as I am able;" and I. afterwards married the defendant; but the fact of separate property did not appear upon the pleadings:—It was held, that there was no sufficient consideration in this promise appearing on the pleadings to support an action of *assumpsit*. (3)

[P. 741.] A married executrix being, with her husband and co-executor, a plaintiff in a suit in Chancery, applied for liberty to proceed in the suit in conjunction with her co-executor as a feme sole, upon an affidavit stating, that her husband had been transported, but without setting forth the term of his transportation, or whether there had been a conviction for felony or not:—It was held, that such affidavit was insufficient: and it seems, that a feme covert, whose husband has been transported for a limited term of years, will not be allowed to sue in equity as a feme sole. (4)

[P. 745.] If in *assumpsit* against A., and B. his wife, the declaration allege, that the defendants promised, without stating whether the promises were made before or during the marriage, it will be bad on special demurrer. But where to such a declaration the defendants merely plead (in abatement), that the promises were made by the defendants and C. jointly, and not by the defendants alone, and a verdict is found for the plaintiff on an issue taken upon a replication stating, that the promises were not made to the defendants and C. jointly, the court will presume, for the purpose of supporting the declaration, that the promises were made before the marriage, when a joint liability might be created. And it seems, that a plea in abatement in *assumpsit*, that the alleged promises were made by the defendants and one C., and not by the defendants only, contains a sufficient confession of the promises in the declaration to entitle the plaintiff to judgment after a verdict negating the plea. (5)

[P. 747.] A. (a married woman, and executrix), with her husband and B. (her co-executor), filed a bill to raise charges in the testator's will mentioned; the husband was subsequently transported beyond the seas for seven years, leaving A. and B. resident in Ireland. A. was permitted to proceed in the cause, as if she were a feme sole, notwithstanding her coverture, it appearing that it would be for the benefit of the parties interested that she should do so. (6)

ACTS AND CONTRACTS BY AND WITH A FEME COVERT, WHICH BIND THE HUSBAND.

What will be sufficient to repel the inference of agency by the wife.

RESPONSIBILITY OF HUSBAND FOR NECESSARIES.

Where a covenant in a deed includes debts previously contracted by the wife for necessities while living with her husband.

Where a traverse was holden bad, as being a traverse of matter of law.

CONTRACTS MADE BY A WIFE BEFORE COVERTURE.

Insufficient consideration for a promise by a feme covert while a feme sole.

THE DECLARATION.

Incapacities of a feme covert, whose husband has been transported.

If in an action against husband and wife the declaration allege, that the defendants promised, without stating whether the promises were made before or during the marriage, it will be bad.

Where a feme covert of a transported husband, will be allowed to sue as a feme sole.

(1) *Freestone v. Butcher*, 9 C. & P. 643.

(2) *Summers v. Ball*, 8 M & W. 569.

(3) *Ferrers v. Costello*, 1 Longfield & Townsend (Irish), 292.

(4) *Foster v. Everard*, 1 Crawford & Dix (Irish), 135.

(5) *France v. White*, 1 M. & G. 731.

(6) *Farran v. Crosbie*, 1 Crawford & Dix (Irish), 497.

PLEADINGS.

Where plea of payment will be held bad, for not averring, that the wife was authorised to receive payment.

[P. 750.] To a count for work done and attendance given by A., then and still the wife of the plaintiff, for the defendants, and at their request, the defendants pleaded payments made from time to time to the wife, and acceptance by her in satisfaction of the cause of action and damages:—which was held bad for not averring, that the wife was authorised by the plaintiff to receive payment. (1)

BILLS OF EXCHANGE AND PROMISSORY NOTES.

FORM AND OBLIGATION GENERALLY.

"Six months after date, pay without acceptance to the order of J. C. F. 100*l*. value received" is a promissory note.

An instrument which is not a promissory note.

An instrument will not be a promissory note, if no time be stipulated for payment.

Where an instrument is good as a guarantee, but not as a promissory note.

Production by the plaintiff of an I. O. U. signed by the defendant but not addressed, is *prima facie* evidence, that it was given to the plaintiff.

THE STAMP.

What is not a bill of exchange or order for payment of money within the Stamp Act.

THE ACCEPTANCE.

A party who requests another to "lend his acceptance" impliedly engages to take up the bill at maturity.

PRESENTMENT FOR PAYMENT.

Where the holder of a check guilty of *laches*.

Where drawer of a check not damaged by its not being presented for payment, until eighteen days after receipt.

[P. 763.] In *Miller v. Thompson* (2) the plaintiff declared upon an instrument as a promissory note; upon its production it was in the following form:—"Six months after date, pay without acceptance to the order of J. C. F. 100*l*., value received;" the instrument was issued from a branch bank of a joint stock banking company, of which J. C. F. was managing director, and was signed by one T. N. as "for the directors:"—It was held, that the instrument was a promissory note, and that there was, therefore, no variance between the proof and the record, and consequently no amendment necessary under stat. 3 & 4 Will. 4. c. 42. s. 23.

[P. 763.] An instrument in the following form, "At twelve months after date, I promise to pay Messrs. R. and Co. 500*l*., to be held by them as collateral security for any moneys now owing to them by J. M., which they may be unable to recover on realising the securities they now hold, and others which may be placed in their hands by him," is not a promissory note, and cannot be declared on as such. (3)

[P. 763.] A paper was in the following form:—"I, R. J. M., owe Mrs. E. the sum of 6*l*., which is to be paid by instalments, for rent. (Signed) R. J. M.:"—which was held not to be a promissory note, as no time was stipulated for the payment of the instalments. (4)

[P. 765.] An instrument was in the following terms:—"I undertake to pay to R. J. the sum of 6*l* 4*s*. for a suit of, ordered by D. P.:"—It was held, that it was not a promissory note, but good as a guarantee; as the consideration could be collected by necessary inference from the instrument itself. (5)

[P. 766.] The production by the plaintiff of an "I. O. U.," signed by the defendant, but not addressed, is *prima facie* evidence, that it was given to the plaintiff by the defendant; and if the latter wish to rebut the inference arising from its production by the plaintiff, he should shew, that it had been in the hands of some other party. (6)

[P. 795.] A note written by a creditor at the foot of an account, requesting the debtor to pay that account to A. B., which the creditor delivered to A. B. for the purpose of his getting in the money for the creditor, is not a bill of exchange, or order for payment of money within the Stamp Act. (7)

[P. 828.] A party who requests another to "lend his acceptance," impliedly engages to take up the bill at maturity, and to indemnify the acceptor against the consequences of non payment. (8)

[P. 867.] The plaintiffs sold horses to the defendant on the 10th of March, 1840, and in payment the defendant gave a check on his bankers, which the plaintiffs crossed to their own bankers, and paid in to them on the 11th of the same month. The defendant's bankers did not use the clearing-house in Lombard Street, and accordingly the plaintiff's bankers presented the check to the defendant's bankers on the 12th, whereas, otherwise, they would have presented it at the clearing-house on the evening of the 11th. The defendant's bankers had stopped payment on the 12th:—It was held, that the bankers of the plaintiffs had acted in strict accordance with the rules of mercantile law, but that the plaintiffs themselves had been guilty of *laches* in not paying the check to their banker on the 10th, if they received it within banking hours. (9)

[P. 869.] The holder of a banker's check ought to present it for payment within a reasonable time; and it is a question for the jury, on an issue of due presentment, whether this rule has been complied with. Where a check drawn on a country banker, dated 19th of March, was not presented until the 6th of April, and no cause was assigned for the delay, but the drawer had not sustained loss by the non presentment at an earlier period, the drawer was held liable to be sued on the check. (10)

(1) *Offley v. Clay*, 2 M. & G. 172.

(2) 1 Dowl. P. C. N. S. 199.

(3) *Robins v. May*, 11 A. & E. 213.

(4) *Moffat v. Edwards*, 1 C. & Marsh.

16.

(5) *Jarvis v. Wilkins*, 7 M. & W. 410.

(6) *Curtis v. Richards*, 1 M. & G. 46.

(7) *Norris v. Solomon*, 2 M. & Rob. 266.

(8) *Reynolds v. Doyle*, 1 M. & G. 733.

(9) *Alexander v. Burchfield*, 1 C. & Marsh.

75.

(10) *Serie v. Norton*, 2 M. & Rob. 401.

[P. 886.] In *assumpsit* against the drawer and the indorser of a bill of exchange, the issue being, whether or not the defendant had received notice of dishonour, a declaration by him to a party (not the holder), that he should pay the bill, and should not avail himself of the informality of notice, is evidence from which the jury may infer, that the defendant had due notice (1)

[P. 890.] Want of notice of the dishonour of a check on a banker is sufficiently excused, *prima facie*, by alleging, that the banker had no effects of the drawer, and had received no consideration for payment of the check, and that the defendant had sustained no damages by reason of his having no notice of dishonour, at least upon general demurrer. (2)

[P. 897.] A notice of dishonour, which states, that a bill of exchange "has been dishonoured," is sufficient, although it does not state, that the bill has been presented. (3)

[P. 898.] In an action by an indorsee against the payee and indorser of a bill of exchange drawn in England on, and accepted by a French house, both the plaintiff and the defendant being domiciled in England: — It was held, that due notice of the dishonour by the acceptor was parcel of the contract; that the bill, being made payable by the acceptor abroad, was a foreign bill, and the *lex loci contractus* must therefore prevail; and that it was sufficient for the plaintiff to shew, that he had given the defendant such notice of the dishonour and protest, as was required by the law of France. (4)

[P. 898.] In an action by an indorsee against an indorser of a promissory note, the following letter from the plaintiff to the defendant was held to be an insufficient notice of dishonour: — "This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately. My son will be in London on Friday morning." (5)

[P. 900.] A bill of exchange drawn by the defendant was indorsed by him to the plaintiff S. and Co., who carried on business in partnership at Smethwick, four miles from Birmingham, by them to the Birmingham and Midland Counties Bank, and by them to W. It became due on the 17th of August, and was dishonoured. On the 18th W. returned it to the bank at Birmingham, who received it on the 19th. The plaintiff S. had previously given directions at the bank, that all communications for his firm should be made to him at Tremadoc, in Carnarvonshire (in which neighbourhood he was engaged in mining concerns). The bank accordingly, on the 20th of August, sent notice of dishonour by post to S. at Tremadoc, which he received there on the 21st; and by the post of the 22d he sent notice to the defendant: — It was held, that the notice to S., and therefore that to the defendant, was duly given. (6)

[P. 900.] A party being entitled to notice of dishonour of a bill of exchange on the 28th of April, and all the parties living in town, a witness stated, that he put a letter containing the notice of dishonour into the post at 1 o'clock, p. m., on the 28th; the post-mark on the letter was the 29th: — It was held, that if the jury were satisfied, that the letter was put into the post sufficiently early for the party in the ordinary course of the post to have received it on the 28th, it was sufficient, and that its having been delayed in the post office would make no difference. (7)

[P. 907.] A count on a banker's check alleged, that it had been drawn by the defendant upon a banking firm; that it had been presented for payment, and had not been paid; that the bankers had no effects of the defendant; and that the defendant had sustained no damages by reason of his having received no notice of dishonour of the check: — It was held on general demurrer, that the declaration disclosed a sufficient excuse for the want of notice of dishonour. (8)

[P. 931.] In *Billing v. Ries* (9) it appeared, that A. on Tuesday, the 17th of November, asked B. to give him change for a check for 10*l.* 10*s.* drawn by C. on W. and Co., bankers. A. did so, and kept the check till the following Saturday, when he paid it to his bankers'. On Monday the 23d W. and Co. stopped payment, and the check was not paid by them. In the evening of that day B. told A. that the check had been "returned," not telling A. that W. and Co. had stopped payment, a fact which A. did not know. A. gave B. 5*l.* and an O. U. for 5*l.* 10*s.* and took back the check. It was proved, that C. had funds in the hands of W. and Co.: — It was held, that the suppression of the fact by B. that W. and Co. had stopped payment, and the statement by him, that the check had been "returned," amounted to such a fraud upon A., as would entitle him to recover back the 5*l.*, in an action for money had and received; and that, to entitle him to do so, it was not necessary, that he could have given or tendered back the check to B.

[P. 933.] In *assumpsit* by payee against maker of a promissory note, it was pleaded to part, that the note was delivered to the plaintiff for the purpose of his paying, on the

NOTICE OF DISHONOUR.

What is sufficient evidence in an action against drawer and indorser of a bill, for the jury to infer that the defendant had due notice.

Where want of notice on a banker is excused.

Where notice does not state that the bill has been presented.

Where notice of the dishonour and protest may be given in accordance with the law of France.

Insufficient notice of dishonour.

What is due diligence of the notice of dishonour.

Notice of dishonour, if delayed by the post office, will not affect the remitter.

Where the declaration discloses a sufficient excuse for the want of notice of dishonour.

THE CONSIDERATION.

Where the suppression of the fact, that bankers have stopped, upon whom a check has been drawn, will amount to fraud.

Where there appears on the record a sufficient

(1) *Brownell v. Bonney*, 1 A. & E. N. S. 39.

(2) *Kemble v. Mills*, 1 M. & G. 157.

(3) *Stocken v. Collins*, 9 C. & P. 653.

(4) *Rothschild v. Currie*, 1 A. & E. N. S.

(5) *Messenger v. Southey*, 1 M. & G. 76.

(6) *Shelton v. Braithwaite*, 8 M. & W. 252.

(7) *Stocken v. Collins*, 9 C. & P. 653.

(8) *Kemble v. Mills*, 9 Dowl. P. C. 446.

(9) 1 C. & Marsh. 26.

consideration to entitle the plaintiff to judgment.

defendant's account, certain debts of the defendant to his creditors; that the plaintiff took it on the terms and understanding, and for the purpose aforesaid, and then promised the defendant to pay the said debts in manner aforesaid; and that no consideration was received by the defendant or given by the plaintiff for the note. Replication, that the note was made and delivered to the plaintiff, at the request of the creditors, for the purpose of paying them so soon as the defendant paid the note; without this, that the plaintiff promised to pay the said debts as alleged in the plea. Issue joined on the special traverse. At the trial, the plaintiff proved the inducement of his replication, and had a verdict:—It was held, that the issue was a material one; that the evidence entitled the plaintiff to a verdict on such issue; and that there appeared on the record a sufficient consideration to entitle the plaintiff to judgment. (1)

SET-OFF.

Where an issue on the plea of set-off must be found for the plaintiff, because it was pleaded to the whole declaration.

[P. 940.] In an action by a banker as indorsee, against his customer as acceptor of a bill of exchange for 67*l.*, the defendant pleaded to the whole declaration a plea of set-off for money had and received. It was proved, that the banker had a balance of 37*l.* in his hands belonging to the defendant, for which latter amount the banker refused to honour the defendant's check, alleging, that he held the 37*l.* on account of this overdue acceptance:—It was held, that the issue on the plea of set-off must be found for the plaintiff, because it was pleaded to the whole declaration and not pleaded as to 37*l.* only, but that the jury ought to allow the 37*l.* in reduction of the damages. (2)

DECLARATION.

If a check be conclusively given to the clerk of a bank, the principal can take possession of it, and sue the parties.

[P. 942.] A customer of a branch belonging to the London and Westminster Bank having overdrawn his account previous to a quarterly inspection of the affairs of the branch, handed over to the clerk who superintended the business of the branch, and who was his friend, a check for 500*l.*, which was entered to the credit of the customer; the clerk promising that it should not be presented, but should be returned after the inspection was over. This check the customer had obtained from an acquaintance, giving him his own check for the same amount in exchange. It was not returned by the clerk to the customer according to his promise, but was found by the directors of the bank among the papers of the branch in the clerk's portfolio, after he had been discharged from his situation:—It was held, that the directors might recover the amount of the check from the maker. (3)

Notes when given for a fraudulent preference, cannot be enforced.

[P. 943.] An agreement was made between the defendant and the plaintiff and other creditors of the defendant, that the defendant should pay, and that the plaintiff and the other creditors should accept the amount of their debts by certain instalments secured by the defendant's notes; and it was at the same time, without the knowledge or consent of the other creditors, agreed between the plaintiff and the defendant, that the defendant should indorse to the plaintiff a bill accepted by a third party, in order to give the plaintiff a fraudulent preference, and induce him to become a party to the composition: the note being given and the bill indorsed by the defendant in pursuance of this agreement, it was held, that the plaintiff could not sue the defendant even on the notes given for the instalments, although the plaintiff had not enforced or received payment of the acceptance when due. (4)

In an action by indorsee v. drawer, the declaration need not contain any promise to pay.

[P. 943.] In an action by the indorsee against the drawer of a bill of exchange, the declaration need not contain any promise to pay the bill; and the omission is only ground of special demurrer. (5)

Where payment of a promissory note cannot be considered voluntary, and co-surety liable for contribution.

[P. 943.] Where one of two persons, who, as sureties for a third, signed together with the principal a joint and several promissory note, and on the note becoming due, paid the amount, although no demand had been made or action brought against him by the holder:—It was held, that such payment could not be considered voluntary, and that he might sue his co-surety for contribution. (6)

Where an instrument set out upon oyer must be read as forming part of the declaration.

[P. 945.] An instrument set out upon oyer must be read as forming part of the declaration (or other pleading) in which *profert* has been made of such instrument. (?)

PLEADINGS.

Where a plea is bad for not averring, that a release was after the acceptance.

[P. 945.] In an action by the payee against the acceptor of a bill of exchange, the defendant pleaded, that before the bill became due, and whilst the plaintiff was the holder thereof, and before the commencement of the action, the plaintiff released the bill; without alleging, that the release was after the acceptance:—It was held on demurrer, that the plea was bad for not averring, that the release was after the acceptance. (8)

Issuable plea, where the drawer has been twice bankrupt.

[P. 946.] To an action by the indorsee against the acceptor of a bill of exchange, a plea, that the drawer had been twice bankrupt, and that his estate had not paid 1*s.* in the pound under the second fiat, whereby the property in the bill vested in the assignee under the second fiat, and the drawer could make no title by indorsement, is an issuable plea; because, as observed by Mr. Baron Alderson in *Mackay v. Wood* (9), "Any plea must be

Judgment of Mr. Baron Alderson in *Mackay v. Wood*.

(1) *Cole v. Cresswell*, 11 A. & E. 661.

(2) *Barnes v. Butcher*, 9 C. & P. 725.

(3) *Boaquet v. Corser*, *ibid.* 664.

(4) *Howden v. Haigh*, 11 A. & E. 1033.

(5) *Steincher v. Barker*, 1 Dowl. P. C. N. S. 370.

(6) *Pitt v. Purssord*, 8 M. & W. 538.

(7) *Ashton v. Freeston*, 2 M. & G. 1.

(8) *Ibid.*

(9) 7 M. & W. 420, 421.

considered an issuable plea, which, being determined in favour of the defendant, shews that the plaintiff has no right of action. The rule to be collected from the decision of this court in *Humphreys v. Waldegrave (Earl of)* (1) is, that a plea is an issuable plea which tenders some matter, upon which, if issue be taken, the case would be decided upon the merits. The plea, therefore, must be allowed."

[P. 946.] In an action by an indorsee against the acceptor of a bill of exchange drawn by F., and by him indorsed to the plaintiff: it was pleaded, that F. indorsed it in blank, and delivered it to the plaintiff as the agent of one R., to whom F. was indebted, for the purpose and on the terms, that the plaintiff should deliver it to R. on account of the debt; that the plaintiff received it as such agent only, and for such purpose, &c., and without consideration; that the plaintiff detained the bill in breach of his duty and in fraud of R., who claimed the bill, dissented from the action, and required the defendant not to pay the amount to the plaintiff: — It was held after verdict, that as the plea shewed no delivery to the plaintiff as indorsee, it amounted to a constructive denial of the indorsement to him, and was therefore good in substance, though bad on special demurrer. (2)

[P. 946.] In an action by the indorsee against the acceptor, the defendant pleaded, that he had no notice of the indorsement, that he did not promise to pay, and that the plaintiff had not paid the whole consideration. The court refused to set aside the plea, as a nullity upon a motion; but where a plea is clearly frivolous the court will set it aside, although the defendant be not under terms to plead issuably. (3)

[P. 946.] In *assumpsit* by the indorsee against the acceptor of a bill of exchange drawn by B., it was pleaded, that before the making of the bill, to wit, on &c., a commission of bankruptcy under the great seal of Great Britain, was duly awarded against B. and C., then being traders and co-partners, under which they were duly declared and adjudged bankrupts; that B. obtained his certificate under that commission, and was thereby discharged according to the laws concerning bankrupts; that afterwards, and before the making of the bill of exchange, to wit, on &c., B., being a trader subject to the bankrupt laws, and indebted to O. in 100*l.*, became and was a bankrupt, and afterwards, to wit, on &c., a certain other commission of bankruptcy was duly awarded against him on the petition of O., under which he was duly adjudged and declared to be a bankrupt, and O. was duly chosen and appointed, and became assignee of his estate and effects as such bankrupt; that afterwards, to wit, on &c., B. duly obtained his certificate under the last mentioned commission, and that B.'s estate did not then or at any other time produce, after all charges, sufficient to pay the several creditors who had proved their debts under the last mentioned commission, 15*s.* in the pound; that by reason of the premises, the bill of exchange in the declaration mentioned, after the acceptance and delivery thereof by the defendant to B., and before the indorsement thereof by B., became and was the property of O. as such assignee, and B. indorsed the bill without having any right, title, or authority so to do, and the plaintiff was not nor is the legal holder thereof: — It was held on special demurrer, that this plea was bad, on two grounds, first, that the defendant was estopped by his acceptance of the bill payable to B.'s order, from saying, that B. was incapable of transferring the bill by indorsement; and secondly, that the plea ought, even if the defendant could set up such a defence, to have set forth fully all the proceedings in the bankruptcy. (4)

[P. 946.] To an action by the payee against the makers of a promissory note, the defendants pleaded, that there was no consideration for the note, and that it was made subject to the condition, that the defendants should not be called upon to pay the same, if they were not able, but that it should be renewed. There was an affidavit, that the plea was false. The court set aside the plea on the ground of its being false and tricky, and calculated to embarrass the plaintiff. (5)

[P. 946.] In *assumpsit* on a bill of exchange by the last indorsee against an intermediate indorser, the defendant pleaded, that he was induced to indorse the bill by the fraud, covin, and misrepresentation of the plaintiff and two others of the indorsers, and other persons in collusion with them, and without any value or consideration. The plaintiff in his replication traversed the alleged fraud, &c., without replying to the allegation of absence of value and consideration; which, on special demurrer, was held to be good. (6)

[P. 946.] To an action by the assignees of a fourth indorsee against the first indorsee of a foreign bill of exchange, the defendant pleaded, that after the indorsement to the third indorsee, and before the indorsement to the fourth, the bill was refused acceptance, and was protested, and that the defendant had not notice of the non acceptance and protest, and that the said indorsees had notice: — It was held, that *de injuriâ* was a good replication. (7)

[P. 946.] In an action by indorsee against acceptor of a bill of exchange, the defendant

If a plea shew no delivery to the plaintiff as indorsee, it amounts to a constructive denial of the indorsement to him, and is therefore good in substance though bad on special demurrer.

Where in an action by indorsee against acceptor, the court will refuse to set aside the plea as a nullity on motion.

Where plea defective, in not stating the proper title of a party to a bill of exchange, and not setting out the proceedings in bankruptcy.

Where plea will be set aside, because it is false and calculated to embarrass the plaintiff.

Where plaintiff in her replication traverses alleged fraud, without replying to the allegation of absence of value and consideration.

Where in an action by the assignees of a fourth indorsee, *de injuriâ* is a good replication.

Where in an ac-

(1) 6 M. & W. 622.

(2) *Adams v. Jones*, 12 A. & E. 455.

(3) *Horner v. Keppel*, 10 *ibid.* 17.

(4) *Pitt v. Chappelow*, 8 M. & W. 616.

(5) *Mitford v. Finden*, *ibid.* 511.

(6) *Daniels v. Coombe*, 2 M. & G. 347.

(7) *Whitehead v. Walker*, 1 Dowl. P. C.

N. S. 600.

tion by indorsee v. acceptor. replication of *de injuriâ* is a good plea.

Where in an action by indorsee v. acceptor, the replication of *de injuriâ* is improper.

DEBT.

Where there is a sufficient privity between payee v. the maker of a promissory note, to enable the former to support an action of debt.

Debt is maintainable by indorsee v. his immediate indorser.

Debt can be maintained on promissory note, although it do not express, that it is for value received, or for any consideration.

Where plea bad, because it answers only part of the consideration, though pleaded to the count on the bill generally.

EVIDENCE.

Where the defendant must prove the want of consideration from the plaintiff to C. D.

What is sufficient evidence of the identity of an acceptor.

In an action against the acceptor, proof that the bill was indorsed by the same person who drew it, is sufficient, though a different person from the person in the bill.

Sufficiency of presentment to maintain the affirmative of the issue raised, of the due presentment of the bill in an action against the indorsee.

pleaded that it was accepted for a gaming debt, and that the plaintiff before the indorsement to him had notice thereof; to this *de injuriâ* was replied: — which was held good as special demurrer. (1)

[P. 946.] To an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that after the indorsement to the plaintiff and before the commencement of the suit, to wit, on &c., the plaintiff, for a good and valuable consideration, indorsed the bill to J. W., who from thence, until, and at and after the commencement of this suit was, and still is and remains, the indorsee and holder thereof, and the defendant, from the time of such indorsement to the said J. W., continually hitherto hath been and still is liable to pay the amount of the bill to the said J. W. Replication *de injuriâ*: — It was held on special demurrer, that the plea was in denial, not in excuse, of the breach alleged in the declaration, viz. the non payment of the bill according to the tenor and effect of the acceptance, and therefore that the replication was improper. (2)

[P. 947.] To an action of debt on a joint and several promissory note expressed to be for value received, payable on demand, brought by the payee against the maker, the defendant pleaded, that he and one G. W. made the note, and that it was signed by him at the request of G. W. for the security to the plaintiff of the amount thereof, and that the defendant never had any consideration; to which there was a replication, traversing the denial of consideration: — It was held on demurrer, that there was sufficient privity between the plaintiff and the defendant to enable the former to support an action of debt, for that although the bill was for the security of a collateral debt, the defendant by making it entered into a new, original, and immediate contract with the plaintiff. (3)

[P. 947.] Debt is maintainable on a bill of exchange by an indorsee against his immediate indorser. (4)

[P. 947.] Debt may be maintained on a promissory note, by payee against the maker, though the instrument do not express, that it is for value received, or for any consideration. So on a bill of exchange by drawer, being also payee, against acceptor. (5)

[P. 948.] In debt by the drawer and payee of a bill of exchange for 25*l.* 10*s.* 3*d.* drawn in November "for value received to Michaelmas last," the defendant pleaded, that before the acceptance he held a message, &c., as tenant to the plaintiff at a certain rent, and that the bill was drawn and accepted in payment by anticipation, amongst other considerations, of 12*l.* 10*s.*, part of the said rent not then due, and that before the drawing and acceptance of the bill, the plaintiff assigned the message to J. S., of which the defendant had no notice until after such drawing and acceptance; that after the bill became due, and before the commencement of the suit, J. S. gave notice of the assignment to the defendant, and required and received the 12*l.* 10*s.* rent from him; and that therefore the consideration of the acceptance as respected the 12*l.* 10*s.* wholly failed: — It was holden (after the plaintiff had pleaded over, viz. upon demurrer to the replication), that the plea was bad, on the ground, that it answered only part of the consideration, though pleaded to the count on the bill generally, and that fraud (which was not alleged) was not necessarily to be inferred from the statement in the plea. (6)

[P. 948.] On replication *de injuriâ* to a plea by the acceptor of a bill, that it was accepted for the accommodation of the drawer, and by him indorsed to A. B. without consideration for the purpose of raising money, and by A. B. fraudulently indorsed to C. D. without consideration, and by him to the plaintiff without consideration, the defendant must prove the want of consideration from the plaintiff to C. D. (7)

[P. 949.] In an action on a bill of exchange directed to "Charles Bamer Crawford, East India House," and accepted, C. B. Crawford; a witness, stated, that the acceptance was in the handwriting of C. B. Crawford, and that he was formerly in the India House, but the witness could not tell, whether that person was the defendant in the suit: — It was held, that the evidence was sufficient without proof of identity. (8)

[P. 949.] In an action against the acceptor of a bill of exchange purporting to be drawn and indorsed by A. B., proof, that the bill was indorsed by the same person who drew it is sufficient, though that person is shewn not to be A. B. (9)

[P. 949.] A bill of exchange was presented for payment at the door of the house, where the drawee was described as living, to a lodger, who was coming from the passage of the house into the street. The drawee had removed to another residence, known to the occupier of the house, but not to the lodger; and it was not shewn, that he had left funds for payment: — It was held, that the presentment was sufficient to maintain the affirmative of the issue raised of the due presentment of the bill in an action against the indorser. (10)

(1) *Humphreys v. O'Connell*, 7 M. & W. 370.

(2) *Schild v. Kilpin*, 8 ibid. 679.

(3) *Sison v. Kidman*, 1 Dowl. P. C. N. S. 493.

(4) *Watkins v. Wake*, 7 M. & W. 488.

(5) *Hatch v. Trayer*, 11 A. & E. 702.

(6) *Clark v. Lazarus*, 2 M. & G. 167.

(7) *Brown v. Philpot*, 2 M. & Rob. 285.

(8) *Greenshields v. Crawford*, 1 Dowl. P. C. N. S. 439.

(9) *Smith v. Money Penny*, 2 M. & Rob.

317.

(10) *Burton v. Jones*, 1 M. & G. 83.

[P. 949.] A promise by the drawer to pay the indorsee and holder of bills overdue is evidence on an account stated in an action by the indorsee against the drawer. (1)

[P. 949.] In *assumpsit* by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.* payable on demand, averring a demand on a particular day, plea as to 3*l.*, parcel of a set-off due at the time when the note was demanded, and ever since, concluding with a verification and prayer of judgment, and as to 12*l.* 9*s.* 4*d.*, residue, that at the time of the demand, the defendant tendered the plaintiff 12*l.* 9*s.* 4*d.*, and hath always, from the time of making his said promise as to 12*l.* 9*s.* 4*d.*, been ready and willing to pay that sum, and now brings the same into court, &c., concluding with a verification and prayer of judgment. Replication to the first plea, a traverse, that any set-off was due at the commencement of the suit, on which issue was joined; to the second, that, before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.*, was due upon the note, and that before the said tender, the plaintiff demanded payment of the said sum of 15*l.* 9*s.* 4*d.*, which so included the 12*l.* 9*s.* 4*d.*, but that the defendant refused to pay the 15*l.* 9*s.* 4*d.*, and that at the time of such demand and refusal, no set-off or other just cause for non payment thereof existed: — It was held on special demurrer, that the replication was good. (2)

[P. 949.] To an action of *assumpsit* on a promissory note by an indorsee against the maker, it was pleaded, that it was delivered by the defendant to the indorser J. to enable him to take up a former note, also made payable by the defendant to J. for the accommodation of J., and by him indorsed to the plaintiff; and that, after the note declared on became due, the amount was paid to the plaintiff by the defendant. Replication *de injuriâ* generally: — Upon which it was holden, that the averment, introductory to the payment of the last mentioned note, might be rejected as surplusage; that the payment only need be proved; that such payment might be shewn without producing the note itself; and that, in an action by the plaintiff on the first note, a verdict and judgment for the defendant on the above issue would not be pleadable in bar, nor evidence of any immaterial statement in the plea, for that the replication only put in issue material allegations. (3)

[P. 950.] To a declaration on a bill of exchange drawn by J. H. upon and accepted by the defendant, alleging that J. H. indorsed it to E. M., and E. M. indorsed it to the plaintiff. It was pleaded, that J. H. did not indorse the bill to E. M. At the trial, J. H. proved, that the name J. H. written on the back of the bill was written by himself; that he had received the bill as the accountant to the Imperial Bank, for a debt due to the bank, and after writing his name on it, he had delivered it to W. M., who was also employed in the bank, to be kept by him for the bank. E. M. proved, that he had received the bill from W. M. as he said for value, and indorsed and delivered it for value to his father, the plaintiff. The defendant proposed to controvert this, and to shew, that both E. M. and the plaintiff received the bill with full knowledge of the fraud committed by W. M. in handing over the bill. The learned judge rejected this evidence as inadmissible under the plea denying J. H.'s indorsement, and the plaintiff obtained a verdict: — It was held, on motion for a new trial, that the evidence tendered ought to have been received, as, if the facts stated had been fully proved, the jury ought to have found for the defendant on the issue that J. H. did not indorse the bill to E. M., for although there was an indorsement of the bill, there was no valid delivery by J. H., or by any authority from him, and so no complete transfer by indorsement to E. M. (4)

[P. 950.] Payment by a stranger of the amount of a bill of exchange to the bankers at whose house the bill is, by the acceptance, made payable, under an arrangement with such bankers, whereby the party paying obtains possession of the bill for a collateral purpose of his own, is not a payment of the bill by the acceptor. Nor can such payment, if made before the bill becomes due, be considered as a payment for the honour of an indorser. Where, therefore, to a count by the executors of A. the indorser, against B., C., D., the acceptors of a bill, the defendants pleaded payment, and the evidence was, that A. had placed the bill in the hands of E. in order to be presented, who improperly discounted it, and, to regain possession of it, paid the amount into the bankers of B., C., D., the acceptors, and then returned the bill to A.: — It was held, that this evidence negatived the plea. (5)

[P. 950.] Upon a contract to indemnify an accommodation acceptor, the Statute of Limitations begins to run from the time at which the plaintiff is damaged by actual payment. (6)

[P. 951.] Where in an action on a promissory note, in which the consideration was expressed to be "for commission due to the plaintiff for business transacted for the defendant," the defendant pleaded, that the real consideration for the note was services to be hereafter rendered by the plaintiff, which had never been performed, and the plaintiff re-

In an action by indorsee v. drawer, a promise by the latter to pay the former, is evidence on an account stated.

Where in an action by payee v. maker of a promissory note, a replication traversing a set-off, and tender is good.

Where in an action by indorsee v. maker, payment only need be proved, and such payment shewn without producing the note.

Where evidence of a knowledge of fraud should be received, under a plea denying an indorsement.

Where a payment cannot be considered as a payment, for the honour of the indorser.

Where the Statute of Limitations begins to run upon a contract to indemnify an accommodation acceptor.

Where evidence of a different con-

(1) *Officer v. Dovatt*, 2 M. & Rob. 230.

(2) *Cotton v. Godwin*, 7 M. & W. 147.

(3) *Shearm v. Burnard*, 10 A. & E. 593.

(4) *Marston v. Allen*, 8 M. & W. 494. 1 Dowl. P. C. N. S. 442.

(5) *Deacon v. Stodhart*, 2 M. & G. 317.

(6) *Reynolds v. Doyle*, 1 ibid. 753.

sideration may be received, to that which is expressed on the note.

A plea that a bill was paid by the acceptor before it became due, and afterwards re-issued by him without any new stamp, can be supported only by proof of actual payment.

Time within which an application must be made to set aside an issue, where one issue is for the plaintiff, and the other for defendant.

PARTICULARS OF DEMAND.

Where a plaintiff is allowed to amend his particulars, the defendant will not be allowed to plead specially.

STAYING PROCEEDINGS.

The rule with respect to setting aside proceedings for irregularity, does not apply to amendments.

DAMAGES.

Where in assessment of damages upon a bill of exchange the plaintiff is not compelled to produce the bill at the trial.

Service of a rule to compute principal and interest upon one of several defendants is sufficient.

JUDGMENT.

Where the court will set aside the pleas with costs, and allow the plaintiff to sign judgment.

Where the indorsee should give the bill up to the drawer.

plied *de injuriâ* : — It was held, that evidence in support of this plea was admissible, and ought to have been received by the judge at the trial. (1)

[P. 951.] A drawer of a bill of exchange before it became due, agreed with the acceptor, that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied; the acceptor accordingly executed the mortgage, and received back the bill uncanceled: — It was held, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value before it became due; and that a plea in such action, that the bill was paid by the acceptor before it became due, and afterwards re-issued by him without any new stamp, could be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied. (2)

[P. 951.] Where the finding on one issue is for the plaintiff, and the other for the defendant, and cross rules are sought for, to set aside the verdict on such findings, each party must move within the first four days of term. (3)

[P. 956.] Where a plaintiff in *assumpsit* is permitted to furnish a further bill of particulars, the defendant (having pleaded the general issue with notice of set-off) will not be let in to plead specially, but will have a reasonable time allowed him to pay money into court, and be at liberty to amend his particulars of set-off. (4)

[P. 956.] In two actions between the same parties on different bills of exchange, the court consolidated them after issue joined, and notice of trial given, upon payment of all the costs of the second action. (5)

[P. 956.] To an action by an indorsee against the acceptor of a bill of exchange, the defendant pleaded the plaintiff's discharge under the Insolvent Act, alleging, that his office vested in the assignee by assignment by deed, instead of by order under stat. 1 & 2 Vict. c. 110. s. 37. The plaintiff took issue on the assignment by deed, and gave notice of trial for the 15th. On Tuesday, the 8th, a summons was taken out to amend the plea, which was heard on the following Thursday, when the application was refused. On Saturday, the 13th, a similar application was made to the court: — It was held, that the application was not too late, as the rule with respect to setting aside proceedings for irregularity did not apply to amendments. (6)

[P. 960.] After judgment for the plaintiff on demurrer, in *assumpsit* on a bill of exchange, the plaintiff (on going to trial to assess the damages and upon other issues) was held entitled to a verdict for the full amount of the bill stated in the declaration, without being compelled to produce the bill at the trial. (7)

[P. 960.] Service of a rule to compute principal and interest on a bill of exchange or promissory note upon one of several defendants, is sufficient, as service upon one, is service upon all, (8)

[P. 960.] In an action on two bills of exchange by indorsee against acceptor, to which it was pleaded as to one bill no consideration between a drawer and defendant; and as to the other, no consideration paid by the plaintiff to the defendant. The court set aside the pleas with costs, and allowed the plaintiff to sign judgment, although the defendant was not under terms. (9)

[P. 960.] Where, after an action is brought by the indorsee of a bill of exchange against the acceptor, the drawer pays the acceptor part of the amount, the indorsee (unless he be suing as a trustee for the drawer) should take a verdict against the acceptor for the balance and interest only, and when he is paid, he should give the bill up to the drawer. (10)

CARRIER.

GENERAL EXTENT OF LIABILITY.

What will raise the inference of negligence.

Bailee not respon-

[P. 967.] If a cargo weighing a certain weight be delivered to a carrier to be carried, and when the cargo arrives at its destination the weight be deficient, this is evidence from which a jury may infer negligence in the carrier; and if the deficiency did not arise from the negligence of the carrier, it is incumbent on him to shew that. (11)

[P. 967.] If A. place a dog with B., and the dog be received by B., to be kept by him

(1) *Abbott v. Hendricks*, 1 M. & G. 791., vide ante, 820—847. tit. ACCEPTANCE.

(2) *Morley v. Culverwell*, 7 M. & W. 174.

(3) *Deacon v. Stodhart*, 2 M. & G. 317.

(4) *Hughes v. Dowd*, 1 Crawford & Dix (Irish), 420.

(5) *Booth v. Payne*, 1 Dowl. P. C. N. S. 348.

(6) *Welch v. Hall*, ibid. 365.

(7) *Lane v. Mullins*, ibid. 562.

(8) *Amlot v. Evans*, 7 M. & W. 462.

(9) *Knowles v. Burward*, 10 A. & E. 13.

(10) *Hemming v. Brook*, 1 C. & Marsh. 57.

(11) *Hawkes v. Smith*, ibid. 72.

for reward to be paid to him, A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the *onus* lies on B. to acquit himself, by shewing that he was not in fault with respect to the loss. (1)

[P. 991.] Where a declaration in case against a common carrier for refusing to carry goods averred, that the plaintiff "was ready and willing, and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage, and conveyance of the said parcel:"—It was held on special demurrer, that the averment was sufficient, and that it was not necessary to aver an actual tender of money for the carriage. (2)

[P. 992.] Goods were forwarded by a carrier's waggon to A. in London, and delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions, that they should remain there to await his orders. They remained there, accordingly, for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, and sent to A. with the goods, stated, that "any goods that should have remained three months in the warehouse without being claimed, or on account of the non payment of the charges thereon, would be sold to defray the carriage or other charges thereon, or the general lien, as the case might be, together with warehouse rent and expenses." The carrier had often before carried goods for A., but no goods of his had before lain in the carrier's warehouse:—It was held, that the carrier was not, under these circumstances, a mere gratuitous bailee of the goods at the time of their loss; and therefore, that A. might recover against him the value of the goods, on a declaration in *assumpsit*, alleging, that they were delivered to the defendant to be safely kept for the plaintiff, for certain reasonable compensation and reward to be therefore paid by him. (3)

[P. 996.] Silk dresses made up for wearing, are not "silks" within the meaning of the Carriers' Act (4); nor is an eye-glass with a gold chain attached to it, for the purpose of its being hung round the neck of the wearer, "trinkets," within the meaning of that enactment. (5)

[P. 997.] If a message be left at the booking-office of a carrier from N. to L., for his van to call for the plaintiff's luggage at another inn, for the purpose of its being carried to L., and the carrier's servant and van to go to the other inn, and the plaintiff's luggage be there put into the carrier's van, and afterwards lost therefrom, the carrier is liable for the loss, just as he would be, if the luggage of the plaintiff had been taken to the defendant's regular booking-office. (6)

[P. 999.] A carrier is not bound to convey goods, except on payment of the full price for the carriage, according to their value; and if that be not paid, it is competent for him to limit his liability by special contract. And, therefore, where a carrier receives valuable goods to carry, after notice to the bailor, that he will not be responsible for loss or damage to them, unless a higher than the ordinary rate of insurance be paid for the carriage, he receives them on the terms of such notice, which amounts to a specific contract. But he is not exempted thereby from all responsibility; but is, notwithstanding the notice, bound to take ordinary care in the carriage of the goods, and is liable, not only for any act which amounts to a total abandonment of his character of a carrier, or for wilful negligence, but also for a conversion by a mis-delivery arising from inadvertence or mistake, if such inadvertence or mistake might have been avoided by the exercise of ordinary care. (7)

sible for the loss of an animal, if he took reasonable care of it.

DECLARATION.

Where not requisite to aver an actual tender of money for the carriage.

Where a carrier is not a mere gratuitous bailee of the goods at the time of their loss.

EVIDENCE.

Silk dresses made up for wearing, are not silks within stat. 11 Geo. 4. & 1 Will. 4. c. 68. s. 1. It is unimportant, in order to fix a carrier with liability, at what place he takes up his goods.

A carrier is not bound to convey goods except on payment of the full price for the carriage according to their value.

CASE.

[P. 1005.] Case lies against a sheriff for making a false return.

Where the sheriff on a *feri facias* returns, that he has levied part of the debt, and that the debtor has no goods whereof the residue can be levied; and the creditor accepts the amount levied on account, and towards payment of his debt, he is not thereby precluded from bringing an action against the sheriff for a false return. (8)

Where a plaintiff had issued a *feri facias*, and the sheriff seized the goods of the debtor, the proceeds of which were exhausted by payment of a year's rent to the landlord under stat. 8 Anne, c. 14 s. 1., the expenses, and the sum due upon another writ of *feri facias* previously delivered to the sheriff:—It was held, that a return of *nulla bona* to the plaintiff's writ was proper, and that the sheriff, in an action against him for falsely making such return, might shew the above facts, under a plea, that the original defendant had no goods whereof the sheriff could levy the damages in the declaration mentioned. (9)

GENERALLY.

SHERIFFS.

Creditor by accepting part of his debt from the sheriff, is not thereby precluded from bringing an action against the sheriff for a false return.

What is admissible evidence in an action against sheriff for making a false return, under the plea, that the original defendant had no goods whereof the sheriff could levy the damages.

- (1) *Machenzie v. Cox*, 9 C. & P. 682.
- (2) *Pickford v. Grand Junction Railway*, 8 M. & W. 372.
- (3) *Cairns v. Robins*, *ibid.* 258.
- (4) Stat. 11 Geo. 4. & 1 Will. 4. c. 68.

- (5) *Davey v. Mason*, 1 C. & Marsh. 45.
- (6) *Ibid.*
- (7) *Wyld v. Pickford*, 8 M. & W. 443.
- (8) *Holmes v. Clifton*, 10 A. & E. 673.
- (9) *Wintle v. Freeman*, 11 *ibid.* 539.

**WHEN CASE WILL
LIE.**

In running down a vessel, the question is, whether the plaintiff by his negligence or improper conduct substantially contributed to the occurrence of the injury of which he complains.

The owners of a disabled vessel, are responsible, if it drift against another vessel.

Rule of the river for sailing vessels.

Where a nautical witness cannot be asked, whether he conceives the conduct of the captain to be correct or not.

**THE DECLAR-
ATION.**

Where the declaration discloses a sufficient cause of action.

Where in action against a railway company for negligence, the facts are not sufficient to justify a nonsuit.

Assignment of damages when a person has been so injured, as to render him incapable of holding his office.

Where damages given for a less amount than the injury proved, because the jury conceived, that there were faults on both sides.

THE PLEADINGS.
Where in an ac-

[P. 1018.] The question, in what is called a running down case, is whether the plaintiff, by his negligence or improper conduct, substantially contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the bye-laws of the river Thames, at the time when she came in collision with a barge, it was held, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. The deposition of a witness taken before the coroner on an inquiry touching the death of a person killed by the collision, is receivable in evidence in the action for damages, if the witness be alive to be beyond the seas. (1)

[P. 1019.] The owners of a vessel disabled by the negligence of its crew, are answerable for damage done by its accidentally drifting, when so disabled, against another vessel. (2)

[P. 1019.] The rule of the river is, that if a light vessel be going free, and a loaded vessel be coming close hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. (3)

[P. 1019.] A nautical witness cannot be asked, whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not. (4)

[P. 1023.] The declaration, after stating, that the plaintiffs prepared, vended, and sold for profit a certain medicine called "Morison's Universal Medicine," which they were accustomed to sell in boxes wrapped up in paper, which had those words printed thereon, alleged that the defendant, intending to injure the plaintiffs in the sale of their said medicines, deceitfully and fraudulently prepared medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, with the words "Morison's Universal Medicine" printed thereon, in order to denote, that medicine was the genuine medicine prepared and sold by the plaintiffs; and that the defendant deceitfully and fraudulently vended and sold, for his own lucre and gain, the last-mentioned boxes of the said articles, represented by him to be medicines by the name and description of "Morison's Universal Medicine," which had been prepared and sold by the plaintiffs; whereas, in truth, the plaintiffs had not been the preparers, &c., thereof:—It was holden, on a motion to arrest the judgment, that the declaration disclosed a sufficient cause of action. (5)

[P. 1024.] In an action on the case brought against a railway company, the declaration alleged, that the defendants, by their servants, so negligently and improperly managed and directed their steam engine, and the fire and igneous matter contained therein, that through the carelessness, negligence, and improper conduct of the defendants by their servants, divers sparks of fire, and divers portions of the said fire and igneous matter passed and flew from the said engine to, and into, and upon a stack of beans of the plaintiff in a field adjoining the railway, near to which the defendants' engine was then passing, and the same became ignited, and was wholly burned and consumed: to which "not guilty" was pleaded. In a special case stated for the opinion of the court by order of a judge under stat. 3 & 4 Will. 4. c. 42. s. 25., it was stated, that the stack of beans was eleven yards from the rails of the railway, that the engines and boilers used upon the railway were of the ordinary description, and were used at the time of the occurrence in question, in the ordinary manner:—It was held, that there was no evidence for the decision of a jury, with regard to the carelessness and negligence of the defendants; and that, upon the facts stated, the defendants were not entitled to a nonsuit; and that the case, therefore, was improperly stated for the opinion of the court under that statute. (6)

[P. 1025.] If the plaintiff, through the negligence of the defendant, be disabled for life from performing the duties of an office to which he belongs, the measure of his damage is by no means to be taken from the amount of an annuity, which would replace the annual salary of the plaintiff; for, *non constat*, that the plaintiff would have retained his situation for life. (7)

[P. 1025.] In an action against the owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of 500*l.*; the jury gave a verdict for 250*l.* only; and on being asked how they made up their verdict, replied, that in their opinion there were faults on both sides:—It was holden, that, notwithstanding this, the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovery. (8)

[P. 1025.] In an action for negligence in not properly securing a cow of the defendant in a slaughter house, the declaration stated, that by means thereof the cow "ran at, butted

(1) *Sills v. Brown*, 9 C. & P. 601.

(2) *Secombe v. Wood*, 2 M. & Rob. 290.

(3) *Sills v. Brown*, 9 C. & P. 601.

(4) *Ibid.*

(5) *Morison v. Salmon*, 2 M. & G. 385.

(6) *Aldridge v. Great Western Railway*
Comp. 1 Dowl. P. C. N. S. 247.

(7) *Rapson v. Cubitt*, 1 C. & Marsh. 64.

(8) *Raisin v. Mitchell*, 9 C. & P. 613.

at, gored, killed, and destroyed "a cow of the plaintiff. The defendant pleaded a payment of 30s. into court, and that the plaintiff had sustained no greater damage; to which the plaintiff replied, that he had sustained greater damages:— It was held, that the defendant could not go into evidence to shew, that his cow had not killed the plaintiff's cow, as the contrary was admitted by the defendant's plea. (1)

[P. 1025.] In an action on the case for negligent driving, where the defendant's possession of the carriage, alleged to have been negligently driven, is stated in the declaration by way of inducement, such possession is admitted by the plea of not guilty. (2)

[P. 1026.] Whatever may be the issue raised on the record, if a case can be suggested in which a right, beyond the mere right to recover damages, might come in question at the trial, the judge has power to certify under stat. 3 & 4 Vict. c. 24., so as to give the plaintiff costs. And where, in case against the defendant for selling medicines under a false representation, that it was prepared by the plaintiffs, the jury returned a verdict for the plaintiffs, damages one farthing, and the judge certified under stat. 3 & 4 Vict. c. 24.:— It was held, that the case was within the foregoing statute. (3)

[P. 1026.] In case for negligence, for exposing ploughshares for sale in a street, whereby the plaintiff was thrown down and injured; not guilty was pleaded. At the trial the jury found their verdict for the plaintiff, damages 1s., and the judge refused to certify, on the ground that it was not a case in which he had power to do so under stat. 3 & 4 Vict. c. 24. s. 2.:— It was held, that although the action was not one in which the judge could grant a certificate, it was still within the statute, and that the plaintiff was not entitled to his costs. (4)

[P. 1026.] In case injuring plaintiff's house by removing the support of defendant's; the latter pleaded, first, not guilty; secondly, a denial of the right to support; thirdly, payment of money into court, and no damages *ultra*. The first issue was found for the plaintiff without damages, the last for the defendant, and the jury were discharged from any finding on the second:— It was holden, that, as the record stood, the defendant was entitled to the *postea*, and that unless the judge amended by inserting nominal damages on the first issue, a *venire de novo* must issue. (5)

tion for negligence by which the plaintiff's cow had been killed, the defendant cannot go into evidence to shew, that the plaintiff's cow had been killed.

Where possession is admitted by the plea of not guilty. Costs.

If a right, beyond the mere right to recover damages, might be questioned at the trial, the judge can certify under stat. 3 & 4 Vict. c. 24.

Where an action is not one in which the judge can certify under stat. 3 & 4 Vict. c. 24. s. 2., and where the plaintiff is not entitled to his costs.

JUDGMENT. Where the defendant is entitled to the *postea*.

COMMON.

[P. 1029.] A right of common for cattle "levant and couchant" upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining. (6)

[P. 1042.] A release executed by several commoners of their separate rights of common over the same waste is sufficient to make them all competent witnesses in an action touching the extent of the waste, though there be only one stamp. (7)

DEFINED GENERALLY.

What is comprehended under a right of common for cattle levant and couchant.

SUSPENSION, REVIVAL, &c.

Release executed by several commoners of their separate rights of common, render them competent witnesses.

INSURANCE OF PROPERTY.

Where a lessor cannot recover against his lessee for not insuring the premises.

COVENANT.

[P. 1099.] A lessee covenanted to insure, and the premises were uninsured for a week:— It was holden in an ejectment for a forfeiture for a breach of this covenant, that the lessor could not recover, if he, by his conduct, had led the lessee to believe, that the premises were properly insured by himself. (8)

If a lease (among other covenants) contain a covenant by the lessee to insure, with a proviso, that if he did not do so, the lessor might insure and distrain on the lessee for the premiums, with the usual proviso as to forfeiture, it is doubtful, whether the lessee's omitting to insure, would incur a forfeiture. (9)

[P. 1101.] A covenant "forthwith" to put premises into complete repair must receive a reasonable construction, and is not to be limited to any specific time, and therefore it will be for the jury to say upon the evidence, whether the defendant has done what he reasonably ought towards its performance. (10)

[P. 1109.] In an action of covenant for non repair of premises, held by the defendant under a lease which has several years to run, the proper measure of damages is, not the amount that would be required to put the premises into repair, but the amount to which the reversion is injured by the premises being out of repair. (11)

[P. 1109.] In debt for rent against an administrator as assignee of the intestate, the

TO REPAIR.

A covenant "forthwith" to put premises in repair, is not limited to any specific time. Assessment of damages for the non repair of premises.

Assessment of da-

(1) *Lloyd v. Walkley*, 9 C. & P. 771.

(2) *Emery v. Clark*, 2 M. & Rob. 260.

(3) *Morison v. Salmon*, 2 M. & G. 390.

(4) *Marriott v. Stanley*, 1 ibid. 853.

(5) *Grout v. Glasier*, 1 Dowl. P.C. N.S. 58.

(6) *Whitelock v. Hutchinson*, 2 M. & Rob.

(7) *Carpenter v. Buller*, ibid. 298.

(8) *Doe d. Pittman v. Sutton*, 9 C. & P. 706.

(9) *Ibid.*

(10) *Ibid.*

(11) *Doe d. Worcester (City, Trustees of Schools) v. Rowlands*, ibid. 734.

images for breach of the covenant for not repairing.

defendant pleaded, in discharge of his liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent and unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which the defendant had paid to the plaintiff, and part towards the expenses of a party wall under the Building Act (14 Geo. 3. c. 78.); that before the rent became due, the defendant offered to surrender all his interest in the premises to the plaintiff, who refused to accept them, and that he had fully administered, &c.; to which it was replied, that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; and that the defendant did not offer to surrender, &c. — It was held, that the real value of the premises, as against the defendant, must be taken to be that, which it would have been, if he had not himself committed a breach of a covenant to repair in the original lease; and that the value as between the plaintiff and the defendant was not affected by the insolvency of the under-tenant, whose lease also contained a covenant to repair, with a proviso of re-entry for breach and for non payment of rent. (1)

Where plaintiff not entitled to recover the amount of dilapidations at the time an ejectment was brought for a forfeiture.

[P. 1109.] In covenant, the declaration stated, that the plaintiffs and A. B., since deceased, being possessed of a certain house for the residue of a certain term of ninety-four years wanting twenty days, demised the same to the defendants for twenty-one years at a certain rent, by an indenture containing a covenant to repair, and alleged a breach of that covenant; by means whereof all the estate and interest of the plaintiffs and A. B. in the house became and was forfeited, and the same reverted to C. D., who thereupon availed himself of the forfeiture, and brought an ejectment, in which he recovered judgment, and obtained possession of the house, by means of which premises, the plaintiffs since the death of B. had lost the rents covenanted to be paid by the defendants, &c. The plea traversed the alleged breach of the covenant to repair, on which issue was joined. At the trial the plaintiffs claimed damages for the loss of their term, and for the amount of dilapidations in the house demised to the defendants. It appeared by the particulars delivered in the ejectment brought by C. D., that such ejectment was founded upon the breach of certain covenants contained in a superior lease granted by C. D. for ninety-nine years, and that the breaches of a covenant relied on were, the non repair of various houses, including the house in question (which was shewn to be out of repair), and for the breach of a covenant which was not contained in the lease to the defendants: — It was holden, 1st, inasmuch as it did not appear, that C. D. might not have recovered possession of the property for a breach of the covenant not contained in the lease to the defendants, that the plaintiffs were not entitled to recover the value of their term from the defendants; 2dly, that they were not entitled to recover the amount of the dilapidations in the house in question at the time that the ejectment was brought for the forfeiture. (2)

TO USE LAND IN AN HUSBANDMAN-LIKE MANNER.

Tenants allowing a footpath to be made across the demised premises, is no breach of a covenant to occupy the premises in a proper manner.

FOR RENEWAL. What is not such a breach of the condition to alien, sell, mortgage, assign, grant, convey, dispose of, let, underlet, or part with, as to avoid the lease.

PLEADINGS.

Where in an action on a guarantee, the defendant can plead an indenture of release from the plaintiff to his principal, without making *proferri* of the indenture.

EVIDENCE.

What is a fatal variance of the description of property.

Where notice to quit does not satisfy the covenant.

[P. 1110.] A tenant's allowing a footpath to be made across a part of demised premises, is no breach of a covenant to occupy the premises in a proper manner. (3)

[P. 1123.] A. made a lease by indenture containing a covenant, that it was agreed, and these presents were upon the condition, that the lessee "should not alien, sell, mortgage, assign, grant, convey, dispose of, let, underlet, or part with" the demised premises, or permit the same to be occupied without the consent of the lessor; and if it should happen, that the lessee should, in violation of the said covenant, "alien, sell, mortgage, assign, grant, convey, dispose of, let, underlet, or part with the premises, or any part thereof," the demise should cease, or the lessee pay an increased rent. A. permitted part of the lands to be occupied by a stranger. In ejectment for the forfeiture it was held, that this was not a breach of the condition, such as to avoid the lease. (4)

[P. 1166.] Where the defendant, a surety, by deed poll guaranteed to the plaintiff the payment of a sum of money: — It was decided, in an action on the guarantee, that the defendant might plead an indenture of release from the plaintiff to his principal without making *proferri* of the indenture. (5)

[P. 1169.] In covenant by the assignee of the reversion, in deducing title in the declaration, one of the parties through whom the plaintiff claimed was stated to have suffered a recovery of the lands of Constable Hill. But in the record of the recovery, the lands comprised therein were described as Constable Hills: — It was adjudged, on the issue of *nil tiel* record, that the variance was fatal. (6)

[P. 1169.] In a lease for twenty-one years from Michaelmas, 1823, with a covenant that, if the tenant should desire to determine the demise at the end of the first fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first fourteen years, the lease should determine; the tenant, six months before the June preceding the expiration of the first fourteen years, gave notice that he should quit on 24th June, 1837, agreeably to the covenants of the lease: — It was held, that this notice did not satisfy the covenant, and that the jury could not be asked whether, from the land-

(1) *Hornidge v. Wilson*, 11 A. & E. 645.

(2) *Clow v. Brogden*, 2 M. & G. 39.

(3) *Doe d. Worcester City (Trustees of Schools) v. Rowlands*, 9 C. & P. 734.

(4) *Sharpe v. Bergin*, 1 Longfield & Townsend (Irish), 232.

(5) *Bain v. Cooper*, 8 M. & W. 751. 1 Dowl. P. C. N. S. 11.

(6) *Hosier v. Powell*, 1 Crawford & Dix (Irish), 399.

ord's conduct, as shewn in evidence, they believed that he understood the notice to refer to Michaelmas, 1837. (1)

[P. 1172.] In *Penley v. Watts* (2) it appeared, that A. leased premises to B. from the 25th of March, 1823, for sixteen years wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C., from the 24th of June, 1834, for four years and three quarters, wanting eleven days, and C. covenanted with B. to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages were assessed at 64*l.* 10*s.*, being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previously to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of the dilapidations to be 77*l.* 10*s.*: — It was held, that B. was not entitled to recover also the amount of the costs in the former action.

COSTS.

Where the costs of an action by a landlord, cannot be recovered against his tenant.

DEBT.

[P. 1183.] A declaration in debt stated, that the defendant was indebted to the plaintiff "for goods sold and delivered to the defendant by the plaintiff at his request." The defendant having demurred specially to this declaration, on the ground of its being ambiguous, the court set the demurrer aside as frivolous. (3)

[P. 1184.] Under a plea of *nunquam indebitatus* in debt for goods bargained and sold, it is open to the defendant to take the objection, that the contract is void by the 17th section of the Statute of Frauds. But it seems, that the objection is answered by shewing an acceptance and actual receipt of part of the goods after action brought. (4)

[P. 1184.] To an action of debt for goods sold, &c., the defendant pleaded, except as to 5*l.* 10*s.* 3*d.*, *nunquam indebitatus*; and as to that sum, that the plaintiff ought not further to maintain his action, because, he says, that after the causes of action in the declaration mentioned accrued to the plaintiff, and after the commencement of the suit, he, the defendant, paid to the plaintiff, who then accepted and received the same, a large sum of money, to wit, 5*l.* 19*s.* 7*d.*, in full satisfaction and discharge of all the causes of action in the declaration mentioned, which relate to the said sum of 5*l.* 10*s.* 3*d.* To this there was a special demurrer, assigning for cause, that it was not alleged, that the payment was made in satisfaction and discharge of the damages and costs sustained by reason of the cause of action or the detention of the debt: — It was held, on special demurrer, that the plea being pleaded as to a portion of the debt only, and not to the damages and costs appertaining thereto, was nevertheless a good answer to so much as it was pleaded to, although it was larger than necessary in the concluding part, that not being pointed out as a ground of demurrer; and that the plaintiff might sign judgment for any damage which was not answered by the plea. (5)

[P. 1184.] A. sued B., C., and D. in a joint action for an attorney's bill. B. pleaded *nunquam indebitatus*, and C. and D. suffered judgment by default: — It was held, that in order to entitle A. to a verdict against B., the jury must be satisfied, that there was a joint contract with A. by B., C., and D. jointly, and that it was not sufficient to shew, that there was a separate contract between A. and B. only, even though the evidence would have been sufficient to have supported an action by A. against B. alone. (6)

[P. 1189.] In an action of debt before the sheriff, where the verdict is for 1*s.*, the court has no power to stay the proceedings on payment of the amount of the verdict, or to direct, that judgment shall be entered for the plaintiff without costs. (7)

[P. 1193.] In debt for penalties under stat. 31 Eliz. c. 6. for a simoniacal contract to present, the declaration alleged a contract by the clerk to buy the advowson, if he were presented to the living, and a presentation in pursuance of such contract: — It was held, that proof of presentation was essential to the action, and that for such purpose it was not enough to shew, that the defendant prepared a presentation and tendered it to the bishop's secretary, but which never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson. (8)

[P. 1195.] An overseer who neglects to sign the burgess-list delivered by him under stat. 5 & 6 Will. 4. c. 76. s. 15. (Municipal Corporation Act), incurs the penalty imposed by sect. 48., although his neglect was neither wilful nor corrupt. The delivery of a printed burgess list by an overseer, whose name is inserted in it as a burgess, and who has corrected

THE DECLARATION.

When a demurrer will be set aside as frivolous.

PLEADINGS.

Under a plea of *nunquam indebitatus*, it can be objected, that the contract is void under the Statute of Frauds.

If a plea be pleaded to a portion of the debt only, and not to the damages and costs appertaining thereto, it will be a good answer to so much as it is pleaded to, though larger than necessary in the concluding part.

In a joint action for an attorney's bill against three parties, two of whom allow judgment to go by default, and the third pleads *nunquam indebitatus*, the plaintiff must prove a joint contract with the three parties.

STAYING PROCEEDINGS.

When court has no power to stay proceedings on payment of the amount of the verdict, or to direct judgment to be entered for the plaintiff.

DEBT ON PENAL STATUTES.

In debt for penalties under stat. 31 Eliz. c. 6. for a simoniacal contract to present, proof of presentation is essential to the action.

An overseer's neg-

(1) *Caddy v. Martinez*, 11 A. & E. 720.

(2) 7 M. & W. 601.

(3) *Deriemer v. Fenna*, ibid. 439.

(4) *Fricker v. Thomlinson*, 1 M. & G.

(5) *Henry v. Earl*, 8 M. & W. 228.

(6) *Robeson v. Ganderton*, 9 C. & P. 476.

(7) *Batchelor v. Dudley*, 2 M. & G. 233.

(8) *Greenwood v. Woodham*, 2 M. & Rob.

lecting to sign the burgess list under the Municipal Corporation Act, incurs the penalty under sect. 48. of that act, although his neglect was neither wilful nor corrupt.

the list in his own handwriting, is not a sufficient signature of it by him within sect. 15. (1) And where in debt for the penalty under sect. 48., the declaration stated it to be the duty of the defendant, as overseer with the other overseers, to make out and sign an alphabetical list of burgesses, and averred, that the defendant unlawfully neglected and refused to make out or sign such list: — It was held, on motion in arrest of judgment after a verdict for the plaintiff, that it was unnecessary to shew, that the others did not sign such list; and that, if the signature of a majority was a signing by all, then, as the verdict found that the defendant had not signed, it must be presumed, that the majority had not signed. (2)

Before the commencement of such action, no previous notice of action under sect. 153. need be given by the plaintiff; and it seems, that all the overseers must sign the burgess list; and that where a parish is divided by a local act into nine wards, for each of which there is a separate rate and separate overseer appointed, who is also overseer for the whole parish, all the overseers must join in making out one burgess list for the whole parish. *Ibid.*

BRIBERY AND TREATING.

When no challenge of jurors will be allowed except for cause.

What is an insufficient cause of challenge.

[P. 1202.] On the trial of an action to recover 500*l.* penalty for bribery, alleged to have been committed at the election of members of parliament for the borough of L., which was to be tried by a special jury, the attorney on each side had given to the associate a list of names of certain common jurors whom he did not wish to be called, if a *tales* were prayed: with the omission of those jurors and those who did not appear, there were not sufficient common jurors to make up a full jury when a *tales* had been prayed: — It was held, that the case should not stand over, but that all the common jurors should be called over in the usual way, and that no challenge could be allowed, except for cause; that it was no cause of challenge, that a juror was a tenant of a nobleman whose interest in the borough was supposed to be affected, or that he had been foreman of another jury who had tried another action between other parties for bribery, alleged to have been committed at the same election. (3)

DEBT AGAINST SHERIFF, &c.

In an action against the marshal for an escape, the plea ought to shew, either that the plaintiff had given express authority for the discharge, or that the amount had been paid.

[P. 1222.] In an action against the marshal for permitting the escape of a party imprisoned in execution, it is not sufficient to plead, that the attorney for the plaintiff, whose suit the party was imprisoned, did, as such attorney, require and license the marshal to discharge the prisoner. The plea ought to shew, either that the plaintiff had given express authority for the discharge, or that the amount for which the execution issued had been paid to him or his attorney. (4) *Quære*, Whether a plea in the latter form would justify the marshal, if the plaintiff suing out execution had become bankrupt between the commitment and the order to discharge, and an action of escape were brought by his assignee?

DEBT FOR RENT ARREAR.

In debt for double rent under stat. 15 Geo. 2. c. 8. the declaration must allege the notice by the tenant of his intention to quit the premises to have been in writing.

[P. 1232.] In debt for double rent under stat. 15 Geo. 2. c. 8., the declaration must allege the notice by the tenant of his intention to quit the premises to have been given in writing. (5)

DEBT ON BOND. Liability of corporations.

[P. 1238.] In an action of debt against a corporation, regulated by stat. 5 & 6 Will. 4. c. 76., on a bond given by them to the plaintiff for payment of 1249*l.*, it appeared, on special verdict, that, before the passing of the act, the plaintiff being an alderman of the borough, *per* warranto informations were filed against him and several of his friends and relations, to try their right to be members of the corporation, and that they were ultimately ousted; that the plaintiff without authority from the now defendants caused the informations to be defended; and that, before the passing of the act, certain members of the corporation, then being the governing body, and having the custody of the common seal, and lawful power to affix it to instruments, did, on the plaintiff's application, affix the seal to the said bond, and deliver it to him by way of reimbursement of the costs of such defences, and for no other consideration; that divers of the then burgesses of the corporation had no notice of the bond being given for that cause; and that the sealing and delivery thereof was without fraud, unless the sealing and delivery for the cause aforesaid was a fraud in law upon defendants, or the inhabitants, or the members of the corporation who did not concur: — It was held, that, on the facts found, the corporation were liable on the bond before stat. 5 & 6 Will. 4. c. 76.; that the corporation, as subsisting under the statute, were still liable; and that the liability was a "lawful debt," chargeable on the borough fund, within sect. 92. (6)

Stat. 8 & 9 Will. 3. c. 11. s. 8. does not authorise the assignment of breaches in a replication, which traverses a material averment in the plea.

[P. 1274.] Stat. 8 & 9 Will. 3. c. 11. s. 8. does not authorise the assignment of breaches in a replication which traverses a material averment in the plea. In debt on bond, the defendant, after setting out the condition of the bond on oyer, pleaded performance of part of the condition only, and matter of excuse for non performance of the residue: — It was held, that the replication, which commenced by assigning a breach which would have been a good answer to the plea at common law, and then, as a necessary introduction to the assignment of other breaches, proceeded to traverse the matter of excuse was bad on the ground, that the statute does not authorise any double pleading, except the

(1) *King v. Burrell*, 12 A. & E. 460.

(2) *Ibid.*

(3) *Marsh v. Coppock*, 9 C. & P. 804.

(4) *Savory v. Chapman*, 11 A. & E. 829.

(5) *Farrell v. Donnelly*, 1 Longfield & Townsend (Irish), 374.

(6) *Holdsworth v. Dartmouth (Mayor of)* 11 A. & E. 490.

multiplication of such breaches as could have been properly assigned at common law; and that a replication traversing the matter of excuse, though affirmative, properly concluded to the country, without assigning a breach. (1)

[P. 1277.] The affidavit in support of an application for a *capias*, under stat. 1 & 2 Vict. c. 110. s. 3., need not state, that the deponent has probable cause for believing, that the defendant is about to quit England; it is sufficient if the facts stated in the affidavit enable the judge to form that belief. (2)

ARREST FOR DEBT.
Affidavit under stat. 1 & 2 Vict. c. 110. s. 3. will suffice, if it only state such facts, as will enable the judge to form an opinion, that the defendant is about to quit England.

DECEIT.

[P. 1295.] Defective formation, or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time (*ex. gr.* "Curby hocks"), is not an unsoundness. (3)

Defective formation is not an unsoundness.

[P. 1299.] To an action for breach of warranty of a horse, the defendant pleaded, that the horse was sold subject to a condition, that the warranty should remain in force until noon of the day after the sale, when the responsibility of the vendor would terminate, unless a notice and certificate of unsoundness was in the meantime given:—It was held on special demurrer, that the plea did not amount to the general issue. (4)

PLEADINGS.
Where plea does not amount to the general issue.

[P. 1299.] An undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by evidence arising in that county, which bears on the amount of damages. In an action for breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not: payment in Middlesex of the keep of the horse, after notice to the defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county. *Quære*, Whether a letter of the plaintiff's attorney to the defendant, written in Middlesex but posted in London, giving notice of the unsoundness, and requiring the defendant to take back the horse, otherwise it would be sold by a certain day (verbal notice to the same effect having been previously given to him), was sufficient to satisfy such undertaking. (5)

EVIDENCE.
An undertaking to give material evidence in a particular county, is satisfied by evidence arising in that county, which bears on the amount of damages.

DETINUE.

[P. 1309.] Detinue will lie, though the defendant has *bond fide* sold the chattel, before action brought. (6)

GENERALLY.
Detinue will lie although the chattel may have been sold by the defendant.

DISTRESS.

[P. 1341.] Where a farm tenant is under covenant not to carry off the premises the hay and straw made on the farm, the landlord who has seized the hay and straw under a distress may sell it subject to a condition, that the purchaser shall consume it on the premises. (7)

THE SEIZURE GENERALLY.

[P. 1358.] Where a bailiff, in possession of goods under a landlord's distress, receives a *f. fa.* from the sheriff, and sells the goods under it, the sheriff is liable in an action, for pound breach and rescue, at the suit of the landlord. (8)

Where a farm tenant is under a covenant not to carry off the hay and straw, he may under a distress, sell it subject to a condition, that it shall be consumed on the premises.

[P. 1367.] Where a landlord distrains for more than is due for rent, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due; and it is no defence that, after distress and notice thereof, and before the sale, the landlord served a second notice on the tenant, stating the amount really due, and that the distress was taken for that amount only, and would be sold unless that amount was paid. Thus, in *Taylor v. Henniker* (9) Lord Denman observed, "Here the distress was unlawful in its inception, being for more than was due." "We should therefore have considered the plaintiff as clearly entitled to a verdict for nominal damages, but that we paused in consequence of the two *Nisi Prius* cases of *Avenell v. Croker* (10) and *Wilkinson v. Terry*. (11) Now the first of these cases proceeds on the principle, that, as only one thing was taken, and that must have been equally taken if the right sum had been distrained for, no damage accrued, and, therefore, the plaintiff had no cause of action. The same reasoning applies

DISPOSAL OF A DISTRESS.

When sheriff liable in an action for pound breach and rescue.

REMEDY FOR AN ILLEGAL DISTRESS.

Where a landlord distrains for more rent than is due, an action lies by the tenant, though the goods distrained, are of less value than the rent really due.

Judgment of Lord Denman in *Taylor v. Henniker*

(1) *Webb v. James*, 8 M. & W. 645.

(2) *Willis v. Snook*, *ibid.* 147.

(3) *Brown v. Elkington*, *ibid.* 132.

(4) *Smart v. Hyde*, 1 Dowl. P. C. N. S. 60.

(5) *Greenway v. Titchmarsh*, 7 M. & W. 221.

(6) *Jones v. Dowle*, 1 Dowl. P. C. N. S.

(7) *Abbey v. Petch*, 8 M. & W. 419.

(8) *Reddell v. Stowey*, 2 M. & Rob. 358.

(9) 12 A. & E. 491.

(10) M. & M. 172.

(11) 1 M. & Rob. 377.

though many things be taken, if their value be less than the rent really due, and for which the distress ought to have been. The verdict was for the defendant. A motion for a new trial was made on another ground, and the parties agreed to a *stet processus*; but the ruling of Lord Tenterden on the above point was not questioned. In the latter case, *Parke B.* doubted as to the action being maintainable, but a verdict was taken for nominal damages. With all possible respect for the opinion of those learned judges, we cannot agree to the doctrine contained in those cases. It is true, that, in replevin, a landlord may avow for less rent than he has distrained for; but then the plaintiff complains of the taking altogether, and not of the excess: here he complains of the excess, and that excess really took place. There was a wrongful act of the defendant; and though, by reason of the value of the goods taken falling short of the actual rent due, no real damage was sustained, yet there was a legal damage and cause of action for which the plaintiff was entitled to a verdict. This rule must therefore be discharged."

Effect of a plea in action of debt, that the plaintiff had distrained for more than was due, and that the defendant signed an agreement acknowledging more rent than was due, he being under duress by the plaintiff.

[P. 1368.] In debt, the declaration stated, that arrears of rent being due from the defendant to the plaintiff, and the plaintiff having distrained for the arrears, the defendant by writing, in consideration of the plaintiff withdrawing the distress, undertook that he would pay the arrears, and, in default of his so doing, the plaintiff might take steps to recover them; that the plaintiff did withdraw the distress, but the defendant paid only a part of the arrears. A plea, that the plaintiff had distrained for more than was due, the sum paid by the defendant being all that was in arrear; and that the plaintiff menaced, and was about to sell the distress, unless the defendant made the agreement, which the defendant therefore made:—was held bad on motion for judgment *non obstante veredicto*, duress of goods not being a ground for avoiding an agreement. The defendant also pleaded, that no part of the arrears agreed to be paid was due, except the sum paid by the defendant; and that, except in respect of so much, there was no consideration for the agreement:—which was held bad on motion for judgment *non obstante veredicto*, there being a lawful consideration (whether the larger or smaller sum were due), the adequacy of which could not be discussed. (1)

EJECTMENT.

TITLE REQUISITE TO MAINTAIN EJECTMENT.

A tenant for a definite term does not forfeit his term by orally refusing to pay rent, and claiming the fee as his own.

What is sufficient *prima facie* evidence to entitle the plaintiff in ejectment to recover.

When defendant is precluded from giving secondary evidence of a lease.

BY WHOM EJECTMENT CAN OR CANNOT BE MAINTAINED.

Where a term of years remains in the debtor against a judgment creditor.

Where stat. 3 & 4 Will. 4. c. 47. s. 38, preserves the right of the remainder-man to bring a *formedon*.

[P. 1377.] A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent and claiming the fee as his own. (2)

[P. 1379.] Where it appeared, that the defendant had obtained a verdict, in an action of trespass, against D. (under whom the lessor of the plaintiff derived), by establishing the fact of the existence of a tenancy on her part under D.:—It was adjudged, that proof of the proceedings in the action of trespass, whereby the defendant succeeded in proving such tenancy, together with proof of service of notice to quit, were sufficient, *prima facie*, to entitle the plaintiff in the ejectment to recover. (3)

[P. 1383.] Where the lessor of the plaintiff served a notice on the defendant to produce a certain lease for a term of 100 years; and the defendant produced at the trial a lease corresponding with that described in the notice in all respects, save, that the demise was for a term of 100 years, if certain persons therein named should so long live:—It was held, that the production of the above lease by the defendant, was a compliance with the requisition of the lessor of the plaintiff's notice, and that the latter was precluded from giving secondary evidence of a lease for a term of 100 years absolutely. (4)

[P. 1386.] A sheriff having taken in execution a term of years, the judgment creditor became the purchaser, took possession, and paid rent to the owner in fee, but no assignment was executed to him:—It was decided, that the term remained in the debtor, and he was entitled to recover it by ejectment (5)

[P. 1387.] By a will in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and in default of appointment, remainder to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue:—It was held, in an ejectment by the lessor of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainder over being divested, and the rights of the remainder-man only capable of being enforced by real action. In such a case stat. 3 & 4 Will. 4. c. 47. s. 38. preserves the right of the remainder-man to bring a *formedon*. (6)

(1) *Sheate v. Beale*, 11 A. & E. 983.

(2) *Doe d. Graves v. Wells*, 10 *ibid.* 427.

(3) *Dufferin (Lord) v. Henry*, 1 Crawford & Dix (Irish), 550.

(4) *Callaghan v. Linehan*, *ibid.* 346.

(5) *Doe d. Hughes v. Jones*, 1 Dowl. P.C. N. S. 352.

(6) *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

[P.1388.] M. being seised in fee of land mortgaged to O., but remained in possession, and afterwards demised part for a term to B., who also entered; after which M. mortgaged to H.; H., after this, received rent from B., and demised the other part to A.; afterwards B. and A., on notice from O., paid O. rent. H. then brought ejectment (after notice to quit) against B. and A.:—It was held, that B. and A. might both shew in defence, the first mortgage to O., O.'s notice to them, and their payment of rent to O.; for that, although B. could not dispute M.'s title at the time of the demise, he might shew that H. had no derivative title from M., and he was not precluded by having paid rent to H. under a mistake of the facts; that A., by shewing that M., at the time of the demise to him, was only mortgagor in possession, did not impugn M.'s right to confer upon him, by the demise, a legal title to the possession, but might shew that M. has since been treated as a trespasser by the mortgagee, so as to determine M.'s right; and that O.'s notice to the tenant to pay him the rent might, if received in evidence, tend to shew that, by so doing, O. treated the mortgagor as a trespasser. (1)

When mortgagee can maintain ejectment.

[P.1391.] An interest acquired after the service of an ejectment does not entitle a party to take defence. (2)

An interest acquired after the service of an ejectment does not entitle a party to take defence.

[P.1400.] Where a party is let into possession, and pays rent under an agreement for a future lease for years, which is to contain a covenant against taking successive crops of corn, and a condition of re-entry for breach of covenants:—It was held, that he thereby becomes a yearly tenant, subject to the above terms and conditions. (3)

[P.1401.] A., being owner of a farm, let it for seven years to B.; and by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12s. a week, "and allowing him and his family to reside and have the use of the dwelling-house and furniture therein free of rent;" and this agreement was to be put an end to by three months' notice or three months' wages:—It was held, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of A. being a mere remuneration for services; and that no notice to quit was necessary, if the service was determined. (4)

NOTICE TO QUIT. Where a tenant becomes a yearly tenant, subject to terms to be incorporated in a future lease.

No notice to quit is necessary, if the service be determined.

What is a sufficient disclaimer of the relation between landlord and tenant.

[P.1401.] Where A. was possessed of lands for more than twenty years, and died in 1817; and his widow had possession from that time till her death in 1838, and B. was the eldest son of A. and his wife:—It was held, that though B. could not recover in ejectment, as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer, that the property belonged to B.'s mother and survived to her on the death of his father, and descended to B. as her heir on her death in 1838. It also appeared, that B. had concurred, with other members of his family, in letting land to C. as tenant from year to year, and that the rent should be paid to D. as agent for the family; that B., to whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord;" and that B. then demanded possession, which C. refused to give up:—Upon which it was held, that if the jury were satisfied, that the fair meaning of this was, that C. asserted, that B. and himself were not in the relation of landlord and tenant—this was a disclaimer; and that C. was not entitled to notice to quit; and that if in ejectment the lessor of the plaintiff rely on a disclaimer, it can be no objection to his recovering, that the disclaimer was on the day of the demise laid in the declaration. (5)

What is not a disclaimer of the title of the lessors of the plaintiff.

[P.1401.] In *Doe d. Jeffery v. Cooper* (6), it appeared that, the defendant took premises of one H. at a yearly rent, with an agreement for a lease for seven years, or for the lease for lives, under which H. held the property; H. subsequently assigned his interest in the premises to the lessors of the plaintiff; and their attorney, under an impression, that the seven years had expired, demanded possession; the defendant said, "I hold on lives, and as long as they live I will hold the premises: you know I have an agreement;" the attorney then demanded a quarter's rent, which was due, but the defendant refused to pay it, saying, "I hold under H., and I was directed by him to pay K. (who was the superior landlord), and I will do so; for how do I know he will not come and make a demand on me?"—It was held, to be no disclaimer of the title of the lessors of the plaintiff.

[P.1404.] A notice to quit "on St. Michaelmas Day" is, *prima facie*, a notice to quit at New Michaelmas; but if the holding be from Old Michaelmas, it will be a sufficient notice to quit at that time. (7)

Notice to quit on "St. Michaelmas Day" is, *prima facie*, a notice to quit at New Michaelmas.

[P.1411.] A tenant held a house and land from year to year—the land from the 2d of February; the house, &c., from the 1st of May. On the 16th of February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his present year's holding:—It was decided, that this was a good notice to determine the

Effect of notice, where the tenant does not shew,

(1) *Higginbotham v. Barton*, 11 A. & E. 307.

(2) *Doe d. McKiernan v. Shenkin*, 1 Longfield & Townsend (Irish), 282.

(3) *Doe d. Thomson v. Amey*, 12 A. & E. 476.

(4) *Doe d. Hughes v. Derry*, 9 C. & P. 494.

(5) *Doe d. Bennett v. Long*, *ibid.* 773.

(6) 1 M. & G. 135.

(7) *Doe d. Willis v. Perrin*, 9 C. & P. 467.

that the land was not the principal subject of the holding.

SERVICE OF DECLARATION.
Service on lodgers.

Rule nisi for judgment against the casual ejector was granted, where the service was effected on the servant of the tenant.

Acknowledgment by tenant of service of declaration.

Acknowledgment by tenant that the declaration in ejectment had come to his hands in due time.

Where the wife of the tenant acknowledged having received the declaration and notice in ejectment.

AFFIDAVIT OF SERVICE.

Notice of declaration pushed under the door, the tenant being within, and refusing to open the door.

If an attorney be in possession of premises, it is not requisite in serving him with a notice and declaration in ejectment, to explain their purport.

JUDGMENT AGAINST CASUAL EJECTOR.

Where the lessor of the plaintiff is entitled to judgment against the casual ejector.

When the declaration must reach the tenant.

After judgment signed against casual ejector and writ of possession executed, a judge can direct the judgment and proceedings to be set aside on payment of costs.

THE CONSENT RULE.

Not requisite to produce the consent rule to require the defendant to confess lease, entry, and ouster.

NEW TRIAL.
Where in eject-

tenancy in the spring of 1839, it not being shewn, on the part of the tenant, that the land was not the principal subject of the holding; and that a notice to quit, given by a person authorised by one of several lessors, joint tenants, determines the tenancy as to all. (1)

[P. 1430.] Where lodgers in a house cannot be served, service on the keeper of the house, at the house, is sufficient for a rule nisi for judgment against the casual ejector. (2)

[P. 1430.] Where service was effected on the servant of the tenant, and it appeared, that the latter had appointed an attorney to defend the action, and the servant stated, that she had given the declaration to the tenant, the court granted a rule nisi for judgment against the casual ejector. (3)

[P. 1432.] Service of a declaration on ejectment having been effected in the usual manner, on the son of the tenant in possession on the premises, the tenant was afterwards informed of what had been done; he said, "then he had no time to lose:"—It was held sufficient for a rule nisi for judgment. (4)

[P. 1435.] An acknowledgment by the tenant in possession, on the first day of term, that the declaration (which had been served on a servant upon the premises) had come to his hands before the term, is sufficient on a motion for judgment against the casual ejector. (5)

[P. 1436.] Where service of the declaration and notice in ejectment was sworn to have been effected upon the mother-in-law of the tenant in possession upon the premises, and that the wife of the tenant had since stated, on the day before term, that the papers had been handed to her, the court granted a rule nisi for judgment against the casual ejector. (6)

[P. 1438.] Where a declaration was served by passing the copy of the declaration and notice under the door of the dwelling-house, the party being in the house at the time, and refusing to open the door, or listen to the explanation given of the object and nature of the service:—It was held sufficient. (7)

[P. 1440.] Where the tenant in possession of premises is an attorney, it is unnecessary, on serving him with the declaration and notice in ejectment, to explain to him the nature and meaning of the proceedings; and the court will grant a rule for judgment against the casual ejector under such circumstances, without such explanation being given. (8)

[P. 1441.] Where in an ejectment, brought in respect of premises held by lease, on the ground of a forfeiture, service of the declaration and notice had been effected upon the widow of the lessee, (who was sole administratrix, and to whom it was sworn that it was believed, that the interest of the lessee passed,) and also upon the person in possession:—It was held, that the lessor of the plaintiff was entitled to judgment against the casual ejector. (9)

[P. 1441.] To entitle the lessor of the plaintiff to judgment against the casual ejector, it is not sufficient that the declaration, served on a member of the family of the tenant in possession, came into the hands of such tenant before the first day of the term, unless evidence, that the declaration had reached the hands of the tenant before that day was in the possession of the lessor of the plaintiff early enough to enable him to move upon that day for judgment. (10)

[P. 1442.] After judgment signed against the casual ejector, and writ of possession executed, a judge at chambers may, if satisfied as to facts, direct the judgment and subsequent proceedings to be set aside on payment of costs, and a party let in to defend as tenant, as where the attorney for such party was duly instructed to appear, but through inadvertence, suffered the time to expire without appearing, although the case set up by such party is, that he has been in possession throughout. (11)

[P. 1448.] It is not necessary for the lessor of the plaintiff in ejectment to produce the consent rule as part of his case, so as to entitle him to require the defendant to confess lease, entry, and ouster; and if the latter appear, and refuse to confess lease, entry, and ouster, the lessor of the plaintiff is entitled to sign judgment against the casual ejector, and issue execution. (12)

[P. 1454.] Where, in ejectment, evidence was received in favour of the plaintiff, which was inadmissible, but all objections and exceptions were reserved for the opinion of

(1) *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

(2) *Doe de Threder v. Roe*, 1 Dowl. P. C. N. S. 261.

(3) *Doe d. Elderton v. Roe*, *ibid.* 585.

(4) *Doe d. Brickfield v. Roe*, *ibid.* 270.

(5) *Doe d. Figgins v. Roe*, 2 M. & G. 294.

(6) *Doe d. Morgan v. Roe*, 1 Dowl. P. C. N. S. 543.

(7) *Doe d. Lowndes v. Roe*, 7 M. & W. 439.

(8) *Portland (Duke of) v. Roe*, 1 Dowl. P. C. N. S. 183.

(9) *Doe d. Pamphilon v. Roe*, *ibid.* 186.

(10) *Doe d. Emsley v. Roe*, 1 M. & G. 640.

(11) *Doe d. Mullarky v. Roe*, 11 A. & E. 333.

(12) *Doe d. Flemming v. Armfield*, 1 Dowl. P. C. N. S. 327.

the court above, by the consent of both parties, it was held, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted shewed the title to be in the lessors of the plaintiff; as, upon such a reservation, the court are called upon to decide, whether the lessors of the plaintiff are entitled to recover or not. (1)

[P. 1456.] Where a rule nisi for judgment in ejectment against the casual ejector is served on persons who appear and shew, that they are not in possession, and have no claim to the premises, they are entitled to the costs of being brought before the court. (2)

[P. 1457.] In ejectment for non payment of rent: it appeared that A. in possession of part of the lands in the declaration mentioned was served with the declaration, but was not mentioned in the affidavit of service: — It was held, that A. was entitled to take defence for the portion in her possession, but not for the other lands, save upon giving security for costs. (3)

[P. 1459.] A warrant of attorney to confess judgment in an action of ejectment is not within the meaning of stat. 1 & 2 Vict. c. 110. s. 9., that section only applying to "personal" actions, and therefore the presence, attestation, &c. of an attorney on behalf of the defendant is not necessary at the time of its execution. (4)

[P. 1467.] In ejectment to recover five houses, it was proved, that the lessor of the plaintiff had received the rents of some of them for four quarters, and of the others for five quarters, down to 1841, and that in that month, the lessor of the plaintiff's receiver of rents found the door of one of the houses secured by a chain, and the defendant in it, who said that it was his freehold: — It was held, that this was evidence to go to the jury on the part of the lessor of the plaintiff; and if there was no evidence given on the part of the defendant, it would be for the jury to consider, whether they were satisfied upon this evidence, that the property really belonged to the lessor of the plaintiff. (5)

[P. 1479.] On a motion for judgment against the casual ejector in an ejectment under stat. 4 Geo. 2. c. 28., the affidavit, required by section 2., that there is no sufficient distress on the premises, must be positive; and an affidavit by the landlord, of information and belief that such is the fact, is insufficient. (6)

[P. 1482.] Where the plaintiff, being the owner of a woollen mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a revolving shaft in the room: — It was held, in an action for double value under stat. 4 Geo. 2. c. 28., against the tenant for holding over after the expiration of a notice to quit, that in estimating such double value, the value of the power supplied could not be included. (7)

[P. 1488.] Under stat. 1 Geo. 4. c. 87. the lessor of the plaintiff, on the trial of an ejectment by the landlord against his tenant, may recover for mesne profits down to the day of trial, though no notice of trial has been proved. (8)

[P. 1491.] In trespass for mesne profits, a verdict may be found against the defendant, though he never actually occupied during the time of the trespass, if it be proved, that before the trespass the defendant, who then held lawfully, underlet to H.; that the defendant's and H.'s interest became determined, and that the right of possession vested in the plaintiff; that H. held on; and that the defendant afterwards continued to receive rent of him, and declared him to be his tenant when the plaintiff demanded possession, the defendant and H. both alleging title in the party under whom the defendant formerly held. (9)

[P. 1494.] In an action of trespass for mesne rates, evidence that the defendant did not receive any rent out of the premises since the day of the demise in the ejectment, and that each non receipt was in consequence of an agreement with the plaintiff, was admitted under the general issue, and held to be a good answer to the action (10); Mr. Baron Pennefather observing, "I do not think that the defendant has been shewn to be a trespasser. For some purposes, the premises must be considered to have been in his possession; yet his possession is but a constructive one; and if nothing has been received by the defendant out of the premises, and if, moreover, that non-receipt has been in consequence of an agreement with the plaintiff, it would not be such a possession as to make him a trespasser."

ment a defendant is not entitled to a new trial without payment of costs.

COSTS.

If a rule nisi for judgment in ejectment be served on persons not in possession, they are entitled to costs.

Security for costs.

THE JUDGMENT.

Warrant of attorney to confess judgment in ejectment is not within stat. 1 & 2 Vict. c. 110. s. 9.

EVIDENCE.

What is sufficient evidence to go to the jury, that the property really belonged to the lessor of the plaintiff.

EJECTMENT BY LANDLORD AGAINST TENANT.

Affidavit under stat. 4 Geo. 2. c. 28. s. 2. that there is no sufficient distress on the premises must be positive.

Assessment of damages for double value under stat. 4 Geo. 2. c. 28.

Under stat. 1 Geo. 4. c. 87. lessor may recover for mesne profits down to the day of trial, though no notice of trial has been proved.

ACTION FOR MESNE PROFITS.

In trespass for mesne profits, a verdict may be found against the defendant, though he never actually occupied during the time of the trespass.

EVIDENCE.

If the defendant did not receive rent from the premises since the day of the demise, and that each non receipt was in consequence of an agreement with the plaintiff, it will be an answer to the action.

(1) Doe d. *Gilbert v. Ross*, 7 M. & W. 102.

(2) Doe d. *Tansley v. Roe*, 1 M. & G. 490.

(3) *Nicholson v. Ejector*, 1 Crawford & Dix (Irish), 418.

(4) Doe d. *Kingston v. Kingston*, 1 Dowl. P. C. N. S. 263.

(5) Doe d. *Humphrey v. Martin*, 1 C. & Marsh. 32.

(6) Doe d. *Hicks v. Roe*, 1 Dowl. P. C. N. S. 180.

(7) *Robinson v. Learoyd*, 7 M. & W. 48.

(8) Doe d. *Thompson v. Hodgson*, 12 A. & E. 135. 2 M. & Rob. 283.

(9) Doe v. *Harlow*, *ibid.* 40.

(10) *Bradshaw v. Morris*, 2 Irish Circuit Cases, 213.

EVIDENCE.

PRIMARY EVIDENCE.

If a plaintiff close his case without its appearing, that there is any written contract relating to the subject-matter of the action, the defendant if he rely upon it, must produce it properly stamped.

Memorandum of the payment of money admissible in evidence without a stamp.

Where an agreement stamp not required as "evidence of a contract" within stat. 55 Geo. 3. c. 184.

Lease from the crown does not require a stamp.

Sufficiency of stamp.

On the trial of an issue from the court of Chancery the judge will take notice of the terms of the order by which the issue is directed.

SECONDARY EVIDENCE.

Where a party is entitled to give secondary evidence, he may give any species of secondary evidence.

Judgment of Mr. Baron Alderson in *Doe d. Gilbert v. Ross*.

What is a sufficient acknowledgment of a deed by a married woman although not upon oath.

[P. 1514.] Where a plaintiff closes his case without its appearing, that there is any written contract relating to the subject-matter of the action, the defendant, if he mean to set up that there is such a contract, must produce it, properly stamped, so as to be receivable in evidence; and it makes no difference, that the plaintiff has had notice to produce the document. (1)

[P. 1514.] In *assumpsit* on the money counts, the plaintiff offered in evidence the following memorandum:—"Received from — Carey 38*l.*, for which I will account on demand:"—It was held, that such memorandum was admissible in evidence without a stamp. (2)

[P. 1514.] In an action for board and lodging supplied to an illegitimate child of the defendant, letters of the defendant, containing promises to remit money to the plaintiff and making excuses for not having done so, were held not to require an agreement stamp, as being "evidence of a contract" within the meaning of those words in the Stamp Act, 55 Geo. 3. c. 184. Sched. Part I. tit. *Agreement*. (3)

[P. 1514.] Where a lease from the board of ordnance, which purported to be signed, sealed, and delivered, being first duly stamped, was not stamped:—the court held, that being a lease from the crown, it was not necessary that it should be stamped. (4)

[P. 1514.] Where an agreement for the sale of a house stated, that the sale was subject to the covenants set forth "in a draft lease delivered this day:"—It was held, that in calculating the number of words with reference to the stamp upon the agreement, the covenants in the lease were not to be included; and that the agreement containing less than 1080 words, and being stamped with a 1*l.* stamp, it was sufficiently stamped. (5)

[P. 1516.] On the trial of an issue directed by a court of equity, the judge will take notice of the terms of the order by which the issue is directed. But where issues of *devisavit vel non* were directed by the master of the rolls, who ordered, that they should be tried by a special jury, but that none of the special jury should reside within twelve miles of G. (the assize town); and there was no order as to the talesman, and only eight special jurors appeared, and the plaintiff's counsel prayed a *tales*; but the other party objected; the judge would not grant a *tales*, on the ground, that, there being no order of the master of the rolls as to the talesman, and their residing within twelve miles of G. being no legal ground of challenge, the talesman could not be asked, on the *voire dire*, as to their residences; and that, if any of them did reside within twelve miles of G., the master of the rolls would probably order a new trial on that ground. The trial, therefore, stood over till the next assizes. (6)

[P. 1517.] There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. But where, on a former trial of the title to the same property, on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limitations in it were stated in court by the defendant's counsel:—It was held, that a copy of the short-hand notes of that statement was not receivable in evidence on the part of the same lessors of the plaintiff in a second ejectment against another party. (7)

[P. 1517.] In *Doe d. Gilbert v. Ross* (8) Mr. Baron Alderson observed, "I agree with my brother Parke, that the objection must arise from the nature of the evidence itself. If you produce a copy, which shews, that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case: the existence of an original does not shew the existence of any copy; nor does parol evidence of the contents of a deed, shew the existence of any thing except the deed itself. If one species of secondary evidence be to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original; and the other side, at the trial, may defeat him by shewing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all."

[P. 1520.] An affidavit, verifying the due taking in Russia of the acknowledgment of a deed by a married woman, made before the British consul, was held sufficient, it having been stated in a notarial certificate, made in a former case, that the laws of Russia do not grant authority to magistrates to administer oaths. (9)

- (1) *Magnay v. Knight*, 1 M. & G. 944.
- (2) *Carey v. Eccleston*, 1 Crawford & Dix (Irish), 6.
- (3) *Beeching v. Westbrook*, 8 M. & W. 411.
- (4) *Petrie v. Lamont*, 1 C. & Marsh. 93.

- (5) *Sneezen v. Marshall*, 7 M. & W. 417.
- (6) *Wood (Bart.) v. Thompson*, 1 C. & Marsh. 171.
- (7) *Doe d. Gilbert v. Ross*, 7 M. & W. 102.
- (8) *Ibid.* 107.
- (9) *Davy v. Maltwood*, 2 M. & G. 424.

[P. 1524.] In *Frankis v. Frankis* (1), the plaintiff in ejectment having adduced oral evidence of the terms of defendant's tenancy under him, the defendant put in the following memorandum, signed by himself:—"July 13. 1838. I acknowledge that I have held the estate &c. as tenant to T. F. (the plaintiff), at a yearly rent of 60*l*., from 4th July, 1837, the rent to be paid quarterly; and I further acknowledge to stand indebted to the said T. F. in 60*l*. for the first year's rent, which was due on the 4th July instant. I have on the signing hereof paid the attorney of T. F. 6*d*. in part of the rent so due:—"It was held, that this paper was not a mere acknowledgment or attornment, but a contract or evidence of a contract within stat. 55 Geo. 3. c. 184. Sched. Part I. tit. *Agreement*, and inadmissible without a stamp.

When a document is not a mere acknowledgment or attornment, but a contract or evidence of a contract it is within stat. 55 Geo. 3. c. 184.

[P. 1524.] A notice to produce all letters written by the one party to and received by the other, between the years 1837 and 1841 both inclusive, has been held sufficient to call for a particular letter. (2)

A notice to produce all letters, will authorise the calling for a particular letter.

[P. 1525.] In *Sturge v. Buchanan* (3), the plaintiff gave the defendant notice to produce certain specified letters written by the defendant to his partner, and a letter-book kept by him, containing copies of such letters; and the defendant consented to admit copies of the letters, saving just exceptions, &c., and undertook to produce the letter book in proof of them:—"It was held, that the book, when produced by the defendant, was good secondary evidence against him of the letters specified in the notice; and that, supposing proof of the sending of the letters to be material, the fact of their being transcribed in such a book was evidence of it as against the defendant; and that the defendant had no right to read in his own behalf other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff.

What is good secondary evidence of letters specified in a notice.

[P. 1527.] A notice to produce, served by the defendants on the plaintiff's giving them notice to produce "all letters written to and received by you between the years 1837 and 1841, both inclusive, by and from the said defendants or either of them, during the time aforesaid, or by or to any person on their or your behalf respectively," is good, and is not too general, although it does not specify the date of each particular letter. (4)

Notice to produce letters need not specify the date of each particular letter.

[P. 1529.] Where none of the parties lived in the assize town the plaintiff's attorney served the defendant's attorney in the assize town, on the commission day, with notice to produce a paper, and offered the expenses of going to fetch it; but the defendant's attorney said, that that was of no use, as the paper was not in existence:—"It was held, that the plaintiff on the trial might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the paper was not in existence, got rid of any objection as to the lateness of the service of the notice to produce. (5)

When secondary evidence may be given of the contents of a paper, notwithstanding lateness of service of notice to produce.

[P. 1530.] Where a deed in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a *subpoena duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents. (6)

If an attorney refuse to produce a deed, because he has a lien upon it, secondary evidence may be given of its contents.

[P. 1531.] Where a party refuses to produce a document after notice, and secondary evidence is in consequence given, he cannot afterwards put in the document as part of his own case. (7)

Where a party refuses to produce a document, and secondary evidence be given, the original document is inadmissible.

[P. 1535.] A witness, produced to prove a parol demise from the plaintiff to the defendant, stated that, at the time of making it, the plaintiff looked at written minutes, from which he appeared to read the terms; to which the defendant assented:—"It was held, that, in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible. (8)

When parol evidence of the terms of a demise are admissible.

[P. 1538.] Where there was a devise to John A., the grandson of T. A., charged with the payment of 100*l*. "to each and every the brothers and sisters of the aforesaid John," and at the time of making the will there were two persons named John A., grandsons of T. A., one of whom had several brothers and several sisters; the other had only one brother and one sister:—"It was decided, that parol evidence of declarations of the deviser, that she had left her property to the grandson who had only one brother and sister, were admissible to shew, which grandson should take under the devise; and that it was no objection to such evidence, that the declarations were subsequent to the making of the will. (9)

When parol declarations of a deviser are admissible.

[P. 1538.] Where land was devised to the testator's niece Mary B. for life, remainder to "her three daughters, Mary, Elizabeth, and Ann," in fee, as tenants in common; and at the date of the will Mary B. had two legitimate daughters, Mary and Ann, living; and one illegitimate, named Elizabeth:—"It was held, that extrinsic evidence was admissible to rebut the claim of Elizabeth, by shewing, that Mary B. formerly had a legitimate daughter, named Eliza-

Where extrinsic evidence admissible to shew, that a testator did not know of the death of one of his lega-

(1) 11 A. & E. 792.

(2) *Morris v. Hauser*, 2 M. & Rob. 392.

(3) 10 A. & E. 598.

(4) *Morris v. Hansen*, 1 C. & Marsh. 29.

(5) *Foster v. Pointer*, 9 C. & P. 718.

(6) *Doe d. Gilbert v. Ross*, 7 M. & W. 102. 107.

(7) *Doe d. Thompson v. Hodgson*, 2 M. & Rob. 283.

(8) *Trewhitt v. Lambert*, 10 A. & E. 470.

(9) *Doe d. Allen v. Allen*, 12 *ibid*. 451.

tees, or of the existence of an illegitimate child.

When evidence of instructions given by a testator for his will, and of his declarations, are not admissible to shew, which of two grandsons were intended by the description of the will.

Judgment of Lord Abinger in *Doe d. Hiscocks v. Hiscocks*.

beth, who died some years before the date of the will; and that the testator did not then know her death, or of the birth of the illegitimate daughter:—It was also held, in ejectment for the land by the illegitimate daughter, that letters purporting to have been written and sent, thirty years before, by the testator to his niece Mary B., and produced from the proper custody, were admissible against the plaintiff, without proof of the handwriting, to shew his apprehension of the state of Mary B.'s family. (1)

[P. 1543.] In *Doe d. Hiscocks v. Hiscocks* (2) it appeared, that a testator devised lands to his son John H. for life; and, from his decease, to the testator's grandson John H., eldest son of the said John H., for life; and on his decease, to the first son of the body of his said grandson John H. in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married. By his first wife he had one son, Simon; by his second wife an eldest son, John, and other younger children, sons and daughters:—upon which it was holden, that evidence of the instructions given by the testator for his will, and of his declaration, was not admissible to shew which of these two grandsons was intended by the description in the will, Lord Abinger *inter alia* observing, "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident, that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances, that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words."

"If a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is, what Lord Bacon calls, 'an equivocation,' *i. e.* the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shews, what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

"It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

"Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each; and it is not easy to see, how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, *Bradshaw v. Bradshaw*, and others, are authorities against this conclusion. If therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground, that the devise is void for uncertainty."

[P. 1543.] In construing a devise, words are to be taken to comprehend a subject which falls within the usual sense of such words, unless the will contain a manifest and plain declaration to the contrary.

When therefore A., seised of Whiteacre, Blackacre, and Greenacre, of which Whiteacre stands limited to A.'s issue in strict settlement, and must, on the death of A., vest in B., his eldest son, as first entailed, devises to his son C., Blackacre, and devises to his son D. all the remainder of his lands over which he has "a power of disposal," the reversion of Whiteacre passes with Greenacre to D., although, in a remote part of the will, A., in specifying of his control over B., mentions Whiteacre as an estate "over which he has no power." (3)

In construing a devise, words are to be taken to comprehend a subject which falls within the usual sense of such words.

(1) *Doe d. Thomas v. Beynon*, 12 A. & E. 431. (3) *Doe d. Howell v. Thomas*, 1 M. & G. 335.

(2) 5 M. & W. 363.

[P. 1554.] Where the attestation of a deed is in the usual form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through: — It will be for the jury to say, whether the deed was not duly signed, sealed, and delivered, as all that is very likely to have occurred, though the witness did not remember it. (1)

[P. 1555.] The plaintiff in an action on the case gave evidence, as confirmatory of the defendant's having committed the tort proved, at Layton, that he was seen near the spot at the time in question, and the defendant called witnesses who swore, that the defendant was at Richmond at that time. The plaintiff was allowed to give in reply additional evidence of the defendant's being at Layton, such evidence being a direct contradiction of the new fact of the defendant's being at Richmond. (2)

[P. 1570.] In case for maliciously indicting the plaintiff, the observations made by the judge on the trial of the indictment are not evidence for the plaintiff. (3)

[P. 1587.] Evidence of reputation is not admissible to shew a liability in the occupiers of land to repair a road, *ratione tenura*. (4)

[P. 1606.] When a deceased receiver of rents had rendered to his employer annual accounts of the rents received from property at H.; but the accounts were not signed by any one; and one of the accounts was in the handwriting of a deceased clerk, but on it was written, in the handwriting of the receiver, "H. rents;" another account was in the handwriting of the son of the receiver, who proved, that he made it out by the authority of his father, and that the account was rendered to the employer, as was the usual course: — It was held, that, under these circumstances, both these accounts were receivable in evidence, as the accounts of a deceased agent charging himself to his principal. (5)

[P. 1606.] The admission of an attorney of having received a rule, cures any irregularity in the mode of service. (6)

[P. 1609.] A tenant who has stated to his landlord, that his tenancy commenced in March, will not be permitted, at a trial in ejectment, to set up, that it commenced in November. (7)

[P. 1611.] A plaintiff by his notice to admit, called on a defendant to admit an authority to sell an estate "signed by defendant," and dated "10th August, 1840;" and a judge by consent made the usual order to admit it; when the document was given in evidence, the date, "August," appeared to be written on an erasure: — It was held, that the defendant by this admission had precluded himself from calling on the plaintiff to give evidence to explain the altered date; and it seems that, by an admission of this kind, the accuracy of the document is conceded. (8)

[P. 1616.] Where, in January, 1837, a carriage was sold and delivered by the plaintiff to the defendant; and in April following the defendant wrote to the plaintiff as follows: — "The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market; just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself," &c. : — It was held, that this was some evidence to go to the jury of an agreement to pay for the goods by a bill or note, and therefore, that the jury might give interest on the price as part of the damages. (9)

[P. 1625.] In an action for goods sold, the defendant pleaded, that the defendant and M. had agreed with the plaintiffs, that M. should give a guarantee for payment of the debt by instalments, and that the guarantee was given and was accepted by the plaintiffs in satisfaction. The replication denied the agreement, or that the plaintiffs had accepted the guarantee in satisfaction. It appeared that, before the bringing of the action, Mr. L., who was the plaintiff's attorney on the record, had written to the defendant for payment of the debt, and that it was proposed to give evidence of what Mr. L. had said after he had so written, and before the action: — It was held, that such evidence was not receivable without further proof of the agency of Mr. L. (10)

[P. 1627.] A communication to or by the counsel of A., from or to the attorney of B., respecting the proceedings in a cause between A. and B., which takes place out of court, is not binding upon A. Where therefore, pending a rule nisi, the attorney served with the rule inferred from a conversation out of court, with the counsel who had moved the rule, that the latter would forbear to move to make it absolute for a certain time, and the rule was made absolute by that counsel within the time mentioned, the court refused to re-open the rule. (11)

PRESUMPTIVE EVIDENCE.
Attestation of a deed.

Evidence of the defendant having committed the tort.

HEARSAY EVIDENCE.
Observations made by the judge on a trial for maliciously indicting the plaintiff are inadmissible.
Where evidence of reputation inadmissible to shew a liability to repair *ratione tenura*.

ADMISSIONS.
Where accounts are receivable in evidence as the accounts of a deceased agent charging himself to his principal.
Admission by attorney of having received a rule, cures an irregular service.
Tenant is bound by the statements he makes respecting the commencement of his tenancy.

Where the defendant by an admission precluded himself from calling on the plaintiff to give evidence to explain an altered note.

What is evidence to go to a jury of an agreement to pay for goods, from which the jury might give interest on the price as part of the damages.

Insufficient proof of agency.

Communication out of court with counsel is not binding.

(1) *Burling v. Paterson*, 9 C. & P. 570.
(2) *Briggs v. Aynsworth*, 2 M. & Rob. 168.
(3) *Barker v. Angell*, *ibid.* 371.
(4) *Regina v. Wavertree (Inhab. of)*, *ibid.* 55.
(5) *Doe d. Sturt v. Mobbs*, 1 C. & Marsh. 1.
(6) *Martin v. Gilfoyle, Fox & Smith* (Irish), 145.

(7) *Frewen v. Aherne*, 1 Longfield & Townsend (Irish), 264.
(8) *Poole v. Palmer*, 1 C. & Marsh. 69.
(9) *Davis v. Smith*, 8 M. & W. 399.
(10) *Pope v. Andrews*, 9 C. & P. 564.
(11) *Richardson v. Peto*, 1 M. & G. 896.

EFFECT AND PROOF OF DOCUMENTARY EVIDENCE.

A witness cannot be examined respecting alterations in his depositions, without their production.

An apothecary need not give evidence of his identity as the person named in his certificate to practise.

Certificate under stat. 6 Geo. 4. c. 42. sufficient evidence of a person being the public officer of a banking company.

What is sufficient proof of the enrolment of an indenture in Chancery under the Mortmain Act, and of the time at which it took place.

In an action respecting the duchy of Lancaster, an old MS. book written by one of the officers in the reign of Queen Elizabeth was held to be inadmissible.

To let in the deposition of a witness examined on interrogatories, his absence must be shewn by one who can speak to the fact.

Depositions of a witness examined on interrogatories are inadmissible, notwithstanding he referred to papers which were not produced to the commissioners.

A *vidé voce* examination under stat. 1 Will. 4. c. 22. cannot be had before issue joined.

The court under stat. 1 Will. 4. c. 22. have no powers at the defendant's request to direct the examination of witnesses.

Where the contents of a letter are inadmissible on an issue, whether due diligence had been used to obtain the answer of A. to a bill of Chancery. What is evidence of a fine.

A decree in the

[P. 1633.] A witness who had sworn written depositions on a former occasion, in which he afterwards made some alterations, cannot be cross-examined as to those alterations without producing the depositions. (1)

[P. 1639.] A person suing as apothecary need not give evidence of his identity with the person named in the certificate to practise granted by the Apothecaries' Company. (2)

[P. 1639.] Where, in an action brought in 1839, against the public officer of a banking company, for overmarking a writ of execution in 1838, the plaintiff produced a certificate under stat. 6 Geo. 4. c. 42. of a return, sworn 28th March, 1838, to prove, that the defendant was the public officer of the company, and it appeared that no registry, as required by the act, had been made of the officers of the company after 1838:—It was held, that this, coupled with the certificate, was evidence to go to the jury of the defendant's being such public officer when the action was brought. (3)

[P. 1640.] Under the Mortmain Act (4), the production of an indenture having an indorsement which purports to be a memorandum of the enrolment of the indenture in Chancery on a certain day, and to be signed by a party who is shewn to have acted as clerk of the enrolment, though not so designated in the indorsement, is sufficient proof of the enrolment and of the time at which it took place, without proof of the handwriting of the officer signing the memorandum. The charitable uses to which land is conveyed may be declared by words of reference to another deed relating to other property. (5)

[P. 1642.] In an action to try whether the queen, in right of the duchy of Lancaster, has the right to appoint coroners for the duchy, the plaintiff insisting, that in former times an officer of the duchy, called the feodary, discharged the duties of coroner:—It was held, that a manuscript book, written by one J. S. (a feodary in the reign of Queen Elizabeth), and purporting to contain an account of the duties of his office, and precedents relating thereto, was not receivable in evidence for the plaintiff, who claimed to be duchy coroner, although such book had been kept in the duchy office, and referred to there, as a book of authority. (6)

[P. 1645.] In order to let in the deposition of a witness examined on interrogatories, his absence must be shewn by some one who can speak to the fact of his own knowledge: proof of inquiries, made at the residence of the witness, and of answers given, is not enough. (7)

[P. 1645.] The depositions of a witness examined on interrogatories are admissible, though it appears, that on his examination he referred to papers, which he refused to allow the commissioners to see. (8)

[P. 1646.] An examination of witnesses *vidé voce* before the master, under stat. 1 Will. 4. c. 22., cannot be had before issue joined. (9)

[P. 1646.] In an action at the suit of the crown, the court has no power under stat. 1 Will. 4. c. 22., at the defendant's instance, to direct a commission for the examination of witnesses. (10)

[P. 1650.] On an issue raising the question, whether due diligence had been used to obtain the answer of A. to a bill of Chancery, a witness stated on interrogatories, that he did with due diligence endeavour to obtain the answer, but could not, and that he wrote a letter on that occasion to A.'s agent. The letter itself was not in evidence; and there was no proof, that any endeavour had been made, except writing such letter:—It was held, that the deposition, to the extent above stated, was inadmissible, though the part immediately following set forth the contents of the letter, and was therefore excluded. (11)

[P. 1653.] An examined copy of the record of a fine, levied with proclamations, is good evidence of the fine as the chirograph itself certified by the officer. A fine was proved to have been levied of the estate in question in 1790, and the lessors of the plaintiff gave in evidence a deed of conveyance of part of the property in 1802, by the consor of the fine to a purchaser, which stated, that the fine was levied to the use of himself in fee. This deed was received without objection on the part of the defendant:—And was held to be evidence as a declaration of the uses of the fine, although it was proved, that the defendant derived title under the consor. (12)

[P. 1662.] A decree of the court of Arches for alimony is not admissible in evidence without proof of the proceedings in the suit. And where a suit is removed by appeal from the Consistory Court to the court of Arches, the judgment of the court of Arches is not ad-

(1) *Pujolas v. Holland*, 1 Longfield & Townsend (Irish), 177.

(2) *Simpson v. Dismore*, 1 Dowl. P. C. N. S. 357.

(3) *Durant v. Potter*, 1 Longfield & Townsend (Irish), 253.

(4) 9 Geo. 2. c. 36.

(5) *Doe d. Williams v. Lloyd*, 1 M. & G. 671.

(6) *Jewison v. Dyson*, 2 M. & Rob. 377.

(7) *Robinson v. Markis*, *ibid.* 375.

(8) *Steinkeller v. Newton*, *ibid.* 372.

(9) *Mondel v. Steele*, 8 M. & W. 300.

(10) *Regina v. Wood*, 7 *ibid.* 571.

(11) *Tufton v. Whitmore*, 12 A. & E. 370.

(12) *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

missible in evidence without shewing, that court to be duly in possession of such suit by producing the process of appeal, viz. the transcript of the proceedings sent from the court below. (1)

[P. 1680.] If the counsel for a party rely on an act of parliament, and cite it as an act to be judicially noticed, the opposite party has no right to insist, that the counsel citing it should produce a copy of it printed by the queen's printer. (2)

[P. 1701.] On an issue as to the defendant's signature, witnesses were called for him who deposed, that they knew his handwriting, and did not believe the signature to be his; the plaintiff proposed to ask each witness whether a paper, placed on the witness box, was signed by defendant, purposing, by such inquiry, to test the knowledge of the witnesses by their agreement or disagreement. The paper was not in evidence for any other purpose:—It was held, that such inquiry was not allowable, and that the objection would not have been removed by independent proof, that the paper proposed to be laid before the witnesses, was in fact written by the defendant. (3)

[P. 1701.] Where a person devised real property to his widow for life, and after her death to his children equally, with a power to the widow to mortgage or sell, in case "the fund" arising from the real and personal estate of the testator, was not sufficient for the maintenance of the widow; and the widow executed a mortgage of the property for 30*l.* to her son T., and who four years before the mortgage, had advanced his mother a sum less than 1*l.* to pay a poor's rate, that she was unable to pay; and the subscribing witness to the mortgage deed had acted as attorney both of the widow and T. respecting it:—It was held, that, on the trial of an ejectment by the administratrix of T. to recover the property under the mortgage deed, the subscribing witness might be cross-examined to shew, that the sum of 30*l.*, mentioned in the mortgage deed, and the receipt at the back of it, was never in fact advanced; and that it was for the jury to say, whether the widow was in such circumstances, as to come within the terms of the power, and had had the money really advanced to her, or whether the mortgage was a device to get an advantage to one of the sons, the widow not being in circumstances to require the advance, and in fact never having received the money; and that in the former case the power would be well executed, and in the latter not. (4)

[P. 1706.] The witness who served a notice of action did not know the handwriting of the plaintiff, whose signature the notice purported to bear; and no evidence was given of the plaintiff's handwriting:—It was held sufficient without such proof, as it was enough, that the notice should have been served on the plaintiff's behalf. (5)

[P. 1708.] A deed executed in the presence of a subscribing witness, proved to be abroad at the time of the trial, is admissible on proof of the witness's writing, notwithstanding the power to examine on interrogatories under stat. 1 Will. 4. c. 22. s. 4. (6)

[P. 1713.] A witness called on his *subpœna duces tecum*, who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose. (7)

[P. 1714.] Where a document is called for after notice to produce by the plaintiff, the defendant may, during the plaintiff's case, produce evidence to shew the document lawfully out of his possession; and such evidence is solely for the judge to determine, whether secondary evidence be admissible, and gives the plaintiff's counsel no reply to the jury. (8)

[P. 1714.] A cause was tried at the assizes on a Monday, the commission day being on the Thursday before; a paper was called for under a notice to produce, which was served on the Saturday before the trial; the attorneys on whom the notice to produce was served, and also the party who was their client, lived in the assize town:—It was held, that the service of the notice to produce was not too late, and that the question in such cases is, whether, under all the circumstances, reasonable notice has been given. (9)

[P. 1714.] In a town cause, a notice to produce a paper, that would be in the hands of the opposite attorney was served at 8 p. m. on the evening before the trial, at his office, on one of his clerks, who had the management of the cause:—It was decided, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents. (10)

[P. 1715.] A witness who was duly served with a *subpœna*, but who received no conduct money, accompanied the plaintiff to the assize town, and lived with them while there; on the morning of the trial she refused to go to court to give evidence, unless 9*l.* (which was an unreasonable sum) was paid to her:—It was held, that the plaintiff, not having

court of Arches is not admissible in evidence without proof of the proceedings.

Party relying on a statute need not produce a copy.

Proof of handwriting.

Where a subscribing witness can be cross-examined to shew, that a sum mentioned in the mortgage deed, and the receipt on the back of it, was never advanced.

The handwriting of a plaintiff to a notice of action need not be proven.

If a deed be executed in the presence of a witness who is abroad, evidence of his handwriting is receivable.

PROOF BY WITNESSES.

A witness refusing to produce documents has no right to have the question of his liability argued by counsel.

Where a document is called for, evidence is receivable to shew, that the document is lawfully out of the possession of the person from whom it was demanded.

The question respecting the notice to produce documents is, whether, under all the circumstances, reasonable notice has been given.

Notice to produce a paper served at 8 p. m. on the evening before the trial not too late.

To ground an attachment against a witness for non attendance, a tender must be proved of a rea-

(1) *Leake v. Westmeath (Marquis of)* M. & Rob. 394.

(2) *Forman v. Dawes*, 1 C. & Marsh. 127.

(3) *Griffiths v. Ivory*, 11 A. & E. 322.

(4) *Doe d. Salt v. Carr*, 1 C. & Marsh. 123.

(5) *Forman v. Dawes*, *ibid.* 127.

(6) *Glubb v. Edwards (Clerk)*, 2 M. & Rob. 300.

(7) *Doe d. Rowcliffe v. Egremont (Earl of)*, *ibid.* 386.

(8) *Harvey v. Mitchell*, *ibid.* 366.

(9) *Firkin v. Edwards*, 9 C. & P. 478.

(10) *Gibbons v. Powell*, *ibid.* 634.

sonable sum to convey him home from the assize town in addition to the conduct money.

What expenses must be paid to compel attesting witnesses to an agreement of reference to make an affidavit.

Scale of costs for the expenses of witness's producing and explaining records.

Where a clerk can claim fees above the common remuneration to a witness.

The costs of an attorney for attending a commission for the examination of witnesses will be left to the master.

When the court sits at a different place from that mentioned in the writ of *subpoena*.

Witness not bound to obey a *subpoena* improperly altered by the attorney.

Whether a *subpoena* has been served in a proper time, is a question for the court.

A country witness summoned to attend the Prerogative Court.

Form of oath to be taken by a Chinese.

Where devisee on a bond of his testator, is an incompetent witness.

In an action by a landlord against a sheriff for not retaining a year's rent under an execution against his tenant, the tenant is a competent witness for the plaintiff.

Where cross-actions will not incapacitate servants.

One of the makers of a joint promissory note, is a competent witness to support a plea of payment.

Deposition of a witness who is jointly interested with the defendant, may be read in evidence, if the

tendered her a reasonable sum to convey her home, were not entitled to an attachment against her for not obeying the *subpoena*. (1)

[P. 1716.] In order to compel the attesting witness to an agreement of reference to make an affidavit, the expenses attending the making it, ought to be tendered. (2)

[P. 1716.] The expenses of a witness at Nisi Prius to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for and obtaining copies and translations of such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them. (3)

The costs of the attendance of an officer of the court of Chancery to produce affidavits filed there, for the purpose of using them at a trial to check the testimony of the same deponents at Nisi Prius, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them. (4)

[P. 1717.] A party wishing to produce the roll of attorneys in the court of Chancery evidence on a trial in K. B., applied to the senior clerk of the Petty Bag Office to procure an order from the master of the rolls for their production, which was granted, according to the usual practice; and the senior clerk was then subpoenaed to produce the roll, he being the proper officer:—It was held, that the clerk might claim for attendance at the trial with such roll, not the common remuneration of a witness appearing on a *subpoena duces tecum*, but reasonable fees to a larger amount, which were proved to have been usually paid for fifty years past, to clerks attending with records from the Petty Bag Office: although he did not, when subpoenaed, inform the party that he should demand remuneration as a clerk attending under the order of the master of the rolls, and not as an ordinary witness; and although he did not produce the roll himself, but sent it by his clerk. (5)

[P. 1717.] The court will not interfere with the discretion of the master as to the costs of an attorney for going abroad to attend a commission for the examination of a witness. (6)

[P. 1718.] The writ of *subpoena* required the attendance of the witness in Westminster Hall, the Nisi Prius sittings being held, during term, in a detached building, called the Westminster Sessions House:—It was held, that notwithstanding the apparent inconsistency of the writ, an attachment might be granted for disobedience to it, by reason of the witness neglecting to appear at the Nisi Prius court, there being notices affixed to the walls of the court in Westminster Hall directing witnesses to proceed to the sessions house. (7)

[P. 1718.] A witness is not bound to obey a *subpoena* altered by the attorney from the sittings for which it was originally sued out to subsequent sittings without being resealed. Whether a *subpoena* has been served in a reasonable time before the trial is matter for the court; but service on a person living close to the place of trial, at half-past eleven o'clock in the morning, for a cause called on at two o'clock, is not in sufficient time. (8)

[P. 1719.] A country witness summoned to attend the Prerogative Court, and examined in chief, and sworn to attend again for the purpose of being cross-examined, is privileged from arrest while attending in town for the purpose of giving his testimony. (9)

[P. 1720.] "You shall tell the truth, and the whole truth: the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer."

[P. 1727.] In an action of debt against a devisee on a bond of his testator, in which the question is, whether the signature of the testator is a forgery or not, a party entitled under the testator's will, to an annuity, charged on his real estate, is not a competent witness for the defendant. (10)

[P. 1746.] In an action against a sheriff for removing goods taken under a *f. fa.* without paying a year's rent, which was due to the landlord, the tenant against whom the execution issued, is a competent witness for the plaintiff. (11)

[P. 1755.] Where a defendant in an action of trespass *quare clausum fregit*, has brought a cross-action of the same nature for the same transactions against the plaintiff and his servants, who were witnesses of the fact, such servants are not thereby rendered incompetent witnesses for the plaintiff in the first action. (12)

[P. 1755.] In an action by the payee against one of the makers of a joint and several promissory notes, another of the makers, since stat. 3 & 4 Will. c. 42. s. 26., is a competent witness for the defendant to support a plea of payment. (13)

[P. 1756.] The deposition of a witness examined on interrogatories, jointly interested

(1) *Newton v. Harland*, 1 M. & G. 956.

(2) *Exp. Pike*, 1 Dowl. P. C. N. S. 275.

(3) *Bastard v. Smith*, 10 A. & E. 219.

(4) *Ibid.*

(5) *Bentall v. Sydney*, *ibid.* 162, 163.

(6) *Cornet v. Dempsey*, 1 Dowl. P. C. N. S. 422.

(7) *Chapman v. Davis*, *ibid.* 239.

(8) *Barber v. Wood*, 2 M. & Rob. 172.

(9) *M'Donnell v. Gray*, 1 Longfield & Townsend (Irish), 239.

(10) *Floor v. Davies*, 7 M. & W. 235.

(11) *Read v. Thoyts*, 9 C. & P. 515.

(12) *Gillespie v. Cumming*, 1 Longfield & Townsend (Irish), 181.

(13) *Russell v. Blake*, 2 M. & G. 374.

with the defendant, may be read in evidence for the defendant, the name of the deponent being indorsed on the record under stat. 3 & 4 Will. 4. c. 42. s. 27. (1)

[P. 1758.] In trespass for distraining on the plaintiff; it was pleaded, that W. held the premises as tenant to the defendants, at a rent of 10*l.*, and distress for such rent; to which *non tenet* was replied. The case opened for the plaintiff at the trial was, that W. was seised in fee, and that the plaintiff held the premises of him at a rent of 3*l.*:—It was held, that W.'s wife was not a competent witness for the plaintiff to prove those facts, because, in the event of a verdict for the defendants, W. would be liable over to the plaintiff; and that the incompetency being independent of any use that might be made of the verdict, was not removed by stat. 3 & 4 Will. 4. c. 42. s. 26. (2)

[P. 1763.] Where an instrument is called for at a trial, and not produced, the attorney of the party required to produce it may be asked, whether he (the attorney) has it in his possession, the object of such question being merely to let in secondary evidence of the contents of the instrument. (3)

[P. 1766.] Affidavits of jurors as to what took place in open court on the delivery of their verdict are receivable. (4)

[P. 1769.] The judge at Nisi Prius is a judge of fact, as well as of law, on a question of the competency of a witness arising on the *voire dire*; but his opinion on the facts is subject to review in the court above, which will uphold his opinion, if the evidence of disqualification be ambiguous, and that the testimony of the witness was received. (5)

[P. 1771.] A witness called under a mistake of counsel as to his being able to speak to a transaction, is not liable to cross-examination though sworn, if the mistake be discovered before the question be put. (6)

[P. 1773.] The counsel calling a witness who gives adverse testimony cannot, on re-examination, ask whether the witness had not given a different account to the attorney. (7)

[P. 1779.] The construction of the specification of a patent belongs to the court, and not to the jury. (8)

[P. 1784.] The plaintiff is to prove his case to the satisfaction of the jury; and if he leave it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict. (9) A witness cannot be called to contradict another with respect to a statement suggested to have been made, if there be not an express denial by the party who is supposed to have made it of his having done so. (10)

[P. 1793.] A judge at Nisi Prius is bound to accept a plea *puis darrein continuance*, even after the jury are sworn, provided it be tendered in due form, and accompanied with the proper affidavit; but it seems, that such affidavit is unnecessary, where the subject-matter of the plea arises in the presence of the judge. (11)

[P. 1799.] In *assumpsit* by the holder against the acceptor of a bill of exchange, the declaration stated, that the drawer indorsed to the plaintiff; the defendant pleaded, that the bill was drawn and accepted for his accommodation, and handed to the drawer, that he might get it discounted; that the drawer indorsed it in blank, and delivered it to one A. to get it discounted, who, against good faith, delivered it to the plaintiff, for a purpose unknown to the defendant; of all which facts the plaintiff had notice:—It was held, that on this state of the pleadings, the defendant must begin. (12)

[P. 1799.] To an action by a third indorsee against the maker of a promissory note, the defendant pleaded that, while the note was in the hands of the second indorsee, an order of *nisi prius* was made, that his claim thereon be referred to arbitration; that after the making of the order, and before any award, he, in violation of good faith, and in fraud of such order, delivered the note to the plaintiff, who took it with full knowledge of the premises; and the replication traversed the knowledge of the plaintiff:—It was held, that, upon these pleadings, the defendant was bound to begin and shew the plaintiff's knowledge of the alleged fraud. (13) But it is questionable, Whether material allegations not traversed are to be taken as admitted for all purposes of the cause? (14)

[P. 1799.] If in an action on a life policy the defendants plead, that at the time of the declaration of health and of the making the policy, the habits of the person whose life was insured were immoderate and intemperate, and that he was addicted to excessive drinking; to which it is replied, that his habits were moderate and temperate, and not immoderate

name of the deponent be indorsed on the record.

Where a wife is incompetent independent of any use, that may be made of the verdict.

Where an instrument is called for at the trial, the attorney of the party required to produce it may be asked, whether he has it in his possession.

Affidavits of jurors as to what took place in open court are receivable.

Judge at Nisi Prius, is a judge of fact, as well as of law, on a question respecting the competency of a witness arising on the *voire dire*.

A witness called under a mistake of counsel, is not liable to cross-examination.

Counsel calling a witness, who gives adverse testimony, cannot be asked, whether he gave a different account.

Construction of the specification of a patent belongs to the court.

A witness cannot be called to contradict another, unless there be an express denial by the party who is supposed to have made it.

DEMURRER TO EVIDENCE.

A judge at Nisi Prius must accept a plea *puis darrein continuance*, even after the jury are sworn.

RIGHT TO BEGIN AND REPLY.

Where in an action by holder v. acceptor of a bill of exchange, the right to begin belongs to the defendant.

Where in an action by third indorsee against the maker of a promissory note, the defendant is bound to begin and shew the plaintiff's knowledge of the alleged fraud.

If there be an affirmative on both

(1) *Adams v. Garrard*, 2 M. & Rob. 400.

(2) *Wedgewood v. Hartley*, 10 A. & E. 619.

(3) *Coates v. Mudge*, 1 Dowl. P. C. N. S. 540.

(4) *Roberts v. Hughes*, 7 M. & W. 399.

(5) *Doe d. Norton v. Webster*, 12 A. & E.

442.

(6) *Wood v. Mackinson*, 2 M. & Rob. 273.

(7) *Winter v. Butt*, *ibid.* 357.

(8) *Neilson v. Harford*, 8 M. & W. 806.

(9) *Long v. Hitchcock*, 9 C. & P. 619.

(10) *Ibid.*

(11) *Todd v. Emly*, 1 Dowl. P. C. N. S. 598.

(12) *Lees v. Hoffstadt*, 9 C. & P. 599.

(13) *Smith v. Martin*, 1 Dowl. P. C. N. S.

418. 1 C. & Marsh. 58.

(14) *Ibid.*

sides, the plaintiff has a right to begin.

Where plaintiff on an issue from the court of Chancery, has a right to begin.

Where there are cross-demurrers, the plaintiff's counsel has the right to begin.

Where on the trial of an issue from the court of Chancery, the plaintiff has a general reply on all the parties.

Where the plaintiff has a right to begin in covenant.

Where the defendant is entitled to begin on a policy of insurance.

AMENDMENTS AT NISI PRIUS.
Amendment under stat. 9 Geo. 4. c. 15.

Amendment of record, in libel.

In cases of doubt, the judge will allow amendments under stat. 3 & 4 Will. 4. c. 42 s. 23.

"Government annuity" may be altered to "government security."

and intemperate, and that he was not addicted to excessive drinking; the plaintiff has the right to begin, because there is an affirmative on both sides. (1)

[P. 1799.] On an issue from the court of Chancery to try whether A. B. was at a certain time of sound mind, the plaintiff affirming the soundness is entitled to begin; and upon such issues it will be presumed, that the party ordered to be the plaintiff was intended to begin. (2)

[P. 1799.] Where there are cross-demurrers, the plaintiff's counsel has the right to begin, and may go into the whole of the case. (3)

[P. 1799.] On the trial of an issue directed by the court of Chancery to try, whether the plaintiff was the next of kin of J. S. (with the usual order for indorsing any special matter on the record), one defendant, A. B., claimed to be as nearly related to J. S. as the plaintiff was; the other defendant, C. D., set up a claim inconsistent with the case both of the plaintiff and A. B.: — It was held, that at the close of the plaintiff's case, C. D. should not only open but prove his case, and that then A. B. should do the like, the plaintiff having the general reply on both. (4)

[P. 1801.] In an action of covenant, the declaration stated, that the defendant covenanted to occupy demised premises in a proper manner, and to keep them in repair; but that the defendant did not occupy in a proper manner, and did not keep the premises in repair; to which it was pleaded, that the defendant did occupy in a proper manner, and did keep the premises in repair: — It was held, that, on these issues, the plaintiff had the right to begin. (5)

[P. 1801.] In *Pole v. Rogers* (6), a declaration (which was for a policy of insurance) alleged, that the same was effected in pursuance of a declaration by the plaintiff, averring, amongst other things, that the party whose life was insured, was not accustomed to any habits prejudicial to health, and was in a sound state of health; and that the policy was to be void in case of misrepresentation; it was pleaded, 1st, that the party was accustomed to habits prejudicial to health, to wit, of drunkenness; 2d, that the party was in a bad and unsound state of health; to which *de injuriâ* was replied: — It was held, that the defendant was entitled to begin.

[P. 1807.] A declaration stating, "that in consideration that A. had, at the request of B., advanced 24*l.* to C., and that A. would advance to C. the further sums of 2*l.* per week for so long a period as C. should require, and also such other sums of money as C. should, from time to time require; B. promised to repay him as well the 24*l.* as the further sums of 2*l.* per week, and such other sums as A. should lend and advance to C. as aforesaid;" is not supported by a letter in which B. writes to A., "I beg that you will continue to advance the sum of 2*l.* per week to C.; and I hereby engage to repay you all moneys you may advance to him, in addition to the 24*l.*, which you have already let him have at my request."

But the variance may be amended by the judge at the trial, under stat. 9 Geo. 4. c. 15, if not under stat. 3 & 4 Will. 4. c. 42. s. 23.; where, upon such an amendment being made, the defendant submits to pay the sums recoverable under the amended declaration, he will be entitled to his costs from the time at which he might have paid the money into court; but if he contest the plaintiff's right to recover any thing, and fails, he will be entitled only to the costs occasioned by the misdescription of the contract. (7)

[P. 1808.] Where in an action for a libel the declaration stated, that the defendant published a libel, "contained in, and being an article, in a certain weekly printed publication or paper called the Paul Pry;" and at the trial it was proved, that the defendant gave a printed slip of paper, which appeared to have been cut from the Paul Pry, to several persons for them to read, and that they read it: — It was held, that the judge at the trial might properly allow the record to be amended by striking out the above-mentioned allegation, that the libel was contained in, and was an article in, the Paul Pry. (8)

[P. 1809.] In cases of doubt the judge at the trial will allow amendments under stat. 3 & 4 Will. 4. c. 42. s. 23., because that section provides a remedy, if the judge allow an amendment which ought not to be made, but gives no remedy in any case in which the judge has refused to allow an amendment. (9)

[P. 1809.] Where in the declaration it was alleged, that the defendant was retained by the plaintiff to lay out a certain sum of money for the purchase of a government "annuity" for the term of his life, and the breach stated, was the investment of the money with a private company; and the defendant pleaded, that he did not receive the money for the purpose alleged; and proof was given at the trial of the employment of the defendant to lay out the money in the government "security": — It was held, that it was an amendable variance within stat. 3 & 4 Will. 4. c. 42. s. 23. (10)

(1) *Craig v. Fenn*, 1 C. & Marsh. 43., vide etiam *Rawlins (Knt.) v. Desborough*, 2 M. & Rob. 328.

(2) *Frank v. Frank*, 2 M. & Rob. 314.

(3) *Pims v. Johnston*, 1 Crawford & Dix (Irish), 77.

(4) *Phillips v. Willetts*, 2 M. & Rob. 319.

(5) *Doe d. Worcester (City, Trustees of Schools) v. Rowlands*, 9 C. & P. 734.

(6) 2 M. & Rob. 287.

(7) *Smith v. Brandram*, 2 M. & G. 244.

(8) *Foster v. Pointer*, 9 C. & P. 718.

(9) *Jenkins v. Phillips*, *ibid.* 766.

(10) *Gurford v. Daley*, 1 Dowl. P.C.N.S. 519.

[P. 1809.] The plaintiff, a journeyman carpenter, sued his master on the custom of the trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach fare of the man back to London, and also the back carriage of his tools. It appeared that this custom did not apply where the man, while in the country, was dismissed for misconduct, or dismissed himself. The declaration was founded on a supposed general custom without these exceptions; but the judge at Nisi Prius allowed the declaration to be amended by inserting these exceptions, and adding averments, that the plaintiff was not dismissed for cause, and did not dismiss himself, the plaintiff paying the costs occasioned by this amendment. (1)

Declaration founded on a supposed general custom, without stating certain exceptions.

[P. 1809.] To a declaration on a promissory note for 250*l.* made by the defendant, dated the 9th of November, 1838, payable to the plaintiffs, or their order, on demand; it was pleaded, that the defendant did not make the note. The proof at the trial was of a joint and several promissory note for 250*l.*, made by the defendant and his wife, dated the 6th of November, 1837, payable twelve months after date; but there was no proof of any other note between the parties: — It was held, that this was a variance properly amended at Nisi Prius under stat. 3 & 4 Will. 4. c. 42. s. 23. (2)

Promissory note declared upon as a single note, but proof given of its being a joint note.

[P. 1809.] Where a declaration in ejectment omitted the year of the demise; and at the trial, the plaintiff having proved his title, the judge amended the record accordingly: — It was held, that though this was not a variance amendable under stat. 3 & 4 Will. 4. c. 42. s. 23., yet, as the plaintiff had succeeded in proving his title, the omission was no ground of nonsuit; and it also seems, that the omission would have been no ground for arresting the judgment. (3)

Where a declaration in ejectment omitted the year of the demise.

[P. 1809.] Where, in *assumpsit*, the promise of the defendant is alleged to have been made in consideration of a certain service to be performed by the plaintiff amongst other things, the omission to specify the other branches of the consideration included under the term "other things" is no ground of nonsuit, unless, upon the production of the agreement, in which such other branches of the consideration are specified, they appear to contain matter in the nature of a condition precedent; and, supposing the omission to be material, it is a variance, and as such amendable within the statutes allowing amendments at Nisi Prius. (4)

Where the promise is alleged to have been made in consideration of certain service to be performed by the plaintiff amongst "other things."

[P. 1810.] Where a plaintiff having obtained a verdict on a writ of trial, the defendant obtained a rule to set aside the proceedings, on the grounds, that the date of the writ of summons did not appear in the writ of trial; that the issue did not recite the writ of summons or award of venire; that the award of venire in the writ of trial stated the debt to be above 20*l.*; that the writ of trial did not recite when and out of what court it issued; that the writ of trial bore no date; — the court discharged the rule, and ordered the issue and record to be amended, and the plaintiff to pay the costs of the application. (5)

Where the date of the writ of summons does not appear on the writ of trial.

[P. 1810.] If in *assumpsit* the allegation of the promise be intended only as a statement of the legal effect of a charter-party, the judge has power under stat. 3 & 4 Will. 4. c. 42. s. 23., to amend by either striking out the allegation, or substituting a correct statement of the legal effect. (6)

Where the allegation of the promise is intended only as a statement of the legal effect of the instrument.

[P. 1810.] A declaration in *assumpsit* stated, that in consideration that the plaintiff would employ the defendant to build on a certain plot of ground a room, booth, or building, and to fit it up according to certain plans agreed upon, for the sum of 20*l.*; the defendant promised to erect the same by the 28th of June, 1838; the defendant pleaded *non assumpsit*, and that the agreement was rescinded. The contract proved was, that the defendant should place upon a plot of ground, hired for the purpose by the plaintiff, certain seats and tables to be completed four or five days before the 28th of June 1838 (the day of the coronation) for 25*l.*, and it did not appear that there were any plans agreed upon. The judge at the trial having directed the declaration to be amended in conformity with the contract proved, the court refused a new trial (7); Mr. Baron Alderson observing, "I think this is a case falling exactly within the act of parliament. The parties came to try two things; first, whether there was a contract at all; secondly, whether it had been rescinded; and not to try the particular nature or terms of the contract. If this amendment were not allowed, it would be directly contrary to the meaning and spirit of the act. The defendant has clearly not been prejudiced in his defence thereby, for after the amendment was allowed, he called witnesses to prove, that there was no contract at all, or if there was, that it had been rescinded by consent."

Variance between the declaration and evidence relative to the time at which a contract was to be performed.

Judgment of Mr. Baron Alderson in *Ward v. Pearson*.

[P. 1810.] Where the agreement was between the defendant and two others of the one part, and the plaintiff of the other, and executed only by the plaintiff and defendant, the declaration described it as an agreement between plaintiff and defendant: — It was held,

Parties to an agreement improperly described.

(1) *Read v. Dunsmere*, 9 C. & P. 588.

(2) *Beckett v. Dutton*, 7 M. & W. 157.

(3) *Doe d. Parson v. Heather*, 1 Dowl. P. C. N. S. 64.

(4) *Clark v. Morrell*, 1 M. & G. 841.

(5) *Emery v. Howard*, 1 Dowl. P. C. N. S. 426.

(6) *Whitwill v. Scheer*, 8 A. & E. 301.

(7) *Ward v. Pearson*, 5 M. & W. 17.

Inaccurate statement of an agreement of reference respecting costs.

Amendment of Nisi Prius record must be made during the trial and before verdict.

Where evidence inadmissible to shew, that words were omitted by mistake from a bill of exchange.

Where variance between contract declared upon, and that proved, ground of nonsuit.

POSTPONEMENT OF TRIAL.

Where the issue omits the date of the writ of summons, but the date is correctly inserted in the writ of trial.

THE VERDICT.

Where a prescription set up on behalf of the crown, is subject to a liability, and which forms only one prescription.

Entry of verdict where the issue is divisible.

Where, if a verdict pass for the plaintiff, a *nolle prosequi* should be entered, as to the count upon an account stated.

that this was a variance which a judge or the court had power to amend under stat. 3 & 4 Will. 4. c. 42. s. 23. (1)

[P. 1810.] Where the declaration on an agreement of reference stated, that the costs of the reference and the award were to abide the event; but at the trial it appeared, that the agreement also provided for the costs of making the agreement a rule of court: — It was held, first, that this was a variance; secondly, that it was a variance which might be amended under stat. 3 & 4 Will. 4. c. 42. s. 23. (2)

[P. 1810.] An amendment of the Nisi Prius record under stat. 3 & 4 Will. 4. c. 42. s. 23. must be made during the trial and before verdict, and the judge cannot give the party power to amend on a future day. (3)

[P. 1810.] Where a bill of exchange was expressed in figures to be drawn for 212, in words, for two hundred pounds, value received, with a stamp applicable to the higher amount: — It was held, that evidence to shew that the words "and forty-five" had been omitted by mistake, was not admissible. (4)

[P. 1810.] In *Beech v. White* (5) the declaration stated, that, by written agreement, the plaintiff agreed to let and defendant to take the farm of L. at a certain yearly rent, and that the plaintiff undertook to put the premises in repair within twelve months, after which time the defendant undertook to keep them repaired. It was averred, that the plaintiff repaired within the twelve months, and demised to the defendant on the terms *assumpsit*, and that he became tenant and occupied, but did not keep the property in repair; to which *non assumpsit*, and that defendant did not become tenant or occupy on the terms in the declaration mentioned, were pleaded. The agreement produced at the trial was to let and take as above, and that the plaintiff should keep the buildings insured in 600*l.* (defendant repaying the premiums), and should rebuild them in case of fire; and that the plaintiff should repair within twelve months, and that the defendant should afterwards keep them in repair, as above stated: — It was held, that the variance between the contract declared upon, and that proved, was a ground of nonsuit.

[P. 1816.] Where the issue omitted the date of the writ of summons, but the date was correctly inserted in the writ of trial, and the defendant attended at the trial, and protested against the proceedings, and a verdict was found for the plaintiff, the court refused to set aside the writ of trial on the ground, that the objection should have been taken on the issue. (6)

[P. 1818.] To a declaration in trespass for breaking and entering the closes of the plaintiff, digging mines, and carrying away minerals, and damaging the surface soil, the defendant pleaded, amongst other pleas, a plea justifying under a prescription in the name of the crown, in right of the duchy of Lancaster, to enter upon the land for the purpose of mining, doing no more damage than was necessary for that purpose; and also a plea setting up the same right, subject to the payment of compensation, and allowing a tender of compensation. At the trial, the right of the crown to enter and mine was proved, and the plaintiff's property in the surface soil was also established; but there was no evidence to shew any right of entry in the crown, which was not subject to compensation; and the jury found that sufficient compensation had been tendered: — It was held, upon motion to enter the verdict, that the prescription set up on behalf of the crown, was subject to the liability to make compensation, and with that liability formed only one prescription, and that there being a failure of proof of the prescription set out in the first named plea, the plaintiff was entitled to have the verdict entered for him on that plea. (7)

[P. 1818.] In trover for waggons, wheel-barrows, iron rails, &c., a verdict was given for the plaintiffs at the trial for 1850*l.*; but afterwards, on the argument of a special case, was reduced, by consent, to 600*l.*; and the following rule was drawn up: — "It is ordered by consent, that the verdict found for the plaintiffs on the trial of this case be reduced to the sum of 600*l.*, and that as to the residue of the claim, the verdict be entered for the defendants: " — It was held, that this was the proper course, the issue being divisible, and that the plaintiffs were not entitled to have the verdict entered generally for them, but that the defendants were entitled to a verdict and to their costs, as to so much of the cause of action as they had succeeded on. (8)

[P. 1818.] If, in *assumpsit* on a bill of exchange by indorsee against acceptor, with a count upon an account stated, the defendant pleaded to the first count, that he did not accept, and do not plead to the second count, and the award of *senior* be in the usual form to try, the judge at Nisi Prius will try the issue joined; and if a verdict pass for the plaintiff, a *nolle prosequi* should be entered as to the count upon an account stated. (9)

(1) *Boys v. Ansell*, 5 Bing. N. C. 390.

(2) *Duckworth v. Harrison*, 5 M. & W. 427.

(3) *Brashier v. Jackson*, 6 *ibid.* 549. Doe d. *Bennett v. Long*, 9 C. & P. 773.

(4) *Saunderson v. Piper*, 5 Bing. N. C. 425.

(5) 12 A. & E. 668.

(6) *Cooze v. Neumegen*, 1 Dowl. P. C. N. S. 429.

(7) *Paddock v. Forrester*, *ibid.* 537.

(8) *Williams v. Great Western Railway Comp.* 8 M. & W. 856.

(9) *Luckie v. Gompertz*, 1 C. & Marsh. 55.

[P. 1819.] Where a party complains of an erroneous entry of the verdict on the *postea*, the proper course is to apply to the judge who tried the cause to amend the entry by his notes. But where that course has been taken, and the judge has refused to make an order, the court will not interfere. (1)

[P. 1819.] A verdict in a civil action cannot be given in evidence by the mere production of the *postea*; but the judgment must be produced. (2)

[P. 1819.] On a motion for a new trial, counsel cannot present a point, which does not appear by the judge's notes to have been raised at the trial. (3)

[P. 1819.] On an application for a new trial, on the ground, that the verdict was entered by mistake, the court received the affidavit of a jurymen as to what occurred in open court on delivery of the verdict. (4)

[P. 1820.] A misstatement by one of the plaintiff's witnesses, on a matter foreign to the question at issue between the parties, is no ground for a new trial. (5)

[P. 1820.] In an action of *detinue* to recover possession of a boat, to which there was a plea of not possessed, the plaintiff called a witness to prove his possession, who turned out to be his partner: — It was held, that no objection having been raised at the trial to the admission of his evidence, the court would not interpose on motion, and grant a new trial. (6)

[P. 1820.] It is no ground for setting aside a verdict, that the jury have given only a shilling damages, under a mistaken impression that it would carry costs. (7)

[P. 1824.] Where a judge at Nisi Prius has granted a certificate for speedy execution, under stat. 1 Will. 4. c. 7. s. 2., and final judgment has been signed accordingly, the judge has no power afterwards to order a stay of proceedings. (8)

Course of proceeding, where a party complains of an erroneous entry of the verdict.

A verdict cannot be given in evidence by the mere production of the *postea*.

NEW TRIAL.

Evidence on a motion for a new trial, cannot be discussed, which does not appear by the judge's notes to have been raised.

If a verdict be entered by mistake, an affidavit of a jurymen as to what occurred in court is admissible.

Where no objection has been raised at the trial to the evidence of a partner of the plaintiff.

Jury acting under a mistaken impression respecting costs.

SPEDDY EXECUTION.

Where a judge has no power after final judgment to order a stay of proceedings.

INTEREST WHICH EXECUTORS OR ADMINISTRATORS TAKE AFTER PROBATE.

Where powers of sale given to executors extend only to a moiety first devised among children and their heirs.

PAYMENT OF DEBTS ACCORDING TO LEGAL PRIORITY.

Effect of an administrator promising to pay a simple contract creditor of the intestate, the amount of his debt "out of the first assets."

ADMINISTRATORS.

Writ of inquiry may be executed before the chief justice.

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

Where trover cannot be maintained, without an administration *de bonis non*.

EXECUTORS AND ADMINISTRATORS.

[P. 1842.] Where a testator devised among his children (naming them) one half of his property at his decease, whether in houses, lands, or other effects, to be equally divided among them and their heirs, according to the judgment of his executors, whom he empowered to sell or dispose of the whole or any part, according to their opinion, for the benefit of his children, as they severally arrived at the age of twenty-five, and not before, unless his executors thought it prudent to divide it before; and the testator then gave the remaining half of his property to his wife for her life, and to leave it at her death by her will among his children; but if she made no will, then to be equally divided among his children and their heirs: — It was held, that the power of sale given to the executors extended only to the moiety first devised among the children and their heirs. (9)

[P. 1849.] An administrator promised to pay a simple contract creditor of the intestate the amount of his debt "out of the first assets that came into his hands: " — It was held, that the administrator, on assets coming into his hands, was entitled to retain for the satisfaction of an outstanding judgment, and that the above promise ought to be construed to refer to the first assets properly applicable to the discharge of the simple contract debt. (10)

[P. 1882.] In debt on an administration bond, judgment by default having been suffered and breaches assigned pursuant to stat. 8 & 9 Will. 3. c. 11. s. 8., the court allowed the writ of inquiry to be executed before the chief justice, notwithstanding stat. 3 & 4 Will. 4. c. 42. s. 16., but only granted a rule *nisi* in the first instance. (11)

[P. 1885.] In *Elliott v. Kemp* (12) it appeared, that L. was possessed of furniture and other property, and on his dying intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E., and continued during that period to use the furniture. In October, 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did. In 1838, the furniture was sold by the defendant (who had married another daughter of L.) with E.'s concurrence. In 1840 (disputes having arisen about the distribution of the proceeds) E. took out administration to her mother: — It was held, that E. could not maintain trover for the furniture, without having taken out administration *de bonis non* to L.

(1) *Newton v. Harland*, 1 M. & G. 958.
(2) *Gillespie v. Cumming*, 1 Longfield & Townsend (Irish), 181.

(3) *Gibbs v. Pike*, 1 Dowl. P. C. N. S. 409.
(4) *Roberts v. Hughes*, *ibid.* 82.

(5) *Magnay v. Knight*, 1 M. & G. 944.

(6) *Walker v. Needham*, 1 Dowl. P. C. N. S. 220.

(7) *Mears v. Griffin*, 1 M. & G. 796.

(8) *Lander v. Gordon*, 7 M. & W. 218.

(9) *Bragg v. Ryland*, *ibid.* 59.

(10) *Fitzpatrick v. Purcell*, 1 Crawford & Dix (Irish), 297.

(11) *Canterbury (Archbishop of) v. Burlington*, 1 Dowl. P. C. N. S. 285.

(12) 7 M. & W. 306.

Where an executor not bound by an undertaking to try at a particular sittings.

ACTIONS AGAINST EXECUTOR AND ADMINISTRATOR.

If a plaintiff having charged a defendant in execution dies, and neither probate or administration be taken out, he must, previously to his applying to be discharged, serve a notice on the next of kin to the deceased.

Where an account is inoperative against minors claiming under the testator's will.

A receiver will not be appointed to collect the personal property of a testator, if the solvency of the executors be admitted.

THE PLEADINGS.

Where a plea does not sufficiently shew, that the authority to be given by the legatees was a condition precedent to the payment of a check.

Money paid into court, cannot be pleaded in discharge of principal, interest, and costs.

EVIDENCE.

In an action against an executor, on *plene administravit* pleaded, the plaintiff is bound to shew affirmatively, that the defendant had goods of the testator in his hand unadministered.

In covenant against two executors for eviction upon a covenant of the testator for quiet enjoyment, the declaration by

[P. 1888.] In an action by husband and wife, in right of the wife as executrix, a peremptory undertaking was given to try at a particular sittings; afterwards the husband died: — It was held, that the wife was not bound by the undertaking. (1)

[P. 1888.] Where a plaintiff, having charged a defendant in execution, dies, and neither probate nor administration is taken out within a reasonable time, the defendant must, previously to applying for his discharge, serve notice on the next of kin of the plaintiff, calling on them to prove his will or take out administration to him. (2)

[P. 1890.] Where an account was decreed against an executor after nine years, notwithstanding an account lotted by a mutual friend of the plaintiffs and defendant, and admitted by the plaintiffs in 1833, but not then examined by them or vouched by defendant: — It was held, that such account was perfectly inoperative against minors claiming under the testator's will. (3)

[P. 1893.] Where the solvency of an executor is admitted, and no charge made of the fund being in any danger in his hands, a receiver will not be appointed to collect the personal property of the testator as against such executor desiring to retain the administration of such property. (4)

[P. 1900.] Where in *assumpsit* on a banker's check for 250*l.* it was pleaded, that before the making of the check, the defendant, as executor of one R. S., was lawfully entitled to a bond for 500*l.*, which bond was in the hands of the plaintiff, who refused to deliver up the same to the defendant; that the plaintiff and twelve others claimed to be entitled to legacies under the will of R. S., and thereupon it was agreed between the plaintiff and defendant, that the plaintiff should deliver up the bond to the defendant, and that the defendant should make and deliver to the plaintiff the check in question, which should be a security for the payment of the legacies, and that the plaintiff should receive the said sum of money, upon and subject to an express condition, that the legatees under R. S.'s will should authorise the plaintiff to receive the said sum; that the defendant made and the plaintiff received the check upon that condition, and that the legatees had not authorised the plaintiff to receive the same sum: — It was held on special demurrer — assigning for cause, that it did not sufficiently appear by the plea, that the authority to be given by the legatees was a condition precedent to the payment of the check — that the plea was a good answer to the action. (5)

[P. 1904.] In debt on bond against executor of obligee, the defendant craved over of the condition, by which, after reciting an intended marriage between W. (the defendant's testator) and R., the bond was to be void, if after marriage W. should die in the lifetime of his wife, and his heirs &c. should, within six months after his decease, pay to the obligees 1500*l.* in trust for her; but if his wife died in his lifetime, the bond to be void, if he should pay to the person to whom his wife, by will, should bequeath the 1500*l.*: — It was held, that money paid into court cannot be pleaded in discharge of principal, interest, and costs. (6)

[P. 1906.] In an action against an executor on *plene administravit* pleaded, the plaintiff is bound to shew affirmatively, that the defendant had goods of the testator in his hands unadministered; and though the plaintiff is entitled to his verdict (and therefore to costs) if he can prove any property unadministered, yet the measure of plaintiff's damages is not the amount of his debt, but so much as he can shew to remain in the hands of the executor. Where the testator assigned his property, and the plaintiff in an action against the executor, set up fraud in the assignment, and suggested, to prove the fraud, that the testator was insolvent at the time of the assignment, it is sufficient for the purposes of the plaintiff in the action, if, by the very act of assignment, the plaintiff make himself insolvent, that is, if the property left after the conveyance be not enough to pay his debts. But where the sum realised after the death of the testator very nearly equalled the amount of his debts, his lordship still left it to the jury to say, whether there had been fraud in the assignment. (7)

It is a question for the jury, whether the executor has committed a *devastavit*, by swearing the property above its value, and so incurring a greater stamp duty than he would otherwise have to pay, seeing, that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property. (8)

[P. 1908.] In covenant against two executors upon a covenant of the testator for quiet enjoyment against all claiming under him, the breach assigned was, that the two defendants having, at the time when the indenture was made, lawful title in their own right entered and evicted the covenantee; and entry and eviction by the two was proved; the only evidence shewing, that it was under lawful title, was a declaration by one defendant, after the entry,

(1) *Lee v. Armstrong*, 1 Dowl. P. C. N. S. 390.

(2) *Ryan v. Ball*, 1 Crawford & Dix (Irish), 380.

(3) *Purcell v. Cole*, 1 Longfield & Townsend (Irish), 449.

(4) *Tennent v. Tennent*, 1 Crawford & Dix (Irish), 241.

(5) *Spencer v. Spencer*, 2 M. & G. 295.

(6) *England v. Watson*, 1 Dowl. P. C. N. S. 398.

(7) *Jackson v. Bowley*, 1 C. & Marsh, 57.

(8) *Ibid.*

that the two had lawful title through the testator under a deed prior to that now sued upon : — It was holden, that, assuming it to be admissible as against the party making it, the declaration was not evidence against the other defendant, as it did not relate to the affairs of the executors; and, therefore, that no proof had been given to support the action of covenant; Mr. Justice Patteson observing (1) " Without inquiring how the case would be, if there were only one defendant, which would raise a very grave and difficult question, the rule must be made absolute on the ground that the declaration does not bind the other defendant. *Jones v. Clayton* (Sir W.) (2) and *Ricketts v. Salwey* (3) are distinguishable cases. In *Jones v. Clayton* (4) the sheriff's return denied that either of the parties had goods: it was enough, therefore, to shew that either had, the action being for the falsity of the return. In *Ricketts v. Salwey* (5) the common was claimed in respect of two distinct parts of the property; and it was proved to exist in respect of one. But here it is asserted, that the one title in question was a good title in the two defendants. It is not enough, if the character of the defendants as executors be set aside, to prove an assertion by one, that the two had a good title. My brother Bompas, however, ingeniously puts it, that this is an admission by one executor that the testator had committed a breach. But that is not the evidence. There is no admission made in the character of executor: the only subject upon which the party was speaking was his title to the land; there was no reference to assets. It would be contrary to fact to take that declaration as made in the character of executor. On this single ground I think the rule for a nonsuit should be made absolute."

[P. 1910.] In covenant by A. against B. as administratrix of C. for breaches of covenant in an indenture between A. and C., B. pleaded, that she took out administration at the request of A., and upon his promise, that he would not charge, or seek to charge her, as administratrix or otherwise, with any breaches of the covenants contained in the indenture, and that no assets had come to her hands since the taking out of administration. The plaintiff having replied, taking issue upon the promise, it was held, that the affirmative of the issue was supported by a verbal promise, and that the court would not, after verdict for the defendant, assume that a promise under seal had been proved, and that the plaintiff was entitled to judgment *non obstante veredicto*, on the ground of the insufficiency of such parol promise to bar the action; Mr. Justice Maule observing, " I also am of opinion, that the verdict is properly entered for the defendant. The plaintiff says, that the plea ought to be understood as setting up a contract by deed, because a promise by deed was necessary in order to make the plea a good answer to the declaration. I agree that where the plaintiff does not demur, the plea should, if it possibly can, be understood in a sense in which it is an answer to the action (6); it is the same thing, whether the plaintiff traverses the plea or pleads over. I do not, however, find any case in which it has been held, that you can supply an omission for the purpose of making a plea a good plea. I take the rule to be, not that you are to supply by intendment matter which is omitted, but that you are to understand that, which is alleged in a sense which will support the plea. In *Dean v. James* (7) it was held, that an allegation in pleading, that the debt sued for had been assigned by the plaintiffs, did not import, that the defendant had notice of the assignment. That was not after verdict, but after pleading over; which is, for this purpose, essentially the same thing, for if issue had been taken upon any subsequent pleading, the question would have arisen after verdict. That circumstance would, therefore, make no difference. (8) But this is a plea of a parol promise not to sue, made after the covenant is broken, which I think would be a bad plea in any case." (9)

[P. 1911.] Differences and disputes having arisen between the trustees and managers of a chapel, as to the conduct of B. one of the trustees; and an information and bill having been filed in the court of Chancery at the relation of all the trustees (except B.) against B. and another person, praying an account against B. in respect of such part of the trust funds as had come into his hands; and B. having, by his answer, charged the relators with breach of trust in their management of the trust fund, an order was made by the vice-chancellor, with the consent of all parties, that the cause and all matters in difference should be referred to arbitration, the arbitrator to have full authority over the costs of the suit and reference. The order expressly provided, that the death of any of the parties should not operate as a revocation of the arbitrator's authority, but that his award should be delivered to the personal representatives of the deceased party or parties. During the reference, one of the relators, being a party thereto, died; and afterwards the arbitrator made his award, and thereby directed that the costs of the reference should be borne and paid by the parties by whom they were incurred. The plaintiff, who was one

one defendant, that the two had lawful title to enter, is inadmissible.

Judgment of Mr. Justice Patteson in *Fox v. Waters*.

Where the affirmative of the issue is supported by a verbal promise, the court will not, after verdict for the defendant, assume, that a promise under seal had been proven.

Judgment of Mr. Justice Maule in *Harris v. Goodwyn*.

Where executors are liable for their testator's proportion of the costs of a reference incurred after his death, and also of the costs of the award.

(1) *Fox v. Waters*, 12 A. & E. 53.

(2) 4 M. & S. 349.

(3) 2 B. & A. 360.

(4) 4 M. & S. 349.

(5) 2 B. & A. 360.

(6) *Vide* 1 M. & G. 731. n.

(7) 1 N. & M. 392. 4 B. & Ad. 546. 423.

Pothier, *Contrat de Vente*, part vi. chap. iv. No. 550—599.

(8) But the defect would, in the one case, appear to be cured by a verdict at common law; in the other, after a verdict by the Statutes of Jeofails.

(9) *Harris v. Goodwyn*, 2 M. & G. 405—

of the relators, paid the solicitor, who had been retained for them in the conduct of the reference, his bill of costs, and brought an action for money paid, against the executors of the deceased relator, for his proportion of the costs incurred after his death, including the costs of the award: — It was held, that the executors were liable in such action for their testator's proportion of the costs of the reference incurred after his death, and also of the costs of the award. (1)

FACTOR.

RIGHTS AND LIABILITIES OF PRINCIPALS.

A person who employs a broker in the Stock Exchange impliedly gives him authority to act in accordance with the rules there established.

[P. 1931.] A person desirous of selling some stock shares, employed a broker for that purpose, but directed him by mistake to sell 250 shares, instead of fifty. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder on the next day informed his broker of the mistake, and asked if the bargain could not be made void; the broker answered "No;" and the shareholder then said he must leave the matter in his hands to do the best he could. By the rules of the Stock Exchange, brokers on sale of this description do not name any principal, and if the vendor be not prepared to complete his contract, the purchaser buys the requisite number of shares, and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The broker paid such difference, being unable to complete his contract; and the purchaser having made good the shares at a loss, it was held, that, for the difference so advanced, the shareholder was liable to the broker in *assumpsit* for money paid; because a person who employs a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules then established, though such principal may himself be ignorant of the rules. (2)

FISHERY.

PLEADINGS.

Stats. 13 Rich. 2. st. 1. c. 19. and 17 Rich. 2. c. 9. for the preservation of the fry of fish, are still in force.

[P. 1949.] Stats. 13 Rich. 2. st. 1. c. 19. and 17 Rich. 2. c. 9. for the preservation of the fry or brood of fish, are still in force; and the spawn or brood of oysters called oyster spat is within the provisions of those acts. Where the defendant in an action of trespass *quare clausum* &c. justifies an entry for the purpose of taking such spawn in the *locus in quo*, navigable tide river, the plea must shew, that he took it under circumstances that made the taking legal within the provisions of the several acts for its preservation. (3)

FRAUDS (STATUTE OF).

What is a sufficient delivery, within the Statute of Frauds, although the plaintiff retains a special interest in the goods.

[P. 1989.] In *Dodley v. Farley* (4), where it appeared, that the defendant having bargained with the plaintiff for the purchase of some wool from the plaintiff at a certain price, removed it to a warehouse, used by the defendant for that purpose, but belonging to a third party; and that it was there weighed and packed in sheeting of the defendant's—the course of dealing being, that the wool remained on these premises till paid for; but the wool in question was not removed or paid for: — It was held, that there was a sufficient delivery and acceptance of the goods within stat. 29 Car. 2. c. 3. s. 17. to ground an action for goods sold and delivered, though the plaintiff retained a special interest in them (not properly a lien) in respect of the understood engagement not to remove them till paid for.

GAME.

PROPERTY IN GAME.

Setting dog-spears for the preservation of game.

[P. 2007.] A declaration in case alleged, that the defendant wrongfully and unlawfully set and concealed a dog-spear, the same being an engine calculated to do grievous bodily harm, as well to the liege subjects of the queen, as to their dogs happening to run upon the same among the bushes near a public footway, running through a close of the defendant, by means whereof a dog of the plaintiff's with which he was going on foot along the said

(1) *Prior v. Hembrow*, 8 M. & W. 873.

(2) *Sutton v. Tatham*, 10 A. & E. 27.

(3) *Maldon (Mayor of) v. Woodet*, 13 ibid. 13.

(4) 12 ibid. 682.

footway, and which, by reason of a rabbit having crossed the footway in his view, had then, against the will of and unavoidably by the plaintiff, begun to pursue and was in pursuit of the said rabbit, ran upon the dog-spear and was wounded, &c.; to which it was pleaded, that the defendant set and concealed the said engine for the purpose of preserving his game, and of disabling and killing dogs that might come upon his close, lest they should pursue and destroy the game, whereof the plaintiff had notice:—It was held on general demurrer, that this plea was a good answer to the action; and that it would have been so, even without the allegation of notice. (1)

[P. 2010.] A gamekeeper authorised to seize the dogs of unqualified persons sporting on a manor by deputation given before stat. 1 & 2 Will. 4. c. 32. and not renewed, cannot justify seizing the dogs of uncertified persons committing such a trespass since the passing of that statute; nor is he entitled to notice of action under stat. 1 & 2 Will. 4. c. 32. s. 47., on the ground, that he *bonâ fide* supposed himself to be acting in pursuance of the statute. (2)

RIGHTS OF GAME-KEEPER.

Where a gamekeeper cannot justify seizing the dogs of uncertified persons.

IMPRISONMENT.

[P. 2022.] A magistrate issued a warrant, reciting that, on complaint made on oath before him of a misdemeanour, the plaintiff was stated to be a material witness; that the magistrate had issued a summons requiring the plaintiff to appear to testify his knowledge; that the summons was proved before the magistrate to have been duly served, but the plaintiff did not appear to testify, &c., and said that he would not; and that it was necessary for the ends of justice that the plaintiff should appear at the next assizes to testify, &c.: the warrant then commanded the constable to bring the plaintiff before the magistrate, or before some other justice, to find sufficient bail to appear and give evidence at the next assizes, and testify, &c.:—It was held, that the warrant was bad for requiring the plaintiff to give bail at this stage of the proceedings, assuming, that the magistrate had power to bring him up by warrant to give testimony. (3)

LEGAL AND ILLEGAL IMPRISONMENT.

Where warrant is bad, for improperly requiring bail.

[P. 2023.] When a party is arrested in one action, he is in the custody of the sheriff in all actions in which writs have been delivered to the sheriff. But if the first arrest be illegal, the party cannot be detained under other writs without a fresh arrest; and such fresh arrest is not prevented by the custody under the former illegal arrest, if there be no collusion. But if a sheriff's officer, having arrested without a warrant, procure, for the purpose of making the arrest good, his own name to be inserted in a warrant properly issued in an action to another officer, an arrest or detainer in this action will not warrant a detainer under a *ca. sa.* in another suit, which had been delivered to the sheriff before the first arrest, and no warrant issued on it: nor can the sheriff's officer resort to such last mentioned writ to support the original arrest; but the court will discharge the party as to the prior suit; and this, though affidavit be made negating collusion between the plaintiff in his prior suit and the sheriff or his officer. (4)

BY SHERIFFS.

When a party is arrested in one action, he is in the custody of the sheriff in all actions in which writs have been delivered to the sheriff.

Quare, Whether a defendant, since stat. 3 & 4 Will. 4. c. 67. s. 2., can be arrested on a judgment and *ca. sa.* both more than a year old, and a *ca. sa.* having issued within a year of the judgment without a *scire facias*.

[P. 2026.] Where on demand by the plaintiff's agent, of a perusal and copy of the warrant, the defendants gave a copy, and said, that the original was in the hands of the gaoler; and the agent said he knew that, and made no objection to the tender of a copy; the gaoler in fact having always kept such warrants:—It was held, a sufficient compliance with the demand under stat. 24 Geo. 2. c. 44. s. 6. (5)

What is a sufficient compliance with the demand for the warrant under stat. 24 Geo. 2. c. 44. s. 6.

[P. 2027.] Where a warrant required the constable forthwith to take the plaintiff to the house of correction at W., and there deliver him to the keeper, who was to keep him to hard labour for three months, unless he should sooner pay the maintenance to the overseers; and the plaintiff tendered the arrears to the constable at T., where he was arrested, and to the overseers of B. (the complaining parish) at B., to which place he was taken on his way to W.:—It was held, that the constable and overseer were not authorised to accept such tender. (6)

When constable and overseer not authorised to accept tender of arrears.

[P. 2032.] Stat. 5 & 6 Will. 4. c. 50. s. 109., requiring twenty-one day's notice of action against justices or others for any thing done under that act, does not impliedly repeal the privilege of a justice of the peace to have a month's notice under stat. 24 Geo. 2. c. 44. s. 1. (7)

NOTICE OF ACTION.

Stat. 5 & 6 Will. 4. c. 50. s. 109. respecting notice of action, does not impliedly repeal stat. 24 Geo. 2. c. 44. s. 1.

[P. 2033.] The mere act of a magistrate cannot wave the necessity of serving and proving a notice of action under stat. 24 Geo. 2. c. 44. Therefore, where a magistrate

The mere act of a magistrate can-

(1) *Jordin v. Crump*, 8 M. & W. 782.

(2) *Lidster v. Borrow*, 9 A. & E. 654.

(3) *Evans v. Rees*, 12 *ibid.* 55.

(4) *Collins v. Fewens*, 10 *ibid.* 570.

(5) *Atkins v. Kilby*, 11 *ibid.* 777.

(6) *Ibid.*

(7) *Riz v. Borton*, 12 *ibid.* 470.

not waive the necessity of serving and proving a notice of action under stat. 24 Geo. 2. c. 44.

What is not a case within stat. 2 & 3 Vict. c. 47., for which the parties are entitled to notice of action.

A private person acting under stat. 7 & 8 Geo. 4. c. 29. is not entitled to notice of action.

THE PLEADINGS.
An officer cannot justify under a magistrate's warrant, unless the warrant was actually issued against him.

Where plea is bad, for alleging no complete offence to have been committed by plaintiff under stat. 7 & 8 Geo. 4. c. 29. s. 53., and for omitting to allege no intention on the part of the plaintiff to cheat and defraud the defendant.

An informal conviction is no defence to an action for its enforcement.

EVIDENCE.
Prisoner not taken to prison by the direct road, but by one more circuitous, though more convenient

Where the defendant cannot be

had sent to the plaintiff a paper writing, reciting the notice that had been served on him, and tendering amends in respect of the matter contained in such notice, proof of such notice was required. (1)

[P. 2033.] In *Home v. Grimble* (2) it appeared, that A. had communicated to B. and Co., who were distillers, a method of rectifying spirits, and they were to pay him a salary and 6d. a gallon on all spirits rectified by his method, and to keep an account; A. having a sum due to him, B. and Co. offered to pay it at their solicitor's office, and to produce the account there; A. sent B. and Co. a letter, stating, that he should come to the distillery for a sight of the account, and for payment; to which G., one of the firm of B. and Co., replied by letter, stating, that if A. came to the distillery and either rang or knocked, he would be punished, &c.; A. went to the distillery (which was within the metropolitan police district), and gently rang the gate bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman on a charge of having rung the bell, contrary to the Police Act (3):—It was held, in an action for false imprisonment by A. against G. and H., that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action.

[P. 2033.] A private person, who gives another into custody on a charge of having committed an offence against stat. 7 & 8 Geo. 4. c. 29. (4), is not entitled to notice of action under the 75th section of that act, as that section only applies to constables and other officers, and persons of that kind. (5)

[P. 2038.] In an action by A. against B. for false imprisonment, B. cannot defend himself under a magistrate's warrant against C., although A. was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue; and a demand of a perusal and copy of the warrant is in such case unnecessary. (6)

[P. 2040.] In *Mathews v. Biddulph* (7) the plaintiff declared in trespass, and alleged, that the defendant assaulted him, and forced and compelled him to go along certain public streets to a station house, and from thence to a police office, where he preferred against him a certain unfounded charge, that he had unlawfully attempted to procure from him a certain blank check book—the defendant pleaded, that the plaintiff had unlawfully endeavoured to obtain a blank check book from him, by pretending to one G. A. that he was the servant of one P. T., who kept a banking account at the house of the defendant, and inducing the said G. A. to go to the house of the defendant, and ask for a blank check-book for the said P. T.; that the said G. A. asked for the check book, saying that he wanted it for the said P. T., and that he had been sent by the plaintiff, who was over the way, whereas in truth, the said P. T. was not master of the plaintiff, nor had employed or directed the said plaintiff to procure the said book for him; that the defendant thereupon having good and probable cause of suspicion, and having reason to suppose, that the plaintiff had unlawfully endeavoured to obtain a blank check book from him for unlawful and unauthorised purposes, gave him into custody, &c.:—It was held, that the plea was bad, first, as alleging no complete offence to have been committed by the plaintiff under stat. 7 & 8 Geo. 4. c. 29. s. 53. in respect of which he was authorised to give the plaintiff into custody under sect. 63. of that act, and also, because it alleged no intention on the part of the plaintiff to cheat and defraud the defendant.

[P. 2041.] Where penalties are to be recovered by information before justices of the peace under a statute, which directs, that the justices shall summon the person, against whom the information is exhibited, to appear and plead to, and to attend the hearing of the information at a time and place named in the summons, such summons to be served "ten days at the least" before the time appointed:—It was held, that there must be ten clear days between the service and the day of hearing; and that, where the conviction shews, on its face, that the party was convicted *ex parte* on default of appearance to a summons appointing too early a day, such conviction is no defence to an action of trespass for enforcing it. (8)

[P. 2043.] A constable if he arrest another may take him to prison by the most convenient mode of access, although it be more circuitous: thus, in *Atkins v. Kirby* (9) it appeared, that B. was eighteen miles out of the direct road to W., and that the plaintiff, who was a prisoner going to W., desired to be taken by the direct road; but his request was denied. The judge in summing up left it to the jury to say, whether the route by B. though circuitous, was the most convenient; and they found that it was:—It was held, that the summing up was proper, and that the finding entitled the defendants to a verdict, it not having appeared by the evidence, that the plaintiff had in fact been put to any unnecessary inconvenience.

[P. 2044.] In trespass for false imprisonment on a criminal charge, the defendant

(1) *Martins v. Uppcher*, 1 Dowl. P. C. N. S. 555.

(2) 1 C. & Marsh. 17.

(3) 2 & 3 Vict. c. 47.

(4) Larceny Consolidation Act.

(5) *Brooker v. Field*, 9 C. & P. 651.

(6) *Hoye v. Bush*, 1 M. & G. 775.

(7) 1 Dowl. P. C. N. S. 216.

(8) *Mitchell v. Foster*, 12 A. & E. 472.

(9) 11 *ibid.* 777.

cannot be cross-examined as to the best character of the plaintiff, nor as to previous charges made against him. (1)

[P. 2046.] Where a constable appointed under the Municipal Corporation Act (9) is sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinues, the defendant is entitled to double costs under stat. 21 Jac. 1. c. 12. s. 5., and not merely to costs as between attorney and client under stat. 5 & 6 Will. 4. c. 76. s. 133. (3)

cross-examined as to the bad character of the plaintiff.

COSTS.

Where a constable is entitled to double costs.

INFANT.

[P. 2052.] No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so; and every man is to maintain his own children as he himself conceives proper; and it requires a contract to enable another person to do so, and charge him for it in an action. (4)

[P. 2053.] In *Attwaters v. Courtney* (5) it appeared, that A. placed his son with B., a chemist and druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health—it was intended, that A.'s son should be apprenticed to B., but he stayed for five years with B., having his board and lodging, and being taught the business of a chemist and druggist, and he then left B., and was never apprenticed to him:—It was held, that to entitle B. to recover for the board and lodging and teaching of A.'s son, the jury must be satisfied, that A.'s son was placed with B., upon an agreement or understanding, that B. was to be paid for his board and lodging and for teaching him; but if the jury were not so satisfied, or if they thought that A.'s son was not to be paid for till B. had passed his examination at Apothecaries' Hall, and that A.'s son was then to be apprenticed to B. as an apothecary, it was held, that B. was not entitled to recover any thing for the board and lodging and teaching during the five years.

[P. 2063.] The father, as being the natural guardian of the infant, ought in the first instance to be appointed *prochein amy*; and if his evidence be likely to be required at the trial, an application ought to be made to the court to release him by the appointment of a proper substitute.

Where an uncertificated bankrupt was appointed *prochein amy* for an infant plaintiff, the court on motion removed him, and ordered another to be appointed. (6)

[P. 2064.] Where in an action brought on the part of an infant by his *prochein amy*, the latter cannot be found at the address of which he is described; the proper course is to take out a summons before the judge at chambers for a stay of proceedings, until his address be given by the plaintiff's attorney; and the defendant having, under such alleged circumstances, applied to the court for a stay of proceedings until such security for costs should be given, the court discharged the rule. (7)

NECESSARIES.

No person is bound to pay another for the maintenance of his children, except he has entered into some contract to do so. Where the board and lodging of an infant cannot be recovered.

APPEARANCE.

If a father be appointed *prochein amy*, and his evidence be required, an application should be made to the court to appoint a substitute.

An uncertificated bankrupt will not be allowed to be *prochein amy*.

Mode of proceeding where a *prochein amy* cannot be found at the address of which he is described.

INSURANCE [LIFE].

[P. 2074.] A party whose life is insured, is not the general agent for the assured; and therefore the policy is not void, because such party failed to communicate a material fact, respecting which he was not interrogated by the insurers, unless he was aware of the materiality of the fact, and studiously concealed it. (8)

[P. 2076.] In an action against an insurance office on a life policy, it is no objection to a special juror being sworn, that he is a director of another insurance office, unless that office has granted a policy on the life in question, and the amount of that policy be unpaid. (9)

FALSE REPRESENTATION.

A party whose life is insured, is not the general agent for the assured.

JURORS.

Where it is no objection to a special juror being sworn, that he is a director of another insurance office.

INSURANCE [MARINE].

[P. 2210.] Where a declaration on a policy of insurance on goods on board a ship at the suit of D. W. and A. W., alleged, that the policy was made by them, as well in their

PLEADINGS.

Where the replication is bad, as

(1) *Downing v. Butcher*, 2 M. & Rob. 374.

(2) Stat. 5 & 6 Will. 4. c. 76.

(3) *Maberly v. Titterton*, 7 M. & W. 540.

(4) *Seaborne v. Maddy*, 9 C. & P. 497.

(5) 1 C. & Marsh. 51.

(6) *Watson v. Fraser*, 8 M. & W. 660.

(7) *Hayes v. Carr*, 1 Dowl. P. C. N. S. 522.

(8) *Rawlins (Knt.) v. Desborough*, 2 M. & Rob. 328.

(9) *Craig (Bart.) v. Fenn*, 1 C. & Marsh. 43.

amounting to an argumentative denial of the release mentioned in the plea.

EVIDENCE.

Where a shipowner engages to carry a full cargo.

Insufficient evidence to support an issue, whether a deck cargo was loaded at the request and by the order and direction of the freighter.

Witness to prove improper stowage of cargo, may be asked, whether it is not usual for shipowners to pay for a deck cargo washed or thrown overboard.

own name, as for and in the name of every other person to whom the same did appertain; and that one T. Z. and the plaintiff A. W., or one of them, were or was then and from thenceforth until the loss interested in the goods; and the defendant pleaded a release by D. W. for himself and his partner A. W.; to which the plaintiffs replied, setting out on over the deed of release, by the recital in which it appeared, that the intention of the parties was to release only the sums set opposite their respective names in the schedule thereto annexed; and the declaration averred, that the money so released was due upon other and different contracts than those mentioned in the declaration: — It was held, that the plea was a good answer to the action; but it seems, that replication was bad, as amounting to an argumentative denial of the release mentioned in the plea. (1)

[P. 2215.] Where in the memorandum of a charter-party it was agreed, that the ship should proceed to Quebec, and there load from the factors of the freighter, a full cargo, *not exceeding what the ship can reasonably stow*: — It was held, that the words in italics were merely a qualification upon the shipowner's engagement to carry a full cargo, and not a substantive engagement on his part to stow the cargo in a reasonable manner. (2)

[P. 2215.] Upon an issue, whether a deck cargo was loaded at the request and by the order and direction of the freighter, proof that the superintendent of the freighter's warehouse, who delivered out the goods for shipping, was aware of and approved of the stowage of the cargo, does not support the affirmative of the issue. A direction to a jury, that, *prima facie*, the deck was not the proper place for stowing any part of the cargo, and that, if it increased the danger of the ship, or of that part of the cargo, it is an improper stowage, was held to be correct, though it appeared, that it had been usual to load deck cargoes in the particular trade; but it also appeared to be usual for the shipowner to bear the loss of deck cargo washed or thrown overboard. (3)

[P. 2217.] Upon an issue, whether a cargo (loaded on deck) is improperly loaded, A., a witness, called on the part of the plaintiff to prove, that the practice of stowing part of the cargo upon deck is dangerous, having stated, in answer to a question put to him on cross-examination, that it was usual for ships in the particular trade to carry deck cargoes: — It was held, that A. might be asked, upon re-examination, whether it was not usual for the shipowner to pay for a deck cargo washed or thrown overboard. (4)

LIBEL.

GENERALLY.

Party may be libelled by being styled the father of an offspring.

Where a publication, is not upon the face of it libellous.

[P. 2222.] Where the libel stated (amongst other things), that the sons of the plaintiff were vicious, and brought up and supported in vice by their father, with his unlawful earnings, it was held, that the judge at the trial was justified in telling the jury, that a party might be libelled by being styled the father of an offspring; and that, if they (the jury) thought the observations in question were made in a malicious spirit, they might fairly take them into their consideration. (5)

[P. 2224.] In case for a libel, the declaration stated that the plaintiff was a Roman Catholic priest, and priest of a chapel named, and that the defendant intending to injure him in his said offices, published of him in those offices, a libel, which was set out. The alleged libel contained an account of a Roman Catholic having been seen performing a penance, which was suggested to be of a degrading kind, and added, that the party performing the penance said, that his priest would not administer the sacrament to him till he had performed it, and that his priest was the plaintiff. The declaration also set forth certain comments of the defendant's, accompanying the publication, and in which the Roman Catholic discipline was attacked. The libel was not otherwise connected with the plaintiff; nor were there any allegations, shewing how the enjoining of such a penance would affect the character of a Roman Catholic priest. Upon these facts, the judgment was arrested; the court holding, that the publication was not, on the face of it, libellous, and refusing, even upon the assumption that the plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of any injury to the plaintiff, which the declaration did not shew, though some evidence to that purpose was in fact given: — but it was held, that if the publication had been libellous, it would not have been justifiable on the ground, that it was promulgated at a public meeting called to petition parliament against making a grant in support of a Roman Catholic college. (6)

DECLARATION.

Where a peremptory undertaking to try will be issued, not-

[P. 2234.] Where in Hilary Term, in answer to a rule for judgment as in case of *nonsumit* in an action of libel, the plaintiff produced an affidavit, in which it was stated, that it was believed to be unsafe to proceed to trial, in consequence of a strong feeling of prejudice excited in the public mind by reason of certain disclosures made by a bankrupt while under exami-

(1) *Wilkinson v. Lindo*, 7 M. & W. 81.

(2) *Gould v. Oliver*, 2 M. & G. 208.

(3) *Ibid.*

(4) *Ibid.*

(5) *Kirwan v. Tully*, 1 Crawford & Dix (Irish), 388.

(6) *Hearne (Clerk) v. Stowell (Clerk)*, 12 A. & E. 719.

ation, and in reference to which the libel in question was published; but that they were ready to give a peremptory undertaking to try at the sittings after Easter Term: the court discharged the rule, but required a peremptory undertaking for the sittings after the instant term. (1)

[P. 2235.] Where an affidavit to change the venue stated the alleged libel to be contained in a Dublin newspaper; that there was no plea of justification; and that a fair trial could be had in Dublin at less expense than in Clare: — It was held insufficient to change venue from Clare to Dublin. (2)

[P. 2243.] A declaration in libel after alleging, that the plaintiff had been in prison, and had applied for money to pay his quarter's rent, stated, that he was a "mere man of straw" (thereby meaning that he was insolvent, and in bad circumstances). On general demurrer to the allegation, that the plaintiff was a "mere man of straw," it was held, that it was not necessary to explain the meaning of that term by prefatory averment, and that as the libellous matter contained but one charge, viz. insolvency, the defendant could not plead or demur to part only. (3)

[P. 2246.] In *Tyson v. Evans (Clerk)* (4), which was an action for a libel, it appeared, that the defendant claimed rent of the plaintiff, the plaintiff's agent (with whom the plaintiff had authorised the defendant to correspond on the subject, refusing himself to communicate with the defendant immediately), told the defendant that the plaintiff denied his liability. The defendant thereupon wrote to the agent, alleging facts in support of his claim, and adding, "this attempt to defraud me of the produce of the land, is as mean, as it is dishonest: " — It was held, that the publication of the letter in these terms was not privileged, and that the judge was justified in directing the jury that it was a libel.

[P. 2248.] The copy affidavit produced from the Stamp Office at the trial, described the newspaper as "The Roscommon Journal and Western Impartial Reporter," published on Fridays, whereas the copy newspaper produced, purported to be "The Roscommon Journal and Western Reporter," published on Saturdays: — It was held, that the variance between the descriptions in the copy affidavit and newspaper was not material nor sufficient to exclude the copy newspaper as evidence. (5)

[P. 2248.] If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury, that it was published by the defendant, although there be no evidence given to shew, that the printing and publication were by the direction of the defendant. (6)

[P. 2253.] In an action for a libel which imputed, that the plaintiff's house was opened as a gaming house under the leadership of a woman of notorious character, and the defendant pleaded several pleas, but none of them referring to the plaintiff's wife: — It was held, that the plaintiff could not go into evidence to shew, that his wife was a respectable person, as on these pleadings she must be taken to be so; and that the plaintiff could not go into evidence to shew, that his wife had become ill, and died soon after the publication of the libels. (7)

[P. 2254.] If a paper published by the defendant have a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel; and with respect to the intent, every one must be taken to intend the natural consequences of what he has done. (8)

[P. 2256.] In an action against the editors of a newspaper for libel, the fact of the libel being published on the communication of a correspondent is not admissible in mitigation of damages: thus, in *Talbot v. Clark* (9) Lord Denman said, "The evidence certainly does not go to prove any of the issues, and I do not think it admissible. The justification depends on the facts, not on the statement of them by a third party. I know that in a case in the Common Pleas it has been held, that a previous statement in another newspaper is admissible, but even that decision has been very much questioned."

[P. 2258.] In an action of libel, a judge has power to certify under stat. 3 & 4 Vict. c. 24., that the grievance was wilful and malicious. (10)

[P. 2263.] A motion for a criminal information for libels published in a newspaper was made upon affidavits containing the stamp office certificate verifying the declaration of publication and printing under stat. 6 & 7 Will. 4. c. 76. s. 8. The affidavits also set forth the libel, stating it to be contained in a newspaper, which (as appeared by the affidavits) corresponded with the description in the stamp office declaration. At the time of the motion a newspaper, likewise so corresponding, was shewn to the court. The rule nisi

withstanding an affidavit, that a strong feeling of prejudice existed in the public mind.

What is insufficient to change the venue from Clare to Dublin.

THE PLEADINGS.

The allegation that the plaintiff was a "mere man of straw," does not require a prefatory averment to explain its meaning.

Where the judge was justified in directing the jury, that the publication of a letter was a libel.

When the variance between the descriptions in the copy affidavit and newspaper are not material.

EVIDENCE.

If the manuscript of a libel be proved to be in the handwriting of the defendant, it is *prima facie* evidence of publication.

When a husband cannot give evidence, that his wife is a person of respectable character, or that his wife had become ill after the publication of the libels.

If a paper have a direct tendency to cause unlawful meetings. It is a seditious libel.

The fact of a libel being published in a newspaper on the communication of a correspondent, is not admissible in mitigation of damages.

COSTS.

The judge can certify under stat. 3 & 4 Vict. c. 24. that the grievance was wilful and malicious.

THE AFFIDAVIT.
Where a news-

(1) *Cook v. Brookes*, 1 Dowl. P. C. N. S. 504.

(2) *Carrick v. Mansfield*, 1 Crawford & Dix (Irish), 463.

(3) *Eaton v. Johns*, 1 Dowl. P. C. N. S. 602.

(4) 12 A. & E. 733.

(5) *Kirwan v. Tully*, 1 Crawford & Dix (Irish), 388.

(6) *Regina v. Lovett*, 9 C. & P. 462.

(7) *Guy v. Gregory*, *ibid.* 584.

(8) *Regina v. Lovett*, *ibid.* 462.

(9) 2 M. & Rob. 312.

(10) *Foster v. Pointer*, 1 Dowl. P. C. N. S. 28.

paper containing a libel cannot be shewn to the court, in making a rule absolute for a criminal information.

was granted:—but in consequence of the rule not being drawn up on reading the newspaper, and the newspaper being neither annexed to the affidavit or filed, it was held insufficient both at common law and under the statute, and that the newspaper could not be shewn to the court, on moving to make the rule absolute. (1)

MALICIOUS PROSECUTION.

EVIDENCE.

Where the defendant has a right to use his own deposition as evidence.

[P. 2283.] Where in case for a malicious charge of felony the plaintiff puts in, to prove a formal part of his case, the defendant's and another person's depositions before the magistrates, the defendant has a right to use his own deposition as evidence in the cause, but not that of the other deponent. (2)

MANDAMUS.

WHEN THE WRIT WILL BE GRANTED, &c.

A town clerk *de facto*, is entitled to compensation.

Where a *mandamus* to deliver up documents will be had, for not shewing, that the detainer was by other than a private individual.

SUBSTANCE OF WRIT.

If on the face of the *mandamus* there be no ground for the writ, the defect cannot be supplied by matter appearing in the return.

RESPONSIBILITIES, &c. FOR TORTIOUS ACTS OF SERVANTS.

Where a master entrusts his servant with his carriage, the master is liable for the tortious acts of his servant.

Where a person is not liable for the acts of another, either as his agent or servant.

[P. 2298.] Where the council of a borough acting under stat. 5 & 6 Will. 4. c. 76. s. 65., removed a town clerk who had been elected to hold during good behaviour, but had not made the declaration prescribed by stat. 9 Geo. 4. c. 17. s. 2.:—It was held that, as having been an officer *de facto*, he was entitled to compensation under stat. 5 & 6 Will. 4. c. 76. (3)

[P. 2308.] Where a *mandamus* was issued commanding a party, who was alleged to have custody of certain books, papers, and proceedings relating to a court of requests (4), or to the office of the clerk thereof, to deliver them up to a party who claimed to hold them as having been elected clerk to the court:—It was held, that the *mandamus* was bad, as not shewing, that the detainer was by other than a private individual. (5)

[P. 2321.] If on the face of a *mandamus* there be no ground for the writ, the defect cannot be supplied by matter appearing in the return. (6)

MASTER AND SERVANT.

[P. 2338.] If a servant without his master's knowledge take his master's carriage out of the coach house, and with it commit an injury, the master is not liable, because he has not in such case entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it; but the master in such case will be liable, because he has put it in the servant's power to mismanage the carriage, by entrusting him with it. Therefore, where a servant, having set his master down in Stamford Street, was directed by him to put up in Castle Street, Leicester Square, but instead of so doing, went to deliver a parcel of his own in the Old Street Road, and in returning along it drove against an old woman and injured her:—It was held, that the master was responsible for his servant's act. (7)

[P. 2338.] In *Milligan v. Wedge* (8) it appeared, that the buyer of a bullock employed a licensed drover to drive it from Smithfield; and that by the by-laws of London, no one but a licensed drover could be so employed; the drover employed a boy to drive the bullock (together with others, the property of different persons) to the owner's slaughter house; and mischief was occasioned by the bullock through the careless driving of the boy:—It was held, that the owner was not liable for the injury, the boy not being in point of law his servant; although the careless driving and accident took place after the boy had driven the bullock beyond the bounds of the city, towards defendant's house; and that the owner would not have been liable, if the drover himself had been driving at the time of the injury.

[P. 2339.] Where in an action of case for negligence of the defendant's servant, and consequent injury to the plaintiff, it was pleaded, that the defendant was not employed to make the alterations (those through which the injury occurred) in manner and form:—It was held, that, though the defendant had been employed by a society (the Clarence Club) to make alterations and improvements in their club house, and, though he had employed and stipulated with an agent A. B., a gas fitter, to do such part of the work as lay in his

(1) *Regina v. Woolmer*, 12 A. & E. 422.

(2) *Jackson v. Bull*, 2 M. & Rob. 176.

(3) *Regina v. Cambridge (Mayor, of)*, 12 A. & E. 702.

(4) Under a Local Act, 47 Geo. 3. sess. ii. c. 1.

(5) *Regina v. Hopkins*, 1 A. & E. N. S.

161.

(6) *Ibid*.

(7) *Seath v. Wilson*, 9 C. & P. 607. S.C.

nom. *Heath v. Wilson*, 2 M. & Rob. 181.

(8) 12 A. & E. 737.

Liability of principal for the acts of his servant in laying down gas pipes.

(A. B.'s) department, yet, if A. B. had laid on any pipe not specified in his contract or estimate with the defendant, the defendant was not liable for injury occasioned by the mismanagement or ill manufacture of this particular pipe; and that if the pipe in question had been included in A. B.'s contract with the defendant, yet if, while the defendant's men were working on the premises, and the defendant's contract was not yet finished, and the house was unoccupied, except by the plaintiff, (the servant of the club), the gas had been turned on by his direction, and not by that of the defendant or his agent, the defendant was not liable. (1)

[P. 2340.] Where a van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van; and B.'s coachman, who was driving B.'s carriage, came up, and there not being room for the carriage to pass, the coachman got off his box, and laid hold of the van-horse's head; which caused the van to move, and thereby a packing case fell out of the van upon the shafts of the gig and broke them: — It was held, that B. was not liable for this, as the coachman was not acting in the employment of B. at the time this matter occurred. (2)

[P. 2342.] Where the plaintiff being a cook in the merchant service, entered into a contract with the defendant, a captain in the navy, in command of one of his majesty's ships, to undertake the office of captain's cook on board his ship, on a promise made by the defendant to pay him wages beyond the government pay, to which he would be entitled; and in pursuance of that contract went on board the defendant's ship, and performed the duties of captain's cook: — It was held, that there was a good contract founded on a consideration, and that the plaintiff was entitled to recover in an action of *assumpsit* for work and labour. (3) *Quære*, Whether the contract on the consideration in such a case is legal; but the irregularity, if there be any, cannot be taken advantage of unless specially pleaded. And it seems, that if an objection had been taken at *Nisi Prius*, that the contract should have been specially declared upon, the judge would have allowed an amendment. (4)

[P. 2346.] If a master carpenter send his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and where, in such a case, a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given to him to keep the paths, and upon complaint by the gentleman, the master dismissed the journeyman, the judge left it to the jury to say, whether the master was not justified in such dismissal. (5)

When a master not liable for the act of his servant, because he was not acting in his employment.

RESPONSIBILITIES, &c. FOR WAGES. Where there is a good contract to serve as a cook, and founded on a consideration.

A journeyman may be dismissed for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect.

NUISANCE.

[P. 2365.] In *Thompson v. Gibson* (6), which was an action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held; it having appeared, that the building was erected in October, 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members); that the Earl of L. was the owner of the market in October 1838, and in February, 1839, had demised it to the plaintiff; and that the market was afterwards obstructed by the building: — It was held, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable.

ABATEMENT OF NUISANCE.

Where defendants are liable for continuing a nuisance, although they have no right to enter upon the land to remove it.

PARTNERS.

[P. 2385.] The resident agent appointed by the directors of a mining company to manage the mine, has not an implied authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine for the satisfaction of such arrears, nor in any other case of necessity, however pressing. (7)

[P. 2388.] A declaration at the suit of a public officer of a banking co-partnership under stat. 7 Geo. 4. c. 46., must state, that the co-partnership is carrying on business; and an allegation, that they united for that purpose is bad on special demurrer. (8)

MEMBERS OF MINING CONCERNS.

The resident agent of a mining company, has not an implied authority from the shareholders to borrow money upon their credit.

ACTIONS BY PARTNERS.

Declaration at the suit of a public officer of a bank must allege, that the partnership are carrying on business.

(1) *Rapson v. Cubitt*, 1 C. & Marsh. 64.
(2) *Lamb v. Palk* (*Lady Elizabeth*), 9 C. & P. 629.

(3) *Clutterbuck v. Coffin*, 1 Dowl. P. C. N. S. 479.

(4) *Ibid*.

(5) *Read v. Dunsmore*, 9 C. & P. 588.

(6) 7 M. & W. 456.

(7) *Hawtayne v. Bourne*, *ibid*. 595.

(8) *Fletcher v. Crosbie*, 1 Dowl. P. C. N. S. 149.

EVIDENCE.

Where contract not admissible to prove a partnership, without proof of the execution as an instrument, under which the plaintiff claimed an interest.

[P. 2424.] In *Collins v. Bayntun* (1) the defendant, to prove, that he had been in partnership with the plaintiff, offered in evidence a written contract purporting to be made by the plaintiff and the defendant as partners with K., a builder, for work to be done by K. upon the premises, where the plaintiff carried on the business in which the defendant alleged himself to have been partner; the document was in the plaintiff's custody, and produced by him on notice: — It was held, that the contract was not admissible without proof of the execution, as an instrument under which the plaintiff claimed an interest.

REPLEVIN.

EVIDENCE.

Evidence which will not entitle the plaintiff to a verdict, on the plea of *non tenet*.

[P. 2514.] To an avowry for rent due on a demise of 40*l.* *per annum*, it was pleaded in bar, 1. *Non tenet modo et forma*; 2. As to a part of the rent, that it was not due. It appeared, that the plaintiff held under a lease, reserving 40*l.* *per annum* in the body thereof; but before the lease was executed, the following words were added, between which and the body of the lease the signatures were written. "The allowance of the road to the Six Bells Yard to be made as usual." It had been usual for the lessor to allow the lessee 5*l.* *per annum* for so much annually paid by the lessee to a third party for the use of such road to the demised premises: — It was held, that this did not reduce the reservation to 35*l.* *per annum*, so as to entitle the plaintiff to a verdict on the plea of *non tenet*. (2)

SPECIAL JURY.

Where a defendant cannot avail himself of a rule or a special jury.

[P. 2521.] Where in an action of replevin, the cause was set down for trial on the 19th of January, and notice of trial given for that day, and on the 11th of January the defendant obtained a rule for a special jury, which he did not serve till the 15th: — It was held, that he was not entitled to the benefit of that rule, by reason of the want of promptitude in his proceedings; *sed quare*, Whether the rule for a special jury must be served, as well as obtained, six days before the day of trial, under the rules, H. T. 1 Vict. s. 3? (3)

SHIPPING.

GENERAL LIABILITIES, &c. OF SHIP-OWNERS.

Owner responsible for the acts of his master, in obtaining goods and money for the necessary use of the ship.

[P. 2530.] Where A., the charterer of a vessel, by the charter-party agreed, that on the arrival of the ship at the outward port he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner; and, on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash: — It was held, that although it was not shewn, that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charter-party. (4)

SLANDER.

EVIDENCE.

Defendant can, under the plea of "not guilty," disprove malice, although estopped from giving evidence of the truth of the facts as rebutting the malice.

[P. 2579.] The defendant spoke to the plaintiff's mistress words charging the plaintiff with irregularity in her conduct as a servant girl, in consequence of which, the plaintiff lost her place. The only plea on the record was, not guilty: — It was held, that the defendant might, under that plea, disprove malice in the various methods by which it is usually disproved, yet that he was estopped from giving evidence of the truth of the facts as rebutting the malice, because he had not pleaded that the facts were true; though in such case the absence of the proof of special damage (that the plaintiff thereby lost her place) cannot affect the verdict, yet the jury may consider it in assessing damages. (5)

TITHES.

Where upon an issue under stat. 6 & 7 Will. 4. c. 71.

[P. 2616.] An issue under stat. 6 & 7 Will. 4. c. 71. (6) raised a question as to the mode of taking the tithe of calves; the plaintiff's notice of the points intended to be raised,

(1) 1 A. & E. N. S. 117.

(2) *Davies v. Stacey*, 12 A. & E. 506.

(3) *Phelps v. Kirby*, 1 Dowl. P. C. N. S. 501.

(4) *Weston v. Wright*, 7 M. & W. 336.

(5) *Rumsey v. Webb*, 1 C. & Marsh. 104.

(6) Tithe Commutation Act.

stated an intention to raise one as to the value also. At the instance of the defendant, at the trial, the plaintiff was precluded from going into that question, as not being properly raised by the issue; and the defendant succeeded:—but it was held, that the defendant was not to be entitled to the costs of witnesses brought by him to the assizes, to rebut the plaintiff's evidence on the point as to value. (1)

the defendant is not entitled to the costs of witnesses brought by him to the assizes.

TOLLS.

[P. 2620.] A sale within the city of London in an open shop of goods usually dealt in there, is a sale in market overt, though the premises be described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within. (2)

GENERALLY.

A sale in an open shop within the city of London is a sale in market overt.

[P. 2622.] Where a navigation act (3) imposed a toll on "every ton of butter or other goods, wares, merchandises, and commodities;" and a lower toll on "every ton of coals, cinders, lime and limestone, gravel and manure;" blocks, cut with wedges from the quarry, and there reduced to certain dimensions according to order, and squared with a pick-axe, to be used as railway sleepers, each being, after such preparation, worth ninepence more than unwrought stone of the same weight, were held liable to the toll as stones only, not as merchandize. (4)

Where property liable to pay toll as "stones" and not as "merchandise."

[P. 2625.] In *assumpsit* for tolls, a *computus* of a *prepositus* or reeve of stat. 33 Hen. 6., which was brought from the muniment room of the lord of the manor, but which was not signed, and of which no evidence of the handwriting could be given, but in which the receiver purported to charge himself with the receipt of money—was received in evidence. (5)

EVIDENCE.

Manorial records

[P. 2625.] In an action of *trover* for goods seized under a claim of toll, alleged to be due in respect of landing them at a particular wharf, it is competent for a defendant to set up his claim to the toll under the plea of not possessed; the plaintiff, therefore, has a right to be prepared with evidence to rebut that claim, and he will be allowed the costs of it, although the defendant at the trial, does not raise the question as to the legality of that claim. (6)

Defendant can set up his claim to toll, under the plea of not possessed.

[P. 2626.] In *Brune v. Thompson* (7), where the plaintiff claimed tolls throughout the port of Padstow, it was held, that a record of the King's Bench of stat. 7 Rich. 2. of a cause removed by *certiorari* from the maritime court of Aldestowe, was receivable in evidence for the plaintiff, although that cause was an action of trespass for taking a ship, and that the present plaintiff and defendant did not claim under either of the parties to it; and evidence was allowed to be given by the witness who produced it, that he had ascertained from records, that Aldestowe and Padstow were different names for the same place. But the opposite counsel will not be allowed to ask him, whether he had not found other records besides those given in evidence, which related to the right of the prior of B., from whom the plaintiff traced his title, as that would be giving parol evidence of the contents of those records.

Different names for the same place.

TRESPASS.

[P. 2647.] To a plea in trespass, justifying the taking of a horse, cart, and other chattels, damage feasant, it is a good replication, that the horse, cart, and chattels were, at the time of the distress, in the actual possession and under the personal care of, and then being used by, the plaintiff: and actual danger of breach of the peace need not be alleged. (8)

Where actual danger of a breach of the peace need not be alleged.

If the declaration complain of an assault, and the plea justify, on the ground that the plaintiff was interfering to interrupt the distress, and the rejoinder aver that the horse, &c. were, at the time of the taking, in the plaintiff's possession, &c., for the purpose of being, and were then, used in doing the damage, it would be bad. (9)

What is a bad rejoinder to a plea of justification for taking a distress.

PLEADINGS.

REPLICATION AND REJOINDER.

[P. 2650.] In trespass *quare clausum fregit*, the defendant in his plea justified, as the tenant of one G. B., whose title he deduced; it was replied, that the close was demised to the plaintiff by the defendant as agent of G. B.; and the rejoinder denied that G. B. demised:—It was held, that the plaintiff could not upon general demurrer object to this pleading on the ground, that it traversed facts not alleged, and that it denied only the con-

Where plaintiff on general demurrer cannot object to pleadings, because they traverse facts not alleged.

(1) *Fisher v. Berrell*, 1 Dowl. P. C. N. S. 565.

(6) *Webb v. Tripp*, 1 Dowl. P. C. N. S. 589.

(2) *Lyons v. De Pass*, 11 A. & E. 326.

(7) 1 C. & Marsh. 34.

(3) 7 Geo. 3. c. 96.

(8) *Field v. Adames*, 12 A. & E. 649.

(4) *Fisher v. Lee*, 12 A. & E. 622.

(9) *Ibid.*

(5) *Brune v. Thompson*, 1 C. & Marsh. 34.

clusion of law resulting from the facts stated; and also, that the rejoinder was not objectionable upon the ground, that the traverse was too large. (1)

DAMAGES.

Where an admission by an apprentice, that his master had beaten him for misconduct, is inadmissible.

[P. 2655.] In an action of trespass by an apprentice against his master for assault and battery; to which "not guilty" was pleaded; the defendant cannot at the trial give, in mitigation of damages, evidence of an admission by the plaintiff, that his master had beaten him for misconduct. (2)

USE AND OCCUPATION.

When assignees entitled to recover for the use of furniture.

Where a new agreement may be inferred to take a house at a reasonable rent from a mortgagee.

Judgment of Mr. Baron Alderson in *Salmon v. Matthews*.

[P. 2726.] In *Salmon v. Matthews* (3) it appeared, that the owner of a house, having mortgaged it in fee, and continuing in possession, let it as a ready furnished house to the defendant; the lessor afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished to the defendant, by the week, who, after three weeks' occupation, received notice from the mortgagee to pay the rent to him:—It was held, in an action brought by the assignees for use and occupation of the house and furniture, that they were entitled to recover for the use of the furniture; because, as observed by Mr. Baron Alderson, "Either the rent may be apportioned, according to the case of *Dubiofle v. Cartmoss* (4), cited by Saunders, in his argument in *Windsor (Dean and Chapter of) v. Gooser* (5); or, if not, it is clear, that upon the entry of the mortgagee claiming the house, and having an interest in the furniture, a new agreement may be inferred by the jury to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as a compensation for the use of the furniture to the assignees."

Where the plaintiff cannot maintain *assumpsit*, on an agreement for use and occupation.

[P. 2730.] In *Oldershaw v. Holt* (6) it appeared, that the plaintiff agreed with F., to let him land on a building lease for ninety-eight years from Christmas 1835, at a pepper corn rent for three years, and then at 115*l.* a year, payable quarterly; F. to build on the land, and cover in eight messuages within the first three years, and to accept a lease, &c. with a proviso for re-entry on default. F. entered, but did not build the houses; whereupon the plaintiff brought ejectment and recovered possession on June 12. 1839, the demise in the ejectment being laid on January 1. 1839:—It was held, that the plaintiff could not, in *assumpsit* against F. on the agreement, recover rent from December 25, to January 1.; for it seems, that stat. 4 & 5 Will. 4. c. 22. s. 2. (as to apportionment of rents) does not apply to the case of a landlord determining the relation of landlord and tenant by his own act; and that, if it did, no rent was due here, the re-entry taking effect from the day of the demise, and having therefore put an end to the tenancy before a quarter's rent accrued; but the remedy was by action for mesne profits.

Where the remedy is by action for mesne profits.

WAGER.

Where a judgment cannot be impeached as void by stat. 16 Car. 2. c. 7. s. 3. and 9 Anne, c. 14. s. 1. Stat. 16 Car. 2. c. 7. s. 3. and 9 Anne, c. 1. s. 14. do not avoid judgments, which the winner, or a third party claiming through him, may have recovered against the loser by action.

[P. 2747.] Where the loser of money at play, gave a bill for the amount to the winner, who indorsed it to an innocent party, and such indorsee commenced an action against the drawer, took a *cognovit* from him in the action, and proceeded to judgment (stat. 5 & 6 Will. 4. c. 41. not being yet in force):—It was holden, that the defendant could not afterwards impeach the judgment as void by stat. 16 Car. 2. c. 7. s. 3. and 9 Anne, c. 14. s. 1.; for that those clauses avoided judgments voluntarily given by the loser as security for money lost, but not a judgment obtained adversely by an innocent party, the defendant having had an opportunity of setting up the illegality of the bill as an answer to the action; but, if the defendant could have impeached the judgment as void by the last-mentioned statutes, the marshal of the Queen's Bench might have pleaded its nullity in an action against him for permitting the escape of such defendant when taken in execution upon the judgment; and that the statutes against gaming, 16 Car. 2. c. 7. s. 3. and 9 Anne, c. 1. s. 14., avoided judgments obtained from the loser by the winner as security for money lost, but not judgments which the winner, or a third party claiming through him, recovered against the loser by action. (7)

A document bearing one stamp, but containing two agreements.

[P. 2747.] Where in an action of *assumpsit* to recover a stake of 100*l.* due upon a horse-race, a document was put in evidence, bearing one stamp, but two agreements, one of which had been fulfilled, the other being that, upon which the action was brought:—It was held, that the stamp must be taken to apply to the latter. (8)

Evidence is admissible to explain "four miles across country."

[P. 2747.] Where the declaration stated an agreement between the plaintiff and defendant to run their horses a race "four miles across country," one T. H. to be umpire, and his decision to be final; that during the race the defendant's horse passed through

(1) *Wilkins v. Boucher*, 1 Dowl. P. C. N. S. 478.

(2) *Pyjolas v. Holland*, 1 Longfield & Townsend (Irish), 177.

(3) 8 M. & W. 827.

(4) 5 Cro. Jac. 34.

(5) 2 Saund. 303.

(6) 12 A. & E. 590.

(7) *Lane v. Chapman*, 11 ibid. 966.

(8) *Evans v. Pratt*, 1 Dowl. P. C. N. S. 405.

an open gate, and eventually came in first; and that the umpire on this ground, awarded the stakes to the second horse:—It was held, that evidence was admissible to shew, that the term “four miles across country” meant, that the riders were not to go through an open gate; but that the issue was rightly found for the plaintiff, because that the decision of the umpire was to be final. (1)

THE NEW RULES.

[P. 2800.]

VII. MICHAELMAS TERM, 4 VICT. 1840.

M. T. 4 VICT. 1840.

It is ordered, that the rule relating to enlarged rules, made in Michaelmas Term, in the 30th year of his late majesty King George the Second, and the several rules relating to the peremptory paper made in Hilary Term in the 6th year, in Hilary Term in the 15th year, in Michaelmas Term in the 17th year, in Hilary Term in the 36th year, and in Easter Term in the 41st year of his late majesty King George the Third, be rescinded: AND IT IS FURTHER ORDERED, that no further rules be placed in the peremptory paper, and that the peremptory paper (except as to the cases already set down therein) be abolished; and that in future, all enlarged rules shall be drawn up for the first and other days in the next term, in the order in which they shall have been enlarged, and in such number for each day as the masters may see fit; and either party may bring on such enlarged rules, and the court will dispose of them in the same manner, as if brought on in the term in which they were moved respectively. (2)

Peremptory paper abolished.

(1) *Evans v. Pratt*, 1 Dowl. P. C. N. S. 405.

(2) 12 A. & E. 585.

THE END.

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